Voluntary retrenchment: what you need to know to stay legal

By Talita Laubscher and Qaqamba Vellem

With the current trend of retrenchments showing no sign of abating, the issue of voluntary retrenchments (VR) is being increasingly aired.

Employers and employees alike should familiarise themselves with the relevant legal principles to avoid disputes.

VR is an alternative to a potential forced or compulsory retrenchment. In essence, the employee volunteers and agrees to be retrenched and not to sue the employer for an alleged unfair dismissal in return for payment of an amount or receipt of benefits in addition to that to which he/she is legally entitled.

Employees who volunteer to be retrenched may therefore be required to sign a VR agreement in terms of which it is agreed that the employee's employment shall terminate due to the employer's operational requirements and that he/she waives any rights arising from the termination of his/her services.

Our courts have held that VR agreements are valid and enforceable contracts and that if a court were to fail to give effect to these types of agreements, there would be little point in concluding them.

However, the courts have also held that an employee cannot waive his/her rights to a fair dismissal in consideration for payments which are legally owed. For this reason, a VR agreement will only be enforceable if the employee is paid or granted a 'sweetener' in the form of an amount or benefits in addition to that to which he/she is legally entitled. The sweetener can take many forms, among them a gratuity or an enhanced severance package.

A VR agreement will, furthermore, not be enforceable if the employee is unduly influenced into signing it or if the employer has misrepresented the situation and the employee has, on this basis, concluded the agreement.
An employee is legally entitled to the amounts prescribed by the Basic Conditions of Employment Act 75 of 1997 (the BCEA), the contract of employment and any applicable company policies.

In terms of the BCEA, the following amounts are legally due to an employee who is compulsorily retrenched:

- annual leave accrued to the employee but not yet taken;

- contractual notice pay in the event that the employee is not required to work his/her notice period; and
- severance pay, the minimum amount of which is prescribed by the BCEA as one week's remuneration for every completed year of service. However, where the employer has a more favourable severance pay policy, which could be in writing or have been established through past practice, the policy will apply.

If the employee is contractually entitled to certain payments, like a guaranteed 13th cheque, the employee will be entitled to receive this payment or a pro rata portion thereof.

Severance pay is subject to the deduction of tax. The Income Tax Act 58 of 1962 (the ITA) provides limited scope for tax relief on severance payments. Accordingly, provided that all the provisions of section 10(1)(x) of the ITA are complied with, the first R30 000 of the severance package would be tax free. This is a "once-in-a-lifetime" benefit. An employee who has the misfortune of being retrenched more than once in his working life will therefore only qualify for the tax benefit once.

The employee's waiver will only be enforceable if the employee is given something in addition to the amounts and benefits legally due. This "something more" can take many forms.

For example, the employer may offer to pay an "enhanced severance package" – for instance, two or three weeks' remuneration for every completed year of service as opposed to the BCEA one week minimum. By using such a formula, those employees with longer service will, in particular, benefit from the enhanced package. Alternatively, the employer may offer to pay a gratuity equal to an additional month's remuneration or more. This way, employees with varying lengths of service receive equal treatment when it comes to the gratuity.

Some employers structure the gratuity in the form of an ex gratia contribution towards an employee's medical aid membership for a period of time after the termination. Ultimately, the amount and nature of the gratuity or enhanced package is a matter for negotiation and agreement between the parties.

Who makes the offer of VR?

While the employer would in most instances be the one introducing the Voluntary Retrenchment exercise, it is advisable to structure it so that the employee is the one making the offer of VR.

The offer would then be open to acceptance or rejection by the employer. An enforceable contract would therefore only come into existence upon acceptance of the offer by the employer and not when the employee volunteers.

The employer is entitled to reject an application for VR on the basis of its operational needs and the need to retain key skills, provided it has reserved this right for itself in the VR conditions.

The criteria by which VR applications are assessed should be objective and should be applied fairly to all applicants.

A VR exercise should be introduced as part of the consultation process on potential retrenchment in terms of section 189 and 189A of the Labour Relations Act 66 of 1995 (the LRA).

This is because the aim of the exercise is normally to avoid potential forced retrenchments. The courts have held that by implementing a VR exercise, an employer implicitly contemplates the need for potential forced retrenchments. This contemplation triggers the obligation to commence a formal retrenchment consultation process in terms of section 189/189A of the LRA.

In practice, however, VR exercises are sometimes introduced prior to commencing a formal retrenchment consultation process.

This approach is not without risk for the employer. If the Voluntary Retrenchment exercise does not yield the required results and the employer subsequently introduces a formal retrenchment process, it could be argued that the employer failed to commence the process when it contemplated the need for potential retrenchments. This may put the employer at risk of a finding that any subsequent forced retrenchments are unfair.

Another risk of introducing a VR exercise is that employees whom the company may seek to retain may volunteer. While the company would retain the right to reject a VR application on the basis of its operational requirements and the need to retain key skills, the employee, by volunteering to be retrenched, may already be disengaged and issues around motivation and productivity may arise. This risk exists irrespective of when the VR exercise is introduced and should be managed carefully from an industrial relations perspective.

A VR exercise may assist employers in avoiding compulsory retrenchments, which is one of the objectives an employer must try to achieve during a retrenchment consultation process.

A VR brings the added advantage of reaching finality on the termination of the volunteer's contract of employment, thereby avoiding protracted litigation and the associated costs.

Employers who wish to introduce VR should, however, take note of the legal requirements and framework governing them and obtain legal advice to ensure that their risks are minimised.

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