ALLEN & OVERY

Employment Reorganisation Roadmap

South Africa

1 January 2024

allenovery.com

Contents

1. Employee representation

1.1. What are the main forms of employee representation involved in restructurings?

There is a set hierarchy of persons whom an employer must consult if contemplating a dismissal for operational reasons (retrenchments/redundancies) or concluding an agreement with employees to change the automatic consequences of a business transfer (see answer to **2.4**). The employer must consult the first on the list, and if this does not exist, consult the next, and so on. The hierarchy is as follows:

– parties identified in a collective agreement

– a workplace forum and any registered union with affected members

– any registered union with affected members, and

– affected employees or their representatives nominated for such purpose.

There are no statutory obligations to consult employee representatives in relation to transactions save for limited statutory information obligations (see answer to **2.4**).

Any voluntary consultation will be conducted with registered trade union representatives of affected employees or, if none, with the employees personally.

1.2. Is there a system of employee participation rights?

Employees have no general right to management or board-level representation, unless a collective agreement provides otherwise.

2. Process on business sales

2.1. Are employees automatically transferred to a buyer by operation of law on a business sale?

Employees transfer automatically on a business sale which constitutes a transfer of a business as a going concern. The transfer takes place by way of employer substitution in all contracts of employment, and the transfer of all employment rights and responsibilities from the seller to the buyer.

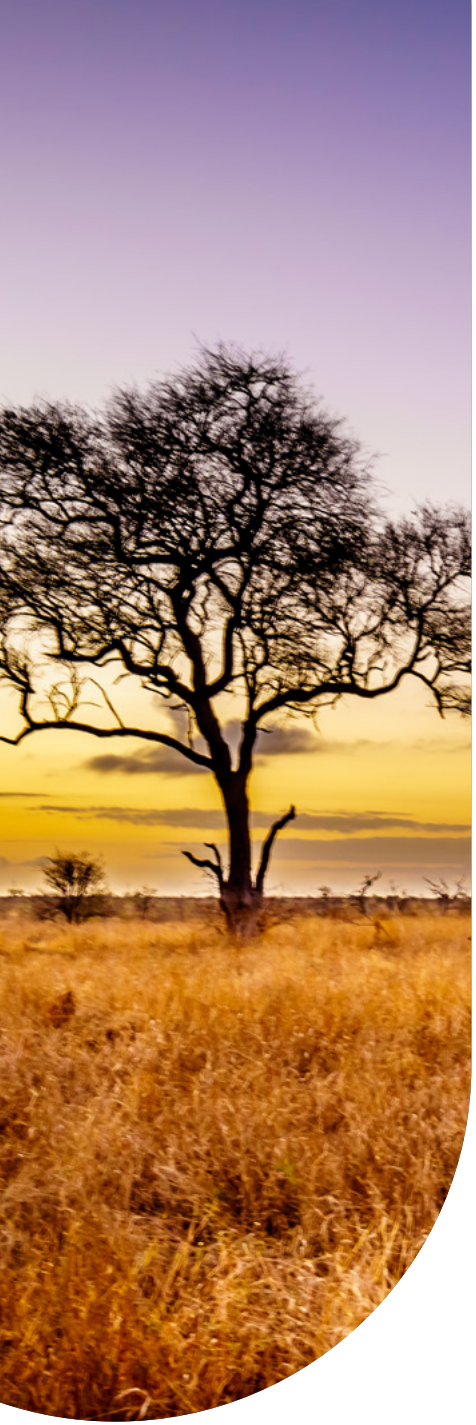
2.2. If so, in broad terms, what is the legal test for identifying which employees transfer?

Employees who are employed immediately before the transfer date and who form part of the business being transferred as a going concern will transfer automatically.

In the case of shared service employees, or when a part of a business is transferred, a number of factors are relevant to determining whether such employees form part of the relevant business, including the amount of time spent on activities relating to the business, reporting lines and the employment contract terms.

2.3. Can employees object to the automatic transfer of their employment and what are the consequences of an objection?

Employees do not have a statutory right to object to the automatic transfer of their employment. Employees who refuse to render services to the new employer could be subject to disciplinary action (which may include dismissal) by the new employer. If the employees render their services to the old employer after the transfer, the old employer should refuse to accept them into service, otherwise it risks creating factual employment relationships.



2.4. Do obligations to inform and consult employees or employee representatives arise on a business sale?

The old employer must disclose the following information to transferring employees:

– which employer (the old or new employer) is liable for paying any leave pay accrued, notional severance pay and any other payments that have accrued but have not been paid to the employees as at the date of transfer (Employee-Related Payments), should such payments fall due, and in the case of apportionment, the terms of the apportionment, and

– the provision that has been made for any such payment if any transferring employee becomes entitled to receive Employee-Related Payments.

In addition, if the business sale constitutes an intermediate or large merger under competition/antitrust laws, there is a statutory obligation to provide a copy of the notification to the competition/antitrust authorities to employees.

There is no general obligation to consult employee representatives on a business sale. However, it is good industrial practice to provide a comprehensive transfer notice and consult with employees who will be affected by the business sale. In addition, if there is a collective agreement specifically requiring the employer to consult with employee representatives on a business sale, the employer is bound by this and must consult with employee representatives.

If the parties wish to change the automatic consequences of the transfer (eg to change the timing of the employee transfer or to make significant changes to transferring employees' terms and conditions) a written agreement must be concluded with the relevant employee representatives (or, if none, with the employees themselves).

2.5. What are the penalties for non-compliance with information and consultation obligations on a business sale?

There are no direct penalties. However, if in the 12-month period following the transfer, transferring employees are dismissed by reason of the employer's operational requirements or liquidation, the old employer will be jointly and severally liable with the new employer in respect of the Employee-Related Payments, unless the old employer can show that it has complied with the relevant statutory provisions. In these circumstances, failure to comply with the statutory information obligations may result in joint and several liability with regard to the transferring employees.

If an employer fails to abide by the terms of a collective agreement which require it to consult with employee representatives on a business sale, then the disputing parties can resolve the dispute according to the conflict resolution method stipulated in the collective agreement. If no such conflict resolution provision exists, the disputing parties can send the dispute in writing to the Commission for Conciliation, Mediation and Arbitration (CCMA).

3. Process on share sales

3.1. Do obligations to inform and consult employee representatives arise on a direct share sale (ie, on the sale of the company itself)?

There is no obligation to inform/consult employee representatives on a direct share sale, unless provided for in a collective agreement. However, it is good industrial relations practice to inform employees of significant changes in ownership, particularly where they result in changes in management, branding, policy and/or methodologies.

If the share sale constitutes an intermediate or large merger under competition/antitrust laws, there is a statutory obligation to provide a copy of the notification to the competition/antitrust authorities to employees.

3.2. Do obligations to inform and consult employee representatives arise on an indirect share sale (on the sale of a company's direct or indirect holding company)?

There is no obligation to inform/consult employee representatives on an indirect share sale, unless provided for in a collective agreement. However, it is good industrial relations practice to inform employees of significant changes in ownership, particularly where they result in changes in management, branding, policy and/or methodologies.

If the indirect share sale constitutes an intermediate or large merger under competition/antitrust laws, there is a statutory obligation to provide employees with a copy of the notification to the competition/antitrust authorities.

4. Process on outsourcings

4.1. Are employees transferred by operation of law in the following scenarios: (i) on an initial outsourcing of processes/services; (ii) on a change of supplier; or (iii) on an insourcing of processes/services?

Employees are automatically transferred by operation of law if the outsourcing, change of supplier or insourcing constitutes a transfer of a business as a going concern. A "business" in this context includes the whole or a part of any business, trade, undertaking or service.

Whether or not the transfer to or from the service provider is "as a going concern" depends on the particular facts and circumstances of each case and is determined with reference to various factors, including whether assets, customers and intellectual property transfer and how similar the activities are before and after the transfer.

4.2. Do obligations to inform and consult employees or employee representatives apply in any of these scenarios?

Obligations to inform apply if the scenario constitutes a transfer of business as a going concern (see answer to **2.4**).

5. Process on collective dismissals

5.1. Is a "collective dismissal" (or "mass layoff") defined by law?

Although a "collective dismissal" is not defined in the Labour Relations Act 66 of 1995 (LRA), additional considerations and procedural requirements apply to so-called "large scale" operational requirements dismissals.

These considerations and requirements are triggered when an employer with 50 or more employees contemplates dismissing more than a specific threshold of employees (determined with reference to a sliding scale) by reason of the employer's operational requirements. The sliding scale is as follows and translates to a contemplated redundancy/ retrenchment of approximately 10% of the workforce:

– 10 or more employees if the employer employs up to 200 employees

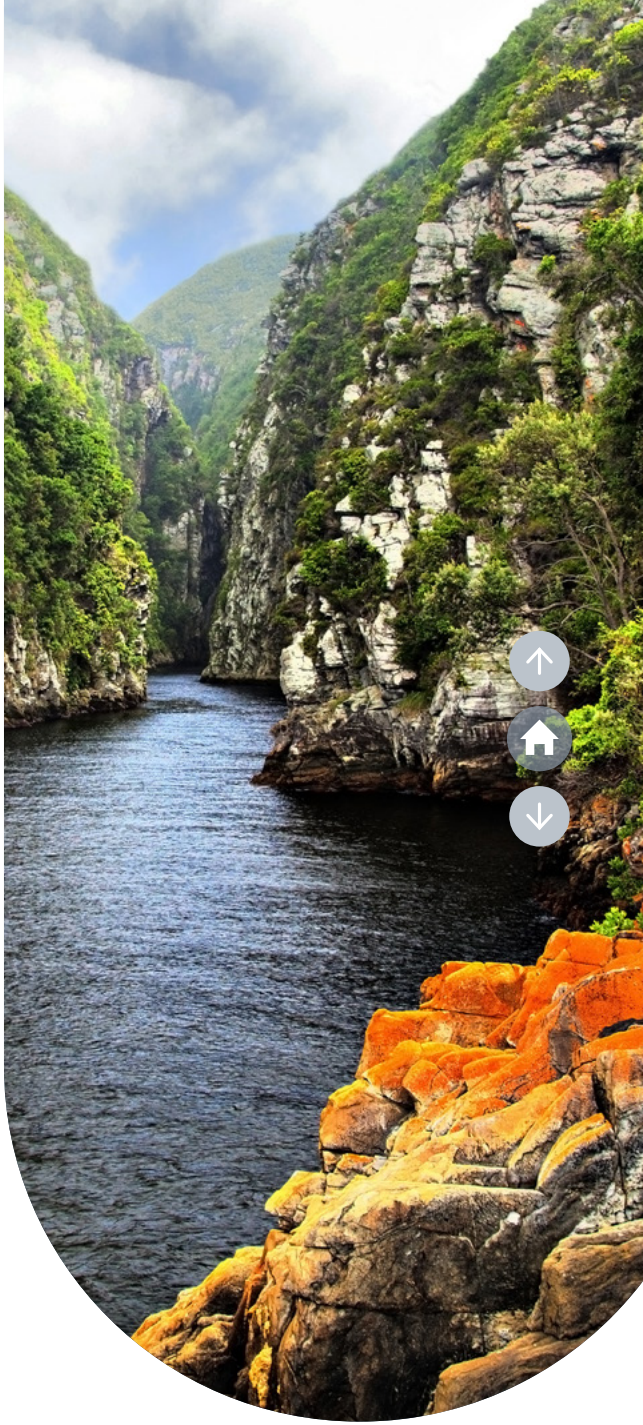
– 20 or more employees, if the employer employs 201-300 employees

– 30 or more employees, if the employer employs 301-400 employees

– 40 or more employees, if the employer employs 401-500 employees, or

– 50 or more employees if the employer employs 500+ employees.

Dismissals by reason of operational requirements implemented over the preceding 12-month period must be taken into account when assessing whether the above thresholds have been exceeded.



5.2. Do obligations to inform and consult employee representatives arise on a collective dismissal?

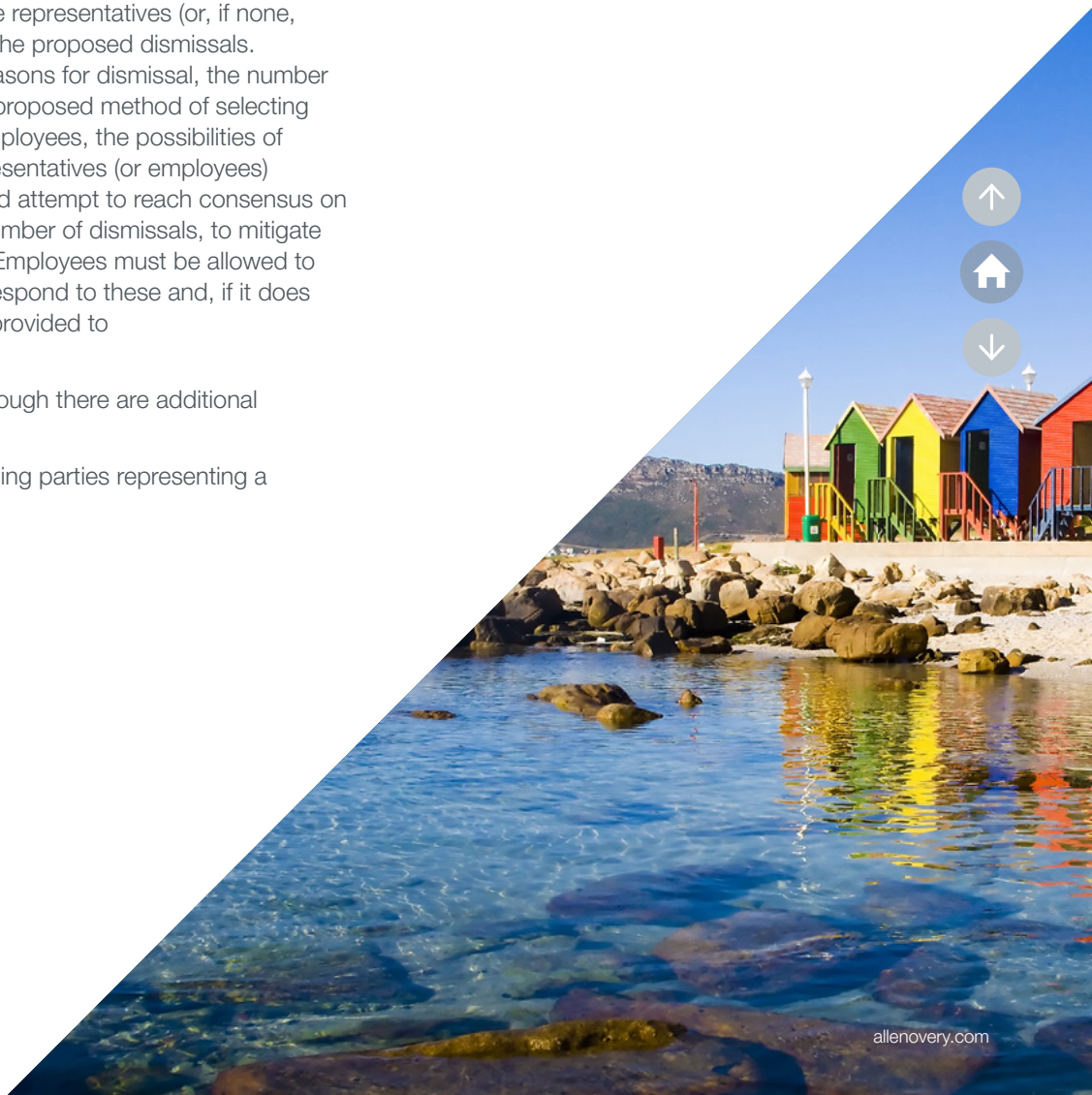
The LRA sets out general requirements in relation to all operational requirements dismissals, regardless of the number of employees affected. An employer must issue a written notice inviting the relevant employee representatives (or, if none, the employees themselves) (see answer to **1.1**) to begin a consultation process regarding the proposed dismissals. This notice must disclose all relevant information for the purpose of consultation (eg the reasons for dismissal, the number of employees affected, the period during which the proposed dismissals are to occur, the proposed method of selecting employees for dismissal, the assistance which may be provided by the employer to the employees, the possibilities of future employment and other alternatives to dismissals). The employer and employee representatives (or employees) (see answer to **1.1**) must then engage in a meaningful joint consensus-seeking process and attempt to reach consensus on certain issues. These issues include appropriate measures to avoid and/or minimise the number of dismissals, to mitigate the adverse effects of dismissals and the proposed selection method and severance pay. Employees must be allowed to make representations during the consultation process. The employer must consider and respond to these and, if it does not agree with them, it must state its reasons for disagreeing. Written responses must be provided to written representations.

In large-scale operational requirement dismissals, the same general procedures apply, although there are additional requirements, most notably:

– a facilitator may be appointed by agreement or on the request of the employer or consulting parties representing a majority of affected employees

– there is a minimum consultation time period of 60 days, and

– employees may have recourse to strike action in certain circumstances.



5.3. Do obligations to inform and consult the competent authorities arise on a collective dismissal?

There is no statutory obligation to inform or consult with any authorities on large-scale operational requirements dismissals.

5.4. When are these obligations triggered?

The obligations to inform/consult employee representatives are triggered when dismissals for operational requirements are "contemplated", ie prior to any decision being taken to proceed with the operational requirements dismissals.

5.5. What are the penalties for non-compliance with information and consultation obligations on a collective dismissal?

Failure to observe information and consultation obligations on an operational requirements dismissal may result in an increased exposure to a finding of unfair dismissal (see answer to **6.5**).

In large-scale operational requirements dismissals, the employees may request the Labour Court to make an order compelling the employer to comply with a fair procedure, interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure, directing the employer to reinstate an employee who has been dismissed until it has complied with a fair procedure, or to make an award of compensation for a maximum of 12 months' remuneration if the above remedies are not appropriate.

5.6. Do obligations to inform and consult employee representatives and/or competent authorities arise in the context of multiple dismissals, which do not qualify as a collective dismissal, as defined by law?

There are general information and consultation requirements in respect of employees in relation to all operational requirements dismissals, regardless of the number of employees affected (see answer to **6.2**).

5.7. What options/alternatives does an employer have when it has been unable to reach agreement with employee representatives during the negotiation period?

The consultation process is a joint-consensus seeking process. Provided the employer consults fully and fairly on all topics for consultation, the employer may give notice to terminate the contracts of employment, even in the absence of agreement with employee representatives.

In the absence of agreement on selection criteria (specifically), the employer must select the employees to be dismissed according to selection criteria that are fair and objective.

6. Process on individual dismissals

6.1. Are employees entitled to a minimum period of notice on dismissal on redundancy or economic grounds?

The minimum notice entitlement depends on length of service:

– up to six months' service – one week's notice

– six months' up to one year's service – two weeks' notice, or

– one or more years' service – four weeks' notice.

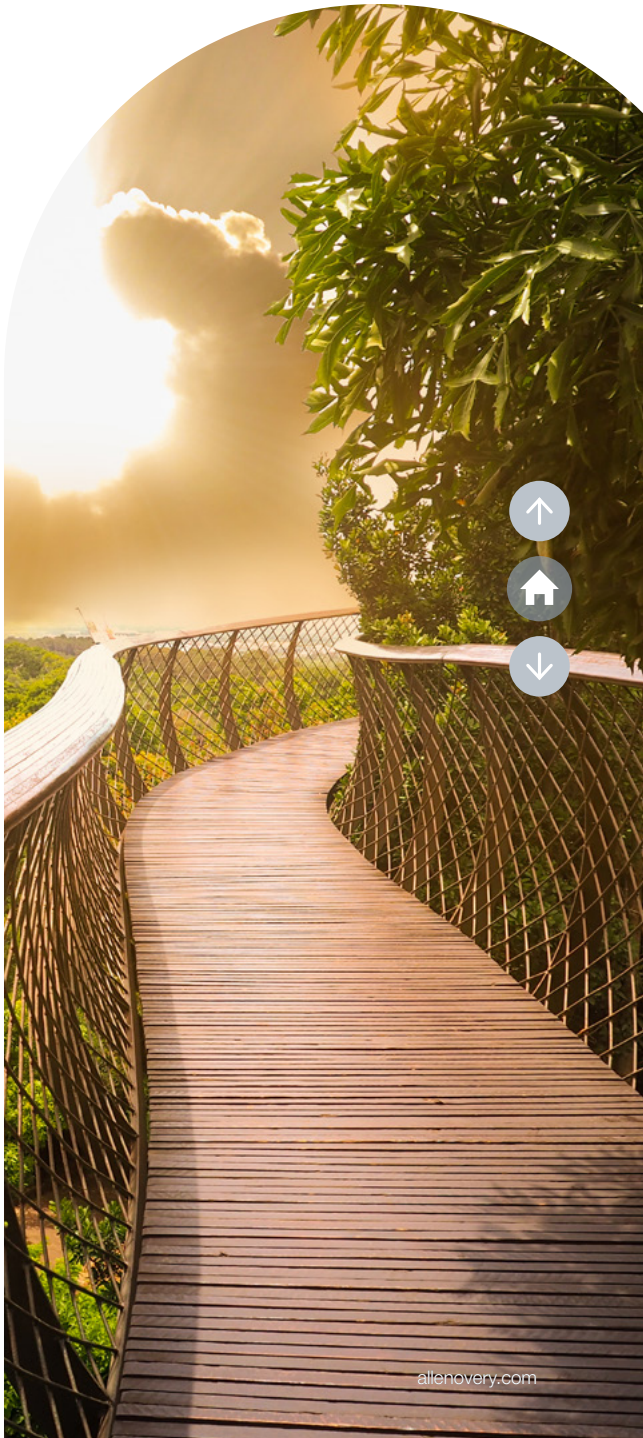
Notice may be enhanced by collective agreement or in the terms of an employment contract. The employer may elect to pay the employee in lieu of notice.

6.2. Does any special procedure apply when proposing to implement an individual dismissal on redundancy or economic grounds?

In all operational requirements dismissals, the employer must be able to justify dismissal based on its operational requirements. Operational requirements mean requirements based on the economic, technological, structural or similar needs of the employer. In addition, the employer must prove that the dismissal was effected in accordance with a fair procedure.

An employer must issue a written notice inviting the relevant employee representatives (or, if none, the employees themselves) (see answer to **1.1**) to begin a consultation process regarding the proposed dismissals. This notice must disclose all relevant information for the purpose of consultation, for example, the reasons for dismissal, the number of employees affected, the period during which the proposed dismissals are to occur, the proposed method of selecting employees for dismissal, the assistance which may be provided by the employer to the employees, possibilities of future employment and other alternatives to dismissals.

The employer and employee representatives (or employee) (see answer to **1.1**) must then engage in a meaningful joint consensus-seeking process and attempt to reach consensus on certain issues. These issues include appropriate measures to avoid and/or minimise the number of dismissals, to mitigate the adverse effects of dismissals and the proposed selection method and severance pay. Employees must be allowed to make representations during the consultation process. The employer must consider and respond to these and, if it does not agree with them, it must state its reasons for disagreeing. Written responses must be provided to written representations.



6.3. Does special dismissal protection apply where dismissals are to be implemented following or in connection with a business transfer?

A dismissal is automatically unfair if the reason for the dismissal is a business transfer or a reason related to a business transfer where a business is transferred as a going concern (see **section 2 – Process on business sales**). There is no prescribed time period following a business transfer after which it is "safe" to implement dismissals.

Generally speaking, the new employer may still implement operational requirements dismissals following a business transfer, provided the true reason for the dismissals is the new employer's operational requirements and the new employer follows a fair procedure. As such, the new employer must look at its operational requirements as a whole, post-transfer, and cannot simply ring-fence the transferring employees for redundancy and/or implement dismissals in anticipation of what it expects its operational requirements will be.

Additionally, if the business transfer requires competition/antitrust approval, the competition/antitrust authorities may impose conditions on the approval prohibiting the dismissal of certain employees for a period of time post-transfer.

6.4. Are employees entitled to a minimum severance payment on dismissal for redundancy or economic grounds?

The minimum statutory severance payment for an employee dismissed for operational reasons is one week's remuneration per completed year of continuous service with that employer. The amount of severance pay is not capped. "Remuneration" means any payment in money or in kind and includes the value of non-discretionary amounts, benefits and employer contributions to employee schemes. Statutory guidance is available regarding the calculation of "remuneration" for this purpose.

An employee who unreasonably refuses an offer of alternative employment with that employer or any other employer will not be entitled to a statutory severance payment. Severance payment entitlements may be enhanced by collective agreement or in the terms of an employment contract.

6.5. What are the penalties for non-compliance with individual dismissal procedure?

In most circumstances, if there is a dispute about the fairness of a dismissal, the employee may refer the dispute in writing within 30 days to the Employment Tribunal. If the Employment Tribunal does not succeed in resolving the dispute through conciliation, it is referred to arbitration, or the employee may elect to refer it to the Labour Court.

The primary remedy for unfair dismissal is reinstatement. The employee is entitled to be reinstated or re-employed unless the dismissal is only unfair because the employer did not follow a fair procedure, or it is not reasonably practicable for the employer to reinstate or re-employ the employee, or the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable.

Alternatively, Labour Court judges and arbitrators are entitled to award unfairly dismissed employees compensation to a maximum amount equivalent to 12 months' remuneration in the case of unfair dismissal. In the case of automatically unfair dismissals (which are defined with reference to a closed list of circumstances), the maximum compensation payable increases to the equivalent of 24 months' remuneration.

6.6. Is there any special legal protection or does any special treatment apply for particular groups of workers?

Additional entitlements or procedures may be imposed in terms of any sectoral determination applicable to workers in a particular sector. Collective agreements and/or individual employment agreements may also impose additional requirements.

Generally speaking, there is no special protection for employees on protected leave (eg sick leave, maternity leave, parental leave). However, it is practically difficult to consult fairly with such employees. This may therefore impact on timing should the consultation process with such employees be deferred until their return to work.

7. Process when implementing alternatives to redundancy

7.1. Can changes to employment terms be made with or without express employee consent?

Generally speaking, changes to terms and conditions of employment should only be made with employee consent. Dismissals for refusing to accept a unilateral change constitute automatically unfair dismissals.

However, unilateral changes to terms and conditions may be possible if implemented:

– as part of a new organisational structure and in the context of a consultation process relating to the employer's operational requirements, and/or

– in the case of a business transfer, provided the terms and conditions are, on the whole, not less favourable to transferring employees.

See further **section 5 – Process on collective dismissals** and **section 6 – Process on collective dismissals** and the answer to **7.3**.

7.2. Must an employer consult individually or collectively with affected employees or their representatives (if any) before making changes to employment terms?

Employers are required to consult with affected employees or their representatives and engage meaningfully in an attempt to reach consensus between the parties (see further answers to **5.2** and **6.2**).

7.3. Do additional restrictions apply if changes are proposed in connection with or following a business transfer?

If the employee resigns following a business transfer because the new employer has provided them with conditions or circumstances at work that are substantially less favourable than those provided by the old employer, such resignation constitutes a "dismissal" (see answer to **7.1**).

7.4. What are the penalties for non-compliance with these procedures?

Disputes relating to unilateral changes to terms and conditions of employment may be referred to the Employment Tribunal for resolution. If such a referral is made, the employer may be directed to cease implementation of the unilateral change, or to reverse the change if already implemented, pending resolution of the dispute. Employees may also resort to strike action if the dispute remains unresolved.

For penalties relating to unfair dismissal, please see the answer to **6.5**.

7.5. Do national laws promote or permit any alternatives to redundancy (eg layoff or short-time working)?

Employers are required to consult on a number of topics, including appropriate measures to avoid or minimise the number of dismissals. In addition, the employer must inform affected employees of the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives. Specific alternatives are not suggested or promoted in any national law, but generally include short-time, redeployment to other business areas/group entities and re-skilling existing employees.

8. Process on insolvency

8.1. Do obligations to inform and consult employee representatives arise on the sale of an insolvent business (whether share sale or business sale)?

The LRA sets out general disclosure obligations concerning insolvency and provides that an employer that:

– is facing financial difficulties that may reasonably result in its winding-up or liquidation, must advise the relevant consulting party of that fact (see answer to **1.1** for a list of these parties)

– applies to be wound-up or liquidated, must at the time of making the application provide the relevant consulting party with a copy of the application (see answer to **1.1** for a list of these parties), and/or

– receives an application for its winding-up or liquidation, must supply a copy of the application to any consulting party within two days of receipt (or within 12 hours if the proceedings are urgent).

These disclosure obligations are in addition to the general obligations (see **section 2 – Process on business sales** and **section 3 – Process on share sales** as to general obligations).

8.2. Does the buyer of an insolvent business inherit employees and/or employee liabilities by operation of law?

If the sale is a share sale, the identity of the employing entity remains the same and all obligations between the employer and employee continue unaffected.

If the sale is a business transfer and the old employer is insolvent, or if a scheme of arrangement or compromise is being entered into to avoid winding-up or liquidation or for reasons of insolvency, unless otherwise agreed:

– the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the old employer's provisional winding-up or liquidation

– all the rights and obligations between the old employer and each employee at the time of the transfer remain as rights and obligations between the old employer and each employee

– anything done before the transfer by the old employer in respect of each employee is considered to have been done by the old employer, and

– the transfer does not interrupt the employee's continuity of employment and the employee's contract of employment continues with the new employer as if with the old employer.

8.3. Do obligations to inform and consult employee representatives arise where collective dismissals are to be implemented in an insolvent business?

The same obligations apply as in the case of collective dismissals in a solvent business (see **section 5 – Process on collective dismissals** for further information).

9. Contacts

Nikita Shaw
Head: Operations
Tel +27 10 597 9863
nikita.shaw@allenovery.com

Mongale Falla
Associate
Tel +27 10 597 9930
mongale.falla@allenovery.com

For more information, please contact:

Johannesburg

Allen & Overy (South Africa) LLP

6th Floor,
90 Grayston Drive,
Sandton
Johannesburg
2196

+27 (0) 10 597 9850

Global presence

Allen & Overy is an international legal practice with approximately 5,800 people, including some 590 partners, working in more than 40 offices worldwide. A current list of Allen & Overy offices is available at www.allenovery.com/global_coverage.

Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. Allen & Overy LLP is authorised and regulated by the Solicitors Regulation Authority of England and Wales.

The term partner is used to refer to a member of Allen & Overy LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners is open to inspection at our registered office at One Bishops Square, London E1 6AD.

ROW
CS2308_CDD-73986_ADD-111160_South_Africa