

189A. Dismissals based on operational requirements by employers with more than 50 employees.

- (1) This section applies to employers employing more than 50 employees if -
 - (a) the employer contemplates dismissing by reason of the employer's operational requirements, at least -
 - (i) 10 employees, if the employer employs up to 200 employees;
 - (ii) 20 employees, if the employer employs more than 200, but not more than 300 employees;
 - (i) 30 employees, if the employer employs more than 300, but not more than 400, employees.
 - (ii) 40 employees, if the employer employs more than 400, but not more than 500, employees; or
 - (iii) 50 employees if the employer employs more than 500 employees; or
 - (b) the number of employees that the employer contemplates dismissing, together with the number of employees that have been dismissed by reason of the employer's operational requirements in the 12 months prior to the employer issuing a notice in terms of section 189(3), is equal to or exceeds the relevant number specified in paragraph (a).
- (2) In respect of any dismissal covered by this section -
 - (a) an employer must give notice of termination of employment in accordance with the provisions of this section;
 - (b) despite section 65(1)(c), an employee may participate in a strike and an employer may lock out in accordance with the provisions of this section;
 - (c) the consulting parties may agree to vary the time periods for facilitation or consultation.
- (3) The Commission must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultations if -
 - (a) the employer has in its notice in terms of section 189(3) requested facilitation; or
 - (b) consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have notified the Commission within 15 days of the notice.
- (4) This section does not prevent an agreement to appoint a facilitator in circumstances not contemplated in subsection (3).

- (5) If a facilitator is appointed in terms of subsection (3) or (4) the facilitation must be conducted in terms of any regulations made by the Minister under subsection (6) for the conduct of such facilitations.
- (6) The Minister, after consulting NEDLAC and the Commission, may make regulations relating to -
- (a) the time period and the variation of time periods, for facilitation;
 - (b) the powers and duties of facilitators;
 - (c) the circumstances in which the Commission may charge a fee for appointing a facilitator and the amount of the fee; and
 - (d) any other matter necessary for the conduct of facilitations.
- (7) If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189(3) -
- (a) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the *Basic Conditions of Employment Act*; and
 - (b) a registered trade union or the employees who have received notice of termination may either –
 - (i) give notice of a strike in terms of section 64(1)(b) or (d); or
 - (ii) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11).
- (8) If a facilitator is not appointed -
- (a) a party may not refer a dispute to a council or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189(3); and
 - (b) once the periods mentioned in section 64(1)(a) have elapsed –
 - (i) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the *Basic Conditions of Employment Act*; and
 - (ii) a registered trade union or the employees who have received notice of termination may -
 - (aa) give notice of a strike in terms of section 64(1)(b) or (d); or
 - (bb) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11).
- (9) Notice of the commencement of a strike may be given if the employer dismisses or gives notice of dismissal before the expiry of the periods referred to in subsections (7)(a) or (8)(b)(i).

- (10)(a) A consulting party may not –
- (i) give notice of a strike in terms of this section in respect of a dismissal, if it has referred a dispute concerning whether there is a fair reason for that dismissal to the Labour Court;
 - (ii) refer a dispute about whether there is a fair reason for a dismissal to the Labour Court, if it has given notice of a strike in terms of this section in respect of that dismissal.
- (b) If a trade union gives notice of a strike in terms of this section -
- (i) no member of that trade union and no employee, to whom a collective agreement concluded by that trade union dealing with consultation or facilitation in respect of dismissals by reason of the employers' operational requirements has been extended in terms of section 23(1)(d), may refer a dispute concerning whether there is a fair reason for dismissal to the Labour Court;
 - (ii) any referral to the Labour Court contemplated by subparagraph (i) that has been made is deemed to be withdrawn.
- (11) The following provisions of Chapter IV apply to any strike or lock-out in terms of this section:
- (a) Section 64(1) and (3)(a) to (d), except that -
 - (i) section 64(1)(a) does not apply if a facilitator is appointed in terms of this section;
 - (ii) an employer may only lock out in respect of a dispute in which a strike notice has been issued;
 - (b) subsection (2)(a), section 65(1) and (3);
 - (c) section 66, except that written notice of any proposed secondary strike must be given at least 14 days prior to the commencement of the strike;
 - (b) sections 67, 68, 69 and 76.
- (12)(a) During the 14-day period referred to in subsection (11)(c), the director must, if requested by an employer who has received notice of any intended secondary strike, appoint a commissioner to attempt to resolve any dispute between the employer and the party who gave the notice, through conciliation.

- (b) A request to appoint a commissioner or the appointment of a commissioner in terms of paragraph (a) does not affect the right of employees to strike on the expiry of the 14-day period.
- (13) If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order -
 - (a) compelling the employer to comply with a fair procedure;
 - (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
 - (c) directing the employer to reinstate an employee until it has complied with a fair procedure;
 - (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.
- (14) Subject to this section, the Labour Court may make any appropriate order referred to I section 158(1)(a).
- (15) An award of compensation made to an employee in terms of subsection (14) must comply with section 194.
- (16) The Labour Court may not make an order in respect of any matter concerning the disclosure of information in terms of section 189(4) that has been the subject of an arbitration award in terms of section 16.
- (17)(a) An application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the employee's services or, if notice is not given, the date on which the employees are dismissed.
 - (b) The Labour Court may, on good cause shown, condone a failure to comply with the time limit mentioned in paragraph (a).
- (18) The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii).
- (19) In any dispute referred to the \labour Court in terms of section 191(5)(b)(ii) that concerns the dismissal of the number of employees specified in subsection (1), the Labour Court must find that the employee was dismissed for a fair reason if -
 - (a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
 - (b) the dismissal was operationally justifiable on rational grounds;
 - (c) there was a proper consideration of alternatives; and
 - (d) selection criteria were fair and objective.

- (20) For the purposes of this section, an 'employer' in the public service is the executing authority of a national department, provincial administration, provincial department or organisational component contemplated in section 7(2) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994).