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**Compiled by: Adv J Delpont  
Delpont Labour Consultants**



## **Callagan v Pam Golding Properties [2010] ZALC 73**

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Judgement: Molahlehi J

### Introduction

The applicant in this matter contends that his dismissal for operational reasons was both procedurally and substantively unfair and for those reasons claims that he is entitled to the maximum compensation as provided for by section 194 of the Labour Relations Act 66 OF 1995 (the LRA).

### Background facts

It is common cause that prior to his dismissal, the applicant was employed as a branch manager of the respondent's branch office in Port Elizabeth. It is apparent from the evidence presented that after identifying its financial difficulties, the respondent sought ways to address that challenge. A meeting was held where the financial difficulties were

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discussed. One of the resolutions adopted at the meeting was that there is a need to significantly reduce the costs. The possibility of reducing employees was also recorded.

In relation to the Port Elizabeth office it is specifically stated in the minutes that the branch had suffered a financial loss in the amount of R1.4 million. The minutes also reveal that the meeting contemplated evoking the provisions of section 189 of the LRA.

The executive committee convened another meeting. It was resolved at that meeting that there was a need to reduce the costs by R 2 million per month. Again the Port Elizabeth office was specifically referred to and the two options considered was either to close the branch or sell the branch to one of the employees.

The executive committees met with the managers of the respondent. At that meeting the regional managers were entrusted with identifying which of their branches would not succeed in turning around the economic down turn. The managers were also mandated to close down the offices which could not be salvaged. The regional managers were required to recruit the “best branch manager and also in that respect to review their staff base and identify potential, future managers.”



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During August September 2008 the respondent appointed as a sales manager, Mr Wright (“Wright”) in the Port Elizabeth office. The sale manager’s function was prior to that appointment performed by the applicant.

On 2nd December 2008, Mr Van Niekerk (“Van Niekerk”), the regional office manager convened a meeting to be attended by him, Mr Jammy (Jammy) and the applicant. In arranging this meeting Van Niekerk never disclose its purpose to the applicant. At the meeting the applicant was handed a letter headed “Proposed Restructuring and Possible Retrenchment.” The applicant was required to read the letter and immediately thereafter, and after the departure of Van Niekerk, to enter into a consultation process with Jammy concerning the restructuring of the respondent. The proposal from the Respondent’s side was to make the applicant’s position as Branch Manager of the Port Elisabeth branch redundant.

The selection criterion introduced, was based on retaining necessary skills, expertise and experience.

Alternatives in the event of the implementation of the restructuring of the respondent was for applicant to be moved into a vacant position within the Company.



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Further meetings were held between the parties and the respondent indicated that applicant would be retrenched. Applicant made it clear that he regarded retrenchment and the appointment of Wright to be unfair.

The legal principles governing retrenchment

The legal principles governing dismissal for operational reasons are provided for in section 189 read with section 188 (1) of the LRA. Section 188 (1) of the LRA requires the employer to show that the “reasons for dismissal is a fair reason ...based on the employer’s operational requirements” and that the dismissal was “effected in accordance with a fair procedure”.

Section 189 of the LRA sets out a number of requirements which the employer needs to comply with in order for it to be certain that the dismissal was fair.

- The employer has a duty to put in motion the consultation process as soon as it contemplates dismissal for operational reasons.
- Once the consultation process has been initiated both parties are required to engage in a meaningful joint consensus seeking process with the view to agreeing on measures to:

(a) avoid dismissal



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- (b) minimizing the number of dismissals,
- c) change the timing of the dismissal and
- (d) to mitigate the adverse effects of the dismissal.

The other requirement of subsection (1) (b) is that the consultation must also be geared towards reaching consensus on the selection criteria, failing which the employer is obliged to ensure that the selection criteria it applies is a fair one.

Section 189 (3) of the LRA requires the employer to initiate the consultation process by way of issuing a formal notice inviting the other party or parties to the consultation process. In the notice the employer has to disclose all relevant information which will assist the other party or parties to engage in a constructive and meaningful consultation. Subsection (3) obliges the employer to disclose in writing all relevant information including, but not limited to –

- the reasons for the proposed dismissal;
- the alternative that the employer considered before proposing the dismissal , and the reason for rejecting each of those alternatives;



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- the number of employees likely to be affected and the job categories in which they are employed;
- the proposed method for selecting which employees to dismiss;
- the time when or the period during which, the dismissals are likely to take effect;
- the severance pay proposed;
- the assistance that the employer proposes to offer to the employees likely to be dismissed;
- the possibility of the future re-employment of the employees who are dismissed;
- the number of employees employed by the employer; and
- the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.

During the consultation process the employer must ensure that other parties are afforded the opportunity to make representations about the matters disclosed in terms of section 189 (3) of the LRA, including other matters that may concern the retrenchment itself. The employer is then required by subsection (6) of that section to consider and respond to the representation made by the other party and give reasons on those aspects of the presentation that it does not agree with.



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## Caselaw

It is clear and has been accepted that the reading of section 189 indicates that the obligation set out therein is geared towards “joint consensus seeking process” had also implicit therein also is the recognition of the right of the employer to dismiss for operational reasons. In *Johnson & Johnson (Pty) Ltd v Cwuiu* (1999) 20 ILJ 89 (LAC) the court held that it is also clear that once recognizing the right to dismiss for operational reason, the employer is also enquired to ensure that it acts in a fair manner in effecting the dismissal. *SACTWU & Others v Discrete* (a division of Trump and Springbok Holdings) (1998) 12 BLLR 122A (LAC).

It has generally been accepted that in dealing with the requirements of section 189, the court should not adopt a “formal check list” approach. See *Johnson & Johnson supra* at paragraph 96, *Alpha Plant & Services (Pty) Ltd Simons & Others* (2001) ILJ 359 (LAC), *Wolf R AEA DT & Another v Industrial Development Cooperation of SA* (2002) 23 ILJ.



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The “none check list” approach, does not mean that the court should not scrutinize the fairness or otherwise of the dismissal. In *Moodley v Fidelity Cleaning Services* (2005) 26 ILJ 889, the court relying on the dicta of *Johnson & Johnson* correctly held that:

**“A mechanical checklist approach was not appreciate and that the proper approach was to ascertain whether the purpose of section 189 (3) had been achieved.”**

In this respect the piece meal approach as was observed by Mlambo J commenting in the context of the law prior to 2002 amendment in *Keil v Foodgro* (a Division of Leisure Net Limited) (1999) 4 BLLR is opposite the point made and it is stated therein as follows:

**“Having identified retrenchment as a way of addressing its operational problems, respondent had to comply with section 189 of the Act. It is through the constructive engagement implicit in this process that the need to retrench is confirmed as well as the selection of those employees who are to be retrenched. This court has in a number of decisions stated that the consultation process envisaged in section 189 is not sporadic nor superficial. It is a process that must be embarked upon by the employer before it has decided who to retrench. The**



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employer keeps an open mind during the consultation phase and must accede to request for information on the issue by the consulted parties (see NUMSA & others v Comark Holdings (Pty) Ltd [1997] 5 BLLR 589 (LC); NUMSA & other v Precious Metals Chains (Pty) Ltd [1997] 8 BLLR 1068 (LC); CWIU v Johnson & Johnson (Pty) Ltd [1998] 9 BLLR 1186 (LC); Manyaka v Van de Wetering Engineering (Pty) Ltd [1997] 11 BLLR 1458 (LC).”

### Analysis

The court held that it is not uncommon in retrenchment exercises for an employer to appoint either its own employee, a lawyer or for that matter a consultant to act as its representative. The picture presented by Mr Jung, respondent's elected representative is not that of a representative as could have been envisaged in the process of this nature. The picture presented is that of a messenger who had no authority to engage with the applicant and to guide the process with the view of getting a solution either to avoid the retrenchment or failing which, ameliorate its impact on the applicant.

During cross examination, Mr Jung conceded that the applicant did complain that he was used as a scapegoat because Mr Wright was employed in October as a sales



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person when the respondent was already aware of its financial difficulties. This evidence in the court's view indicates clearly that had Mr Jung been a representative in the true sense and not a mere messenger, acting like "conveyer belt" he would have appreciated that what the applicant was complaining about concerned the selection criteria. And had the respondent taken this process seriously and given the representative a proper mandate of seriously engaging with the applicant with the view to finding a solution to the "no fault" situation in which the applicant found himself in, then fairness would have dictated that Mr Jung ought to have paused and reflected on what was raised by the applicant.

Assuming the selection criteria as stated in the letter was used, then he would have engaged with the applicant provided and disclosed to him information as to why Mr Wright was better qualified than him. In the light of the fact that the applicant had performed both the office management and sales functions for the period of two years, Mr Jung ought have applied his mind and assessed the experience gap between Mr Wright and the applicant. Had he done this he might have found that there was in fact no gap between the two. If assuming he found that there was a gap between the experience of the two, he may as well have found that the gap was not so serious that it could not be addressed by training or coaching of the applicant.



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The critical information which the respondent ought to have disclosed to the applicant as soon as the issue of retaining Mr Wright was raised, was not only his specific historical experience but also in fairness his contribution towards the turnaround strategy of the respondent in the two months of his (Mr Wright) taking over the position at Port Elizabeth. Part of the key reason why the law requires employers to disclose information to employees is to avoid the very situation that has occurred in the present instance. The fact that the applicant acknowledge that Mr Wright had better sales experience than him is not good enough.

The testimony of Mr Van Niekerk seems to suggest that it was not necessarily due to expertise through which Mr Wright was retained but rather that he was retained because he had a fixed term contract of employment with the respondent. The fixed term contract was for a six months period and thereafter that contract was renewed on a monthly basis. This evidence shows very clearly that the respondent did not apply its mind to ensuring that proper consultation was in place to ensure that the consensus was reached.

The respondents further failed the test of fairness in the second leg of the selection criteria. Even if it was to be assumed that no consensus was reached in the selection criteria the respondent still failed the test of fairness, because on its own version no



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selection criteria was applied. Thus the retention of Mr Wright was not fair and objective criteria.

In the light of the above analysis, the court was of the view that the dismissal of the applicant was both substantively and procedurally unfair.

