

Operational Requirements Dismissals based on the “similar needs” of the employer – the happy trails of the cerebral employer.

Most employers and practitioners are well versed with the requirement for a fair dismissal based on the employer’s operational requirements. The dismissal must be effected:

- 1 In accordance with a fair procedure; and
- 2 For a valid reason relating to the employer’s economical, technological, structural *or similar* needs.

Whilst the introduction of new technology, need for a new organisational structure or the financial woes or needs of the employer are easy to grasp the category labeled “similar needs” poses some interesting challenges to the grey matter. This area of operational requirement dismissals appears to be the domain for the cerebral employer and the understanding judge.

Employers face the dilemma of workplace strife that cannot be resolved through misconduct or incapacity proceedings. The former typically requires elements of negligence or intention (fault) on the part of the employee, with the latter generally limited to the standard of performance required by the employer that is not met by the employee. What is an employer to do where the employee’s presence in the workplace causes industrial unrest, or where the employee unreasonably refuses to accept changes to his terms and conditions of employment?

The Labour Courts appears to be willing to entertain compelling argument from desperate employers who were faced with these and other workplace dilemmas. In *WL Osche Webb & Pretorius v Vermeulen* (1997) 18 ILJ 361 (LAC) the Labour Appeal Court (“the LAC”) heard from such a distressed employer. The employee, a tomato salesman, earned more commission than his contemporaries selling less fancied vegetables and fruit. Tomato’s attracted higher commission, thereby allowing him to earn more commission than his peers without doing more. This led to more than the odd murmur at the water fountain and staff Christmas function. The employer approached the employee with proposed new remuneration system that would the issue. The employee was requested to accept the new system, propose an alternative or resign. For fairly understandable reasons he proposed that the current system of remuneration be retained. For even more understandable reasons the employer declined to accept his suggestion. The employee resigned and claimed constructive dismissal.

The LAC held that the employer was correct in acting to quell rising industrial unrest by embarking on the process to amend the remuneration model. It

found that the employer did not act with ulterior motive. The LAC held that the employer established a commercial rationale for the changes. Accordingly, the LAC held that the employer did not act unfairly.

In *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & Others* (2003) 24 ILJ 133 (LAC) the LAC accepted the employer's dismissal of employees where the employees refused to accept a change to the shift-system and transport allowance. The Supreme Court of Appeal upheld the decision of the LAC, with the Constitutional Court declining to entertain any final appeal. Employers and practitioners are cautioned to seek legal advice when entertaining this route. The divide between a fair dismissal such as found in *Fry's Metals* above and automatically unfair dismissals (to compel the employee to accept a demand in respect of a matter of mutual interest – Section 187(1)(c) of the LRA) is perilously delicate. See *CWIU & others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC) for an example of a case where the employer, on fairly similar facts, was found wanting by the LAC.

In *Steel, Engineering & Allied Workers Union of SA & others v Trident Steel (Pty) Ltd* (1986) 7 ILJ 86 (IC), a matter decided under the predecessors to the current LRA and BCEA, the Industrial Court ("the IC") heard the case of an employer requiring its employees to work overtime where the latter declined to do so. The employer argued that the survival of its business depended on employees agreeing to work overtime. The Court accepted that this was a valid operational requirement and held that the dismissal of the employees who refused to do so was substantively fair.

Similarly, the Industrial Court was also willing to accept that the employer had a valid economic rationale for insisting on incorporating a restraint of trade into the employee's contract of employment [*Fisher v Clinic Holdings Ltd* [1995] 8 BLLR 27 (IC)].

Whilst the jury is still out on whether incompatibility should be handled as incapacity or operational requirements, there are a number of decisions where the Courts accepted the dismissal of an employee for incompatibility as a valid operational requirement of the business. In *Erasmus v BB Bread Ltd* (1987) 8 ILJ 573 (IC) the manager's disrespectful attitude towards his subordinates was cited by the employees as the reason for calling for his dismissal. The employer acceded to their demand. The employee, not surprisingly, challenged the fairness of this. The IC was willing to accept that the employer had the right to remove an employee from its services where the employee caused a breakdown in the harmonious working relationships between employees in the workplace.

There is also a line of cases where the IC was willing to accept that the breakdown of trust between the employer and employee is a valid reason to terminate the employee's services based on the employer's operational requirements. A *bona fide* and reasonable suspicion of theft was sufficient for the IC to accept the dismissal of an employee for operational requirements in *Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd* (1993) 2 ICD 310 (IC). A similar suspicion of assault was found to be an acceptable reason for dismissal of employees in *FAWU & others v ABI Ltd* (1994) 15 ILJ 630 (IC). Likewise, in *Chauke & others v Lee Service Centre CC t/a Leeson Motors* (1998) 19 ILJ 1441 (LAC) the LAC mentioned *obiter* that where the employer could not identify employees involved in misconduct could consider dismissing the employees due to the employer's operational requirements, but only where such action is required to save the business.

In the recent case of *Tiger Foods Brands Ltd v t/a Albany Bakeries v L Levy N.O & others* (unreported: C 104/07) the Labour Court was called to consider the concept of operational requirements again. The employer's manufacturing executive was shot by unknown persons. This unfortunate incident took place in the midst of acrimonious industrial action by the employees. A factory manager was then telephonically threatened that he would be next (to be shot). Other managers received similar calls later.

The employer could not identify the perpetrators. Its managers, quite understandably, felt threatened in the face of such hostile intimidation. The employer responded by issuing a notice in terms of Section 189(3) of the LRA, proposing to dismiss certain employees for operational requirements. The employer also applied for facilitation in terms of Section 189A. The CCMA appointed facilitator agreed with the union that the proposed reason for the dismissals fell outside of the ambit of operational requirements as defined in the LRA. The employer brought an urgent application to review and set aside the facilitator's ruling (that the CCMA lacked jurisdiction as the proposed reason is not a valid operational requirement).

The Labour Court agreed with the employer. It accepted the employer's reasoning "*[w]hen the managers are being threatened with death, the [employer] cannot operate its business... [t]he need for stability cannot be dismissed as not an operational requirement or economic reason for the retrenchment.*"

Conclusion:

In the face of relentless competition, change taking place at breakneck speed and the joys of managing people, employers need to explore all roads that

may lead to maintaining and growing the business. This may just be the dispute resolution road less traveled, but for the cerebral traveler the view at the end may be worth the journey.

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