Most employers and employees have a broad understanding that the fairness of a dismissal rests on both a substantive and a procedural leg.

On the one hand, substantive unfairness, in broad strokes, suggests that an employee who should not have been dismissed, had been dismissed.

The legislature had chosen to express substantive fairness with reference to the employee’s misconduct or incapacity and the operational requirements of the employer. A dismissal for the latter reason is often referred to as retrenchment.

On the other hand, procedural unfairness implies that the employee had not been given an opportunity to be heard by the employer before the dismissal was affected. There is at least one practical reason for distinguishing between procedural and substantive fairness: when a dismissal is unfair only because the employer did not follow a fair procedure, the competent remedy is generally only payment of compensation and not reinstatement as would be the case when the dismissal is either substantively, or both substantively and procedurally, unfair.

However, maintaining a separation between procedural and substantive fairness is not always easy. While it is perhaps easier to do so in the case of misconduct and incapacity, the lines between the two forms of fairness can sometimes be very blurred, particularly in the case of retrenchment. Key to a fair retrenchment is that it relates to the employer’s operational needs and can only be effected after notice and consultation with affected employees, either through their trade unions or directly with them.

While it is fairly obvious that a retrenchment that is not truly based on the employer’s operational needs, but an underhanded attempt to get rid of, for instance, poor performers, will be substantively unfair, the potential for substantive unfairness does not stop there.

Legislation requires the employer to first give notice and then to consult with affected employees on a number of topics. This is generally regarded as the procedural leg of a retrenchment. However, it is not as simple as it may seem. Not consulting on a statutory prescribed topic will render the subsequent retrenchment procedurally unfair, but the implementation of that topic, regardless of whether it has been consulted on, speaks to substantive fairness and the subsequent retrenchment can still be substantively fair even if no consultation on that topic had taken place.

This rather confusing statement is perhaps best explained with reference to the criteria for selection for retrenchment which is a statutory prescribed topic for consultation. However, the legislation envisages that the employer may nonetheless proceed with the retrenchment using fair and objective criteria if the consulting parties, after meaningful consultation, cannot reach agreement on selection criteria.

Failure to consult on the selection criteria will render the retrenchment procedurally unfair. Failure, in the absence of an agreement, to use criteria that are fair and objective or failure to apply the agreed or fair and objective criteria, will render the dismissal substantively unfair. This is so because if the ‘wrong’ criteria are applied, it can result in the dismissal of an employee who should not have been dismissed.

This implies (somewhat counterintuitively) that the absence of meaningful consultation on selection criteria does not per se imply that the selection criteria used were not fair and objective and that the retrenchment was substantively unfair. In other words, an employer who does not consult on selection criteria, but still uses criteria that somehow are fair and objective, will be off the hook in terms of substantive fairness, but will be in trouble as far as procedural fairness is concerned.

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