

The world of work and Covid-19: Avoiding Retrenchment

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1. Introduction

This paper posits the industrial relations climate in Zimbabwean organizations during and after the Covid-19 pandemic with emphasis on job security dimensions as enunciated by Section 12D of the Labour Act [Chapter 28:01]. The various options that business and labour can adopt to mitigate business losses ushered in by Covid-19 pandemic are at the centre of this paper where right-sizing or retrenchment will take center stage. The same way that Covid-19 has exposed the shocking failures in our health-care system and social safety net, it has also revealed the organization of the dire situation must surmount in handling employment matters posed by such a pandemic. There are some unscrupulous businesses that are planning to take advantage of the Covid-19 pandemic to implement terrifying measures such as retrenchments and forced unpaid leave, while some have already implemented such measures. On the 10th of April 2020, the government of Zimbabwe through the Ministry of Labour and Social Welfare issued a Press Statement on Covid-19 urging business to refrain from imposing unpaid leave measures, retrenchments and unfair terminations on workers during lockdown period. The Hon. Minister of Labour Professor Paul Mavima encouraged social partners in the employment relationship to utilise social dialogue structures at the organization level and National Employment Councils.

The Labour Act [**Chapter 28:01**], ‘Act’ does not define retrenchment. The ‘Act’ however, defines “retrench”, in relation to an employee, as meaning to terminate the employee’s employment to reduce expenditure or costs, adapt to technological change, reorganising the undertaking in which the employee is employed,

or for similar reasons, and includes the termination of employment on account of the closure of the enterprise in which the employee is employed.

Madhuku (2015) submitted that retrenchments belong to the class of termination of employment commonly described as ‘economic dismissals’. He argued that this class is distinctive in that on the one hand, workers lose their jobs without any fault attributed to them, while on the other hand, the employer may be compelled by unavoidable economic considerations to terminate the services of some workers. Section 188 of the South African Labour Relations Act 66 of 1996[LRA] defines retrenchment as dismissal for operational requirements. The LRA under section 213 also defines ‘operational requirements’ to mean requirements based on the economic, technological, structural or similar needs of an employer. [Basson, Christianson, Dekker, Garbers, le Roux, Mischke, & Strydom, 2009]

McNally JA in **Continental Fashions (Pvt.) Limited v Mupfururi 1997(2) ZLR 405(S)** also had an opportunity to also define retrenchment when he says:

“Retrenchment, when used in the context of Labour Relations, means cutting back of expenditure on the employment of workers by reducing their number. (The definition is mine. There is none in the Regulations)”

1. Provisions of the Law Applicable & Analysis

A detailed discussion on legislation that regulates and direct right-sizing or retrenchment is of importance.

1. The Law Applicable

The Labour Act, [Chapter 28:01] section (s) 2 and Section 12D

Case Law: Continental Fashions (Pvt.) Limited v Mupfururi 1997(2) ZLR 405(S)

2.2 Measures to avoid retrenchment

The relevant part of the Labour Act [Chapter 28:01] provides:

12D Special measures to avoid retrenchment

(1) Every employer shall ensure that, at the earliest possible opportunity, his employees are kept informed of and consulted in regard to any major changes in production, programmes, organization or technology that are likely to entail the retrenchment of any group of five or more employees in six months.

(2) Subject to this section, before giving notice of the intention to retrench any employees in terms of section 12C, an employer may agree with the employees concerned, or with any workers committee, works council or employment council which represents the employees, to have recourse to either or both of the following measures for a period not exceeding twelve months—

(a) subject to subsection(4), placing the employees on short-time work; or

(b) instituting a system of shifts as provided in subsection (5).

(3) An agreement entered into in terms of subsection (2) shall have effect notwithstanding anything to the contrary contained in any employment regulations, collective bargaining agreement or other contract or agreement applicable to the employees concerned.

(4) While an employee is on short-time work referred to in paragraph (a) of subsection (2), he shall be paid the hourly equivalent of his weekly or monthly wage for the hours he has actually worked: Provided that an employee shall receive not less than fifty per centum of his current weekly or monthly wage, as the case may be.

(5) For the purposes of paragraph (b) of subsection (2), an employer may divide all or any of the employees concerned into shifts and may—

(a) require each shift to work on alternate half-days, days, weeks or months: Provided that no shift shall be without work for more than one month at a time or for an aggregate of more than six months in any period of twelve months;

(b) pay each employee on shift for the hours, weeks or months he has actually worked.

(6) Before having recourse to any measure referred to in subsection (1), an employer shall give not less than seven days' written notice to every employee affected by the measure.

In relation to the aforementioned section, the paper intends to look at the following measures that organizations may adopt in the aftermath of the Covid-19. This will assist in arresting a possible wave of retrenchments in the name of right-sizing.

1. Informing & Consulting employees

There is a need for the employers to inform and consult employees on major changes in production, programs, organizations or technology that are likely to entail the retrenchment of employees. This provision is aimed at lessening the effects of retrenchment by making employees generally prepared for this eventuality, should it occur. A joint consultative exercise must afford the employees a fair and reasonable opportunity to express their views and give suggestions. This notion is also echoed in section 25 of the Labour Act: 28:01].

In **Continental Fashions (Pvt.) Limited v Mupfururi (supra)**, the court held that before retrenching employees the employer must consult with the employees and give them information. This is however not recommended in cases where the disclosure of the information would harm the employer's business interests for reasons other than its relevance to the consultation process.

Attention must be made to the fact that physical consultations between management and workers is currently not possible due to the COVID-19 lockdown. Resultantly, such reduced face to face discussion hampers post-Covid-19 industrial relations climate discussions. In such a case, the employer may allow employees to make their written representations via various online platforms available.

1. Short-time work

The employer may agree with the employees concerned to avoid retrenchment by placing employees on short-time work. An employee who is on short-time work referred to in paragraph (a) of subsection (2), shall be paid the hourly equivalent of weekly or monthly wage for hours actually worked. This is effective provided that an employee shall receive not less than fifty per centum of his/her current weekly or monthly wage, as the case may be. The balance accrued may be treated as unpaid leave or be paid in the aftermath of the pandemic or when the fortunes of the organization have improved.

1. Shift work

The employer may institute a system of shifts. An employer may divide all or any of the employees concerned into shifts and may require each shift to work on alternate half-days, days, weeks or months; provided that no shift shall be without work for more than one month at a time or for an aggregate of more than six months in any period of twelve months. The employer must pay each employee on shift for the hours, weeks or months he has actually worked.

1. Mutual Agreements

Many mutual agreements options can be agreed between the employer and employees during and after the Covid-19. The parties may agree to use unpaid vacation leave days during and or after the lockdown. A case at hand is the parties to the National Employment Council for the Printing, Packaging and Newspaper Industry. On 15 April 2020, this NEC agreed that organizations can utilize the annual leave days to meet the employees' salaries and compensate for the working days lost due to the national lockdown period. Parties may also agree to cut the salary by a certain percentage and the balance will stand to be paid when the organization recovers post-Covid-19.

1. Non-Renewal of fixed-term employment contracts

It is possible that employers may consider not renewing short term contracts (say 1-month contracts) that are not of any use to the employer during this period of lockdown and subsequently in the aftermath. This measure, however, needs to be complemented by the central government in providing unemployment benefits or just widening the social net like what the Republic of South Africa and Botswana did.

1. Ministerial Intervention

In terms of section 17 of the Labour Act:28:01 the Minister, after consultation with the appropriate advisory council, if any, may make regulations providing for the development, improvement, protection, regulation and control of employment and conditions of employment. The Minister is therefore empowered to enact regulations through a Statutory Instrument barring retrenchments in industries where they may be avoided. This is a critical option that unions and employee side cherish the most in the aftermath of the pandemic.

1. Promoting Remote working

The post-Covid-19 period entails the need for organizations to create mechanisms that allow workers to work remotely. This will ensure that all risks physical contact is eliminated against all odds and arrest any possible infections. Organizations may leverage on technology to create virtual workplaces solutions. Such digital solutions will help keep business operations up and running. For instance, such solutions may include the automation of business processes, procedures and operations to leverage on retrenchment. The NECs may consider modern online solutions like the Integrated Electronic Case Management System.

This modern digital solution is also referred to as the National Employment Councils Management Automation System (NECMAS). It is a sector-wide tool which is web-based and also enables the NECs sector to attain new levels of perfection. It covers from the filing of a case right up to closure (confirmation of a ruling at the Labour Court). The system enables integration of the NECs in Zimbabwe and the various stakeholders.

1. Adopting aggressive innovative business strategies

The Zimbabwean organizations can take a leaf from the Kenyan Airways. This airline demonstrated that innovative business strategies may change the fortunes of a business and be able to avoid retrenchment and survive post-Covid-19. The airline, instead of grounding its passenger planes, decided to convert them to goods flights and are now busy ferrying the much needed essential goods across the globe. Such innovative ideas will create some new revenue streams and mitigate the effects of retrenchment while boosting organizational revenues in the aftermath of Covid-19.

Conclusion

It is inescapable that whatever mitigation measures the central government pursue in an endeavour to curb the spread of Covid-19, business and labour must equally complement such efforts. Such compliments by organizations can be attained when organizations craft during and after Covid-19 survival strategies that ensure employee job security and business continuity. Under such conditions, organizations are not forced by low revenues to right-size at the detriment of employment. It is such strategic decisions and actions that maintain the long term stability of business whilst cushioning employees from retrenchments.

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