



UNIVERSITY OF  
KWAZULU-NATAL™  
INYUVESI  
YAKWAZULU-NATALI

**EXTENDED  
LEARNING**

---

**WEEK 4: 12 MAY 2020**

**RETRENCHMENTS AND  
ALTERNATIVES: DEALING WITH THE  
FALL-OUT FROM COVID-19**


**DR TAMARA COHEN**






---

## **THE IMPACT OF COVID 19 ON THE ECONOMY**

- Treasury - 7 million South Africans could become unemployed if large parts of economy remain closed for remainder of the year.
  - 3 million jobs at risk even if pandemic is contained quickly, while a slow recovery could see 5 million job losses. A worst case scenario would push the unemployment rate to over 50%, from its current rate of 29%.
  - economy could contract between 7% and 12% as a result of impact of Covid 19.
  - Total wages and salaries likely to shrink as much as 30% and company profits slashed more than that.
- 


## **AVOIDING RETRENCHMENTS**

- Employers may have to consider implementing changes to employees' terms and conditions of employment.
  - Managerial prerogative to change workplace practices but not terms and conditions.
  - Employers may not do so unilaterally and need consent of the affected parties to do so.
  - Unilateral changes constitute breach of contract, remediable by contractual damages or specific performance.
  - S186(2) – unfair conduct relating to provision of benefits – could be contractual or legal entitlement or unreasonable/exercise of discretion.
  - Difference between discretionary benefit and contractual benefit (13<sup>th</sup> cheque or performance related bonus).
  - Consultation process to investigate cost-cutting initiatives.
- 



---


# COST CUTTING OPTIONS

- full temporary layoff (where identified employees don't work at all for an agreed defined period).
  - rotational layoff (work only every second week and accept no, or reduced levels, of remuneration in the weeks that they aren't working)
  - short time (for example requiring employees to only work and be paid a shorter day or perhaps a three/four day work week).
  - collective agreements that have historically been concluded with organised labour, through centralised bargaining structures, do provide for short time and layoffs to be implemented without having to obtain employee consent at plant level, subject to certain requirements and restrictions. These include the metal and engineering industry, the clothing manufacturing industry, the motor industry and the electrical industry in respect of scheduled employees.
  - Early retirement – can employees be forced to take voluntary early retirement?
  - Salary cut – should this apply uniformly to Directors and senior staff too?
  - Freeze on salary increases
  - Incentive schemes/profit linked remuneration
- 
- A solid red horizontal bar at the bottom of the slide.



---


## **SHORT TIME/UIF REDUCED WORKING TIME OPTION**

- Short time work defined in UIA as a temporary reduction in the number of ordinary hours of work owing to reasons including slackness of trade amongst others. It is imposed as a temporary measure for a temporary period where there is only limited amount of work for an Employee to do for their Employer.
  - Short time is an alternative to retrenchment and, unless provision is made contractually for imposition of short time, must be done following consultation with and agreement reached with affected employees - failing which breach of contract and unfair labour practice.
  - Can it apply to some employees and not others?
  - s12(1B) of UIA “A contributor employed in any sector who loses his or her income due to reduced working time, despite still being employed, is entitled to benefits if the contributor's total income falls below the benefit level that the contributor would have received if he or she had become wholly unemployed, subject to that contributor having enough credits.”
  - Subject to employee having UIF credits, claim by employee using sliding scale
  - Benefits up to 12 months but generally low benefits.
- 



---

## RETRENCHMENT/REASONABLE ALTERNATIVES

- S189 of LRA - fair reason for operational requirements and fair procedure.
  - Operational requirements – requirements based on economic, structural or similar needs of employer
  - Consultation and **meaningful joint problem solving process** - attempt to reach consensus on appropriate measures to avoid or minimise dismissals; change timing; mitigate adverse effect, severance pay.
  - S189(3) notice - looking at alternatives, numbers and timing, selection criteria, possible re-employment etc.
  - Can notice be issued during lock-down period?
  - S 189(5) and (6) – employee/rep must be allowed opportunity to make representations and employer to expressly respond to alternatives to dismissal proposed by employee and if does not agree must state reasons for disagreeing.
  - How can consultations take place during lock-down? New legislation re Unions access to the workplace
  - Time-frames? Can they be truncated during unprecedented lock-down?
  - Decision to retrench must be operationally and commercially justifiable on rational grounds. Does it have to be a “last resort”?
  - Can courts second guess employers’ decision to retrench?
  - Employer cannot pre-determine need for retrenchment and may not take final decision to dismiss prior to consultation
- 



---


## **S189A – LARGE SCALE RETRENCHMENTS**

- Employers with more than 50 employees
- Formula – eg 10 employees if employ up to 200
- S 189(3) notice
- Parties may appoint CCMA facilitator - 60 days consultation period or if no facilitation process 30 days consultation process.
- Choice whether to strike or refer to Labour Court
- S 189(13) – unfair procedure – direct application to Labour Court within 30 days of notice/date of dismissal. Labour Court can order compliance with procedure, interdict employer from dismissing, order reinstatement, award compensation



---

## RETRENCHMENT ISSUES

- If claimed TERS UIF benefit, can the employee still claim unemployment benefits after retrenchment?
  - Severance pay - what if no funds? S 41 of BCEA. Have to pay accrued leave pay, notice pay and severance pay.
  - Selection criteria? Must be agreement or if not agreement criteria must be “fair and objective”.
  - Disclosure of information –s16 and s189(4) of LRA
  - Re-negotiating terms and conditions - cannot be forced to accept changed terms and conditions by threat of dismissal - s187(1)(c) of LRA - automatically unfair dismissal
  - Section 187(1)(c) of the LRA specifies that a dismissal is automatically unfair if the reason is the refusal by employees to accept a demand in respect of a matter of mutual interest between them and their employer.
  - dismissal for operational reasons is permitted in a situation where employees do not accept changes aimed at addressing the employer’s operational requirements.
- 



# UPCOMING WEBINARS



UNIVERSITY OF  
KWAZULU-NATAL  
INYUVESI  
YAKWAZULU-NATALI

**EXTENDED  
LEARNING**

- IMMUNITY, NUTRITION AND COVID-19:  
SEPARATING FACTS FROM FICTION **14TH MAY 2020**
- RESILIENCE THROUGH MINDFULNESS - PART 1: INTRODUCTION **19TH MAY 2020**
- HEALTHY EATING AND LIVING WHILE STAYING AT HOME **21ST MAY 2020**
- RESILIENCE THROUGH MINDFULNESS - PART 2: STRESS **26TH MAY 2020**
- OBESITY AND FOOD INSECURITY: COMPLEXITIES BEYOND  
AN OVERACTIVE FORK AND UNDERACTIVE FOOT **28TH MAY 2020**
- RESILIENCE THROUGH MINDFULNESS - PART 3: COMPASSION **2ND JUNE 2020**
- HEALTH AND WELLBEING - THE ROLE OF NUTRITION IN  
LIFESTYLE DURING AND AFTER THE COVID-19 PANDEMIC **4TH JUNE 2020**
- RESILIENCE THROUGH MINDFULNESS - PART 4: CONNECTION **9TH JUNE 2020**
- THERE BE DRAGONS - TRANSITIONING THROUGH THE UNKNOWN  
LEADING THROUGH UNCHARTED WATERS **11TH JUNE 2020**
- THERE BE DRAGONS - TRANSITIONING THROUGH THE UNKNOWN  
CHOOSING EMPATHY OVER POWER AS A WAY OF LEADING **18TH JUNE 2020**
- THERE BE DRAGONS - TRANSITIONING THROUGH THE UNKNOWN  
CULTURE TRANSFORMATION - DRAGON SLAYING **25TH JUNE 2020**
- THERE BE DRAGONS - TRANSITIONING THROUGH THE UNKNOWN  
NO MORE FEARS - MAKING THE TRANSFORMATION STICK **2ND JULY 2020**