RETRENCHING EMPLOYEES IN STAGES TO CIRCUMVENT SECTION 189A OF THE LRA

NUMSA v Continental Tyre (as yet unreported – Labour Court 2005)

1 Introduction

As a result of pressure from the trade union movement to reconsider the policy norms governing retrenchments, significant amendments, both procedural and substantive, were made to the retrenchment provisions in the Labour Relations Act, 1995 ("the LRA") in 2002. A new section (s 189A) was introduced which provides that where a potential retrenchment involves at least 10 employees where an employer employs has more than 50 employees such employees acquire the right to strike in opposition to the retrenchment. Employees and trade unions can elect to challenge such retrenchment through the law or by means of protected strike action (see s 65(4)(c)). Section 189A(1)(a) provides that this section applies to employers employing more than 50 employees if –

> "(a) the employer contemplates dismissing by reason of the employer's operational requirements, at least –
> (i) 10 employees, if the employer employs up to 200 employees;
> (ii) 20 employees, if the employer employs more than 200, but not more than 300, employees;
> (iii) 30 employees, if the employer employs more than 300, but not more than 400, employees;
> (iv) 40 employee employees, if the employer employs more than 400, but not more than 500, employees; or
> (v) 50 employee employees, if the employer employs more than 500, employees."

An additional consequence of the introduction of section 189A is that provision is made for statutory facilitation in respect of the retrenchment consultation at the request of the employer or any consulting parties representing the majority of employees who are targeted for retrenchment. Compulsory notice periods are also introduced, since the section requires a 60 day holding-off period if statutory facilitation is embarked upon or pending terminations disputed (s 189A(2)(a) read with s 189A(7)(a) and 189A(8)(b)(i); and see Thompson "Restructuring and Retrenchment" 2002 *Current Labour Law* 30).

In order to prevent employers from circumventing the effect of section 189A by splitting or staggering a retrenchment, section 189A provides that, if the number of employees that an employer contemplates dismissing, together with the number of employees that have been dismissed by reason of that employer's operational requirements in the 12 months prior to the

employer issuing a retrenchment notice, is equal to or exceeds the relevant number set out above the section applies to the second retrenchment exercise as well (s 189A(1)(b)). This provision is important, because the additional rights granted to employees and trade unions by section 189A are significant (as set out above).

But what if an employer retrenches employees in an instance where section 189A does not apply, and thereafter retrenches more employees within the following 12 months or even later? Should section 189A apply to the first retrenchment which, on its own, falls short of the numbers that cause the section to apply? This issue was recently addressed in *NUMSA v Continental Tyre* (unreported – Labour Court 2005).

2 Facts

On 10 May 2005 the respondent, Continental Tyre SA (Pty) Ltd, issued a retrenchment notice in terms of section 189(3) of the LRA. The notice was in regard to employees employed in the Steel, Truck and Extruder Departments. The notice was addressed to the applicant union, the National Union of Metal Workers, and it was invited to a consultation meeting to be held on 11 May 2005. The respondent indicated that it contemplated the possible dismissal of employees based on operational requirements. The respondent wanted to reduce costs and improve efficiency in areas where the demand for tyres was reduced. This reduction affected the Steel and Bias Tyres department and it was contemplated that some 14 employees would be affected. The last day of work envisaged was 13 May 2005 for the affected employees. Some interaction occurred between the parties and on 25 May 2005 the respondent reissued a section 189 notice in respect of the Steel Trade Extruders, three and five departments. On 26 May 2005 the respondent gave notice in terms of section 189(3) in respect of the Cross Ply Department.

The respondent indicated that it contemplated dismissing 42 employees from the Cross Play Department and six from the Steel Truck Department. A process of consultation ensued between the parties and according to the respondent, was finalised. Some 48 employees stood to be retrenched.

On 19 July 2005 the respondent again issued a section 189(3) notice. This time it was coupled with a section 189A notice. The reasons given for a contemplated retrenchment were:

> "(a) The budgeted volume for passenger target sales had reduced locally and internationally.
> (b) The projected sales for 2006 show no indication of improvement.
> (c) The cost of tyres and price war.
> (d) The reduction of working days per week."

The suggested number of employees to be affected was put at 290 and affected most departments and the respondent's plant.

The applicant union thereupon sought an interdict to prevent the respondent from dismissing the 48 affected employees and to include them in the section 189A proceedings.

3 The conclusion of the court

The respondent's case was that the employees could not all be included in the section 189A proceedings, because it had contemplated the dismissal of the employees at different times, hence the issuing of a section 189 notice as well as section 189A (par 33). The applicant's case was that the respondent contemplated the dismissal of the employees all at the same time but divided them (*ibid).*

The court pointed out that the matter revolves firstly around the meaning of the word "contemplated" used in section 189A(1). Secondly the issue that arose was whether section 189A superceded the process under section 189 in the case where the employer issues a section 189A notice immediately on completion of the consultation under section 189.

Ngcamu AJ held that the respondent had been aware of a decline in the tyre sales both locally and internationally. The respondent sought to rescue the situation by first retrenching employees from the departments mostly affected. In doing so the number of employees to be affected was put at 48, two employees less than the figure required for section 189A to be operative (s 189A(1)(a)(v)).

The applicants requested information on 17 June 2005. The information was furnished on 19 July 2005. The respondent also advised the trade union that the section 189 proceedings had been finalised on that day, and issued a section 189A notice, but served it on 20 July 2005. The Court pointed out that it rejected the respondent's suggestion that the process had been finalised, since the information requested was only furnished on that day.

The Court concluded as follows:

> "In the circumstances where the need to retrench arises at different periods of time and while the consultation process is in progress a need arises to retrench more employees bringing the number of employees to be retrenched within the ambit of section 189A, the process under section 189A supercedes the process under section 189. It follows that the process under section 189 should be stopped and the process under section 189A takes over.
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> To allow different processes to continue separately will undermine the provisions of section 189A, which was designed to enable the employees to act collectively when faced with a mass dismissal."

On the facts set out above the court also opined that the respondent had contemplated the last group of employees already when it issued the section 189 notification. The respondent had not been *bona fide*, but embarked on a process of dividing the employees to avoid the operation of section 189A.

4 Discussion

Where an employer contemplates dismissing a number of employees and it has already retrenched employees at any stage in the 12 months prior to this contemplation, section 189A applies if the previously retrenched employees together with *contemplated* employees reached the relevant threshold set out in section 189A1(a) (s 189A1(b)).

Where, like in the present instance, the issue is whether the first and not the subsequent retrenchment exercise is covered by section 189A, the question is whether the employer contemplated the latter retrenchment at the time of the former. This is a factual question. Facts that support a contention that an employer has contemplated the subsequent retrenchment are an awareness of a general decline of demand of the employer's manufactured product, the issuing of a retrenchment notice for a subsequent retrenchment immediately after the first retrenchment process was regarded as completed by the employer, and a delay in issuing a section189A notice until the first process had been "finalised". These considerations are examples of factors that a court will consider. Other considerations may present themselves depending upon facts and reasons for a particular retrenchment.

Ngcamu AJ suggested further that in circumstances where the need to retrench arises at different periods of time but while a consultation process is in progress, the process under section 189A supercedes the process under section 189 if the total number of contemplated retrenches of both processes bring the retrenchment exercises within the ambit of section 189A. The section 189 process should then be stopped and the process under section 189 A should then take over.

It is submitted that this view of the court might be too general a statement. Although it is agreed that in most circumstances such a situation will mean that the employer has in fact contemplated both retrenchment exercises at the time of giving notice of the first retrenchment, there may be instances where that is not the factual situation. The question should always be whether or not the employer had contemplated the subsequent retrenchment at the time of the retrenchment notice of the first retrenchment.

5 Conclusion

Employers should not be allowed to abuse section 189A(1)(a) by retrenching employees in stages and thereby avoiding the threat of a protected strike. The test to determine whether an employer is guilty of such action hinges on the word "contemplates" in section 189A(1)(a), and a court may, after consideration of the factual situation, conclude that the subsequent retrenchment was already contemplated at the time of the former retrenchment exercise. That may lead to an order that initial retrenchment dismissals were invalid, and that the affected employees be included under the ambit of a subsequent section 189A notice.

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