

Can an employer still raise the retrenchment flag in interest negotiations? The *Fry's Metals* case under the Labour Relations Amendment Bill 2012

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OPSOMMING

Kan 'n werkgewer nog die operationele-vereiste-ontslag-roete volg in onderhandelinge oor belangsdispute? Die *Fry's Metals*-saak onder die Wetsontwerp op Arbeidsverhoudinge 2012

Artikel 187(1)(c) van die Wet op Arbeidsverhoudinge 55 van 1996 ("WAV") maak die sogenaamde uitsluitings-ontslag, in die loop van kollektiewe onderhandelinge, outomaties onbillik. Werknemers word egter alleenlik deur die huidige artikel 187(1)(c) beskerm, as die afdanking ten doel het om die werknemers te dwing om hul werkgewer se eis ten aansien van 'n aangeleentheid van gemeenskaplike belang te aanvaar, en as die afdanking bloot tydelik is.

Dit is dus huidige moontlik om finale diensbeëindigings teweeg te bring, vir operasionele redes (ingevolge artikel 189 of 189A van die WAV) as werknemers nie bereid is om toe te stem tot wysigings aan hulle diensvoorwaardes nie, mits die werkgewer substantiewe billikheid in die ontslag kan bewys, en solank die ontslag nie tydelike werking het nie.

Op 22 Maart 2012 het die Suid-Afrikaanse Kabinet sekere voorgestelde wysigings aan die WAV goedgekeur. Artikel 187(1)(c) sal, as die wetsontwerp in sy huidige vorm aanvaar word, die uitwerking hê dat enige ontslagte wat intree as gevolg van werknemers se weiering om toe te stem tot eise van hul werkgewers, ten aansien van aangeleenthede van gemeenskaplike belang, outomaties onbillik sal wees. Dit laat die vraag ontstaan hoe werkgewers artikel 189- en 189A-prosesse, waar moontlike veranderinge aan diensvoorwaardes voorgestel word as alternatief tot ontslag, moet benader, en of sodanige situasies noodwendig tot gevolg sal hê dat die werkgewer nie werknemers wat weier om die alternatief te aanvaar, mag ontslaan nie.

Die skrywers kom tot die slotsom dat artikel 187(1)(c) nie voorrang behoort te geniet bo artikels 189 en 189A nie, en dat dit eerder 'n feitevraag moet wees, wat in elke geval beantwoord moet word, gebaseer op die normale kousaliteitsbeginsels, of die oorwegende rede vir die afdankings gevind kan word in 'n poging deur die werkgewer om werknemers te dwing om 'n aanbod op 'n gemeenskaplike-belang-aangeleentheid te aanvaar, teenoor die vraag of die rede vir die afdanking as gevolg van *bona fide* operasionele-vereistes ontslag is.

1 Introduction

The sanctity of collective bargaining is well established in a South African context, particularly since the advent of the Constitutional era. Section 23(5) of the Constitution of the Republic of South Africa, 1996 guarantees to every trade union, employer's association and employer the "... *right to engage in collective bargaining*."¹ The national legislation enacted to give effect to these constitutional rights, the Labour Relations Act² (LRA) eventually struck a much debated wage-work bargain which functions on the basis that parties to the employment relationship do not have a duty to bargain with each other, although each has a right to engage in collective bargaining.³

Issues of interest (such as wage negotiations) are largely left to be resolved by and between the parties, if necessary by means of industrial action. The state does not get involved in compelling resolution of such interest issues by compelling bargaining, or any specific outcome of bargaining. Instead, in the LRA it created the structures within which parties must engage with each other, and potentially use industrial action to compel agreement with another bargaining party. In common parlance, the term "mutual interest" is often mistakenly used to refer to interest issues, however, strictly speaking, the term "mutual interest" includes both interest and rights issues⁴.

Despite the central role of collective bargaining in South African industrial relations, it was not left completely unregulated in the LRA. Certain conduct within the context of collective bargaining was seen as being too disruptive to constructive labour relations to leave to the parties' discretion. So for instance was employees' criminal behaviour such as violence and intimidation while engaged in a protected strike (or indeed misconduct, whether or not such amounts to criminal behaviour), not considered excusable conduct. Various adverse consequences, including dismissal, could follow for the perpetrators.⁵ Employer behaviour also did not escape scrutiny. It was, for instance, considered that strategic and temporary dismissals by employers in circumstances where the parties were engaging with each other in collective bargaining, in order to compel acceptance of the employer demand, was conduct that placed the negotiating parties in an unfairly uneven bargaining

1 Other employment related rights guaranteed in s 23 Constitution include the right to fair labour practices, the right to form or join trade unions and employer organisations, to participate in the activities of such organisations, and for "workers" the right to strike.

2 66 of 1995.

3 Grogan *Workplace Law* (2009) 346-348; Van Niekerk *et al Law @ Work* (2008) 40-44.

4 Grogan 345. For purposes of this article we do not express a view regarding the appropriate demarcation between the terms "interest dispute", "rights dispute" and "mutual interest issue" for purposes of evaluating s 187(1)(c)'s effect.

5 Van Niekerk *et al* 388.

position, and as such, outlawed.⁶ It is with this type of employer conduct that we concern ourselves in this article.

2 The Labour Relations Amendment Bill

After some 17 years of living with the LRA, it has become apparent that industrial action in South Africa remains susceptible to violence and intimidation. The legislator has therefore now attempted to introduce measures to promote a more constructive use of industrial action. On 22 March 2012, the South African Cabinet approved certain proposed amendments to the LRA. The Labour Relations Amendment Bill (LRA Bill) must still be submitted to, and approved by, parliament before it will become law.

The LRA Bill introduces many far-reaching amendments. Some of these provisions impact heavily on employees and their trade unions (for example, limiting the right to strike to circumstances where the strike is, from the start, supported by the majority of affected employees), but it has not left employer behaviour unaffected either.

Amongst other changes, the LRA Bill introduced a change to section 187(1)(c) of the LRA. This section currently provides that a dismissal is automatically unfair if the reason for the dismissal is to: "... compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee". If the LRA Bill is adopted, dismissals will be automatically unfair if the reason for the dismissal is: "... a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer". In what follows, we evaluate the effect of this amendment.

3 The Effect of the Proposed Amendment to Section 187(1)(c) on Retrenchments

3 1 Current Interpretation of Section 187(1)(c): The *Fry's Metals* Case

The current section 187(1)(c) of the LRA renders the so-called lock-out dismissal by an employer, in the course of collective bargaining, automatically unfair. Lock-out dismissals are dismissals with a temporary effect, until acceptance of an employer offer by the employee bargaining

6 Not only would these types of dismissals be unfair, but it would amount to automatically unfair dismissals. Various authors have expressed doubt as to whether or not the so-called "lock-out dismissal" was really such pernicious conduct as to justify being made an automatically unfair dismissal. See Thompson "Bargaining over Business Imperatives: the Music of the Spheres after Fry's Metals" 27 *ILJ* 2006 704 727; Todd & Damant "Unfair Dismissal – Operational Requirements" 2004 *ILJ* 896 918-919; Grogan "Chicken or Egg: Dismissals to Enforce Demands" 2003 19(2) Employment Law 4 8.

parties. It is effectively a form of industrial action used by employers in a type of final brinksmanship.

With the promulgation of the LRA, section 187(1)(c) appeared as one of the forms of automatically unfair dismissals, carrying the additional penalties associated with this form of dismissal.⁷ It was not immediately apparent to writers or the courts, what had been intended with this section.

Initially, writers and judges alike followed the approach that the section deserved a wide reading, so that employees would be protected from both threats of dismissals, and actual dismissals (whether temporary or final), if the employer's intention with the dismissal was to secure agreement to changes to terms and conditions of employment. That sentiment was informed by the view that, whilst it could be said that it was "... 'manifestly unfair' to dismiss employees for refusing to accept changes to their terms and conditions of employment ..."⁸ when employers could resort to lock-outs to achieve the desired outcome:

[a] contingent dismissal is not a particularly pernicious form of employer conduct in the context of employer-employee relations. It is no more and no worse than a sometimes useful expedient for management in the context of industrial power-play. It is not particularly odious precisely because of its transient intent and effect ...⁹

The general view was therefore that it could not have been the legislator's intention to only prohibit the relatively harmless lock-out dismissals, while leaving open the much more serious option of bringing about final dismissals should employees refuse to accept an employer demand on a matter of mutual interest.

However, in *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA*¹⁰ and *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd*,¹¹ the Labour Appeal Court and Supreme Court of Appeal together devised a reading of the section which construed it narrowly. It interpreted section 187(1)(c) to indeed only protect employees from being dismissed if the purpose of the dismissal was to compel them to accept a demand on a matter of mutual interest, and the dismissal was of a temporary nature. If the employer effected a permanent dismissal, because employees would not accept its demands, section 187(1)(c) could not come to the employees' protection. That of course did not mean that the

7 In terms of s 194(3) LRA the compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal. In all other instances where an employee was unfairly dismissed, the maximum compensation that may be awarded is 12 months' compensation (s 194(1) LRA).

8 *Grogan 2005 19(2) Employment Law* 4 7, 11.

9 Thompson 727.

10 2003 *ILJ* 133 (LAC).

11 2005 *ILJ* 689 (SCA).

employees were without remedy – any operational requirement dismissal must meet the substantive fairness requirements of section 189 of the LRA, and if the employer could not satisfy the Labour Court that a fair operational reason existed for the dismissals, it could still result in a finding for the employees. However, successful employees would then not be entitled to the greater automatically unfair compensation, but only the standard unfair dismissal compensation.¹²

In the *Fry's Metals* case,¹³ the employees unfortunately did not attack the substantive fairness of the dismissals, and limited their case to the alleged automatic unfairness of their dismissal (on urgent application), and hence we do not know whether the courts would have found that the employer's operational needs in any event justified the dismissals.

Subsequent cases have followed the *Fry's Metals* judgments, and only in circumstances where the employer's dismissals were for some reason not final, would section 187(1)(c) be of application. In *Chemical Workers Industrial Union v Algorax (Pty) Ltd*¹⁴ for instance, the facts were very similar to the *Fry's Metals* case. In both instances the employers sought to introduce new shift systems. When each of these sets of employees would not agree to the amendments to terms and conditions of employment represented by the new shift systems, they were then dismissed for operational reasons. In the *Algorax* case (different from the *Fry's Metals* case) the employer offered to reinstate the employees if they would accept the offered changes to terms and conditions, and this offer (which remained open until the matter came to the Labour Court) resulted in a finding that the employer did in fact use a non-permanent form of dismissal, and hence fell afoul of section 187(1)(c). The employer in the *Fry's Metals* case made it very clear in written communications to employees, that the employees were being threatened with dismissal if they refused to accept the new shift system, however, once the dismissals took effect, they were final and the employees were not given the opportunity to change their minds and accept the new shift system. The *Fry's Metals* dismissals therefore did not constitute automatically unfair dismissals in terms of section 187(1)(c).

It therefore transpired that, notwithstanding the general views held previously regarding section 187(1)(c)'s supposed purpose and effect:

... after *Fry's Metals* we have a situation where a temporary dismissal to compel acceptance with a mutual interest demand must be branded as automatically unfair and countered with the strongest remedies available at law while a permanent dismissal for the same reason but without justification (in other words, not a dismissal defensible under ss 188/189) is treated as a lesser industrial offence with lesser penalties.¹⁵

12 Reinstatement or re-employment is available as the primary remedy in the event of any substantively unfair dismissal, irrespective of whether the dismissal qualifies as automatically unfair (s 193(1) LRA).

13 *Supra*.

14 2003 *ILJ* 1917 (LC).

15 Thompson 728.

The aforesaid anomalous position has been law since the Supreme Court of Appeal pronounced on the *Fry's Metals* case. Very good questions remained as to whether the courts have correctly interpreted the legislator's intent.¹⁶ As a result, some speculation has seen the light, about what potential changes to the LRA could be brought about, to correct the position, and whether such anticipated changes would be an improvement or not.

Thompson¹⁷ raised the possibility of an amendment to section 187(1)(c) to outlaw all dismissals in the context of economic disputes (ie both temporary lock-out and final dismissals). He considers this prospect with some dread. In his words:

It is suggested that such 'remedial' steps would not serve industrial society well. On reflection, if the intention was that s[ection] 187(1)(c) should outlaw all dismissals in the context of economic disputes, it was being asked to do too much heavy lifting. And in any event, to locate that kind of control measure in the 'automatically unfair' basket was simply too drastic. The contest between claims for business flexibility on the one hand and protection against labour exploitation on the other is too complex and too important to be addressed by blunt-nosed legislative injunctions. A wide interpretation of s[ection] 187(1)(c) had the potential to hamstring the adaptive capacity of business mightily, and so inflict a great harm on the economy. The court could have tempered this again by a generous and overriding interpretation of the sweep of the operational dismissal provision (the 'employer's leeway'), s[ection] 188(1)(a)(ii), but the exercise would have been a tricky and uneasy one.¹⁸

Lo and behold, the LRA Bill now indeed seeks to bring about in this "blunt-nosed" fashion, the very effect foreseen to have the potential to hamstring "the adaptive capacity of business mightily".

3 2 The Difficulties Presented by Section 187(1)(c) of the LRA Bill in a Retrenchment Context

On a literal reading of the proposed amendment to section 187(1)(c) in the LRA Bill, if the reason for a dismissal is one that constitutes a refusal to accept an amendment to terms and conditions of service, this would be automatically unfair, even if the refusal took place in the course of a retrenchment exercise, where the potential changes to terms and conditions of employment were raised as alternatives to retrenchment.¹⁹

16 Grogan 2003 *Employment Law* 411: "It seems somewhat strange that the legislature should have categorised conditional dismissals in the context of collective bargaining as automatically unfair, but excluded final dismissals occurring in the same context. It is also debatable whether the legislature intended to allow employers to terminate collective bargaining over employer-initiated proposals by finally and irrevocably dismissing the employees". See also Thompson 729.

17 Thompson 729-730.

18 Thompson 729-730.

19 Please note that this difficulty is by no means the only difficulty foreseen with clothing the proposed s 187(1)(c) LRA Bill with meaning, given that

The question to be answered then, is whether the amended section 187(1)(c) was intended to outlaw the potential overlap between mutual interest demands and operational requirement dismissals and if so, the extent to which it does so.

The difficulty foreseen is not in respect of the straightforward operational requirement dismissal for some neatly contained reason that has no impact on the collective bargaining arena, but rather all those gray areas where mutual interest issues seep over into the operational requirement arena, and it becomes difficult to distinguish clearly between the two.²⁰ The difficulty in understanding where the line should be drawn is further exacerbated by the fact that operational requirements within the context of sections 189 and 189A dismissals, can encompass “survival” reasons for the proposed dismissals, but also “for efficiency” or even “for increased profit” reasons.

It is difficult to see how dismissals effected to ensure a business’s survival can be considered unfair (especially automatically unfair), even if the introduction of changes to terms and conditions of employment was offered as a viable alternative to the dismissals. However, not so if the employer’s purpose is to increase profit or efficiency, and to achieve this purpose, seeks to introduce changes to terms and conditions of employment, alternatively dismiss such employees as will not agree to the changes. But is this differentiator even one that is contemplated in the proposed amendment to section 187(1)(c)?

To illustrate, if a business is faced with new technology becoming available to its competitors, which involves a different way of carrying out operations, and which the business must either adopt, or risk losing its competitive advantage completely (and hence disappear), such new technology may lead the employer to demand that its employees agree to work on new terms and conditions of employment (for example working new shift systems, or acquiring new skills). This demand will constitute a mutual interest demand, falling under the proposed section 187(1)(c). Say the employees refuse to agree to the employer’s demand. Is the employer now precluded from embarking upon a section 189 or 189A process, where the different terms and conditions of employment are offered as an alternative to retrenchment? What about the position where the employer does not first seek to achieve the desired outcome in the collective bargaining arena, but instead immediately embarks upon a retrenchment exercise, again offering the different terms and conditions of employment as an alternative to retrenchment? Is one or both of these scenarios putting the employer at risk of transgressing the proposed section 187(1)(c) if dismissals follow a failure to reach agreement? What if the changes are only meant to bring about an

“mutual interest” issues go beyond matters properly falling within the collective bargaining arena, and it may therefore have unintended consequences within other disputes. Such other potential difficulties however do not fall within the purview of this article.

20 See Thompson 717-722 for examples of gray areas.

increase of profit, and even if they are not introduced, the business will continue, albeit not as profitably as its shareholders may like?

To summarise the questions raised in the example above, it remains to be seen whether the proposed section 187(1)(c) will allow for the following:

(a) Can the employer fairly retrench employees who refuse to agree to proposed changes to terms and conditions of employment, where the employer can demonstrate that a failure to implement such changes will probably result in catastrophic consequences for the business, or is the employer limited to trying to compel agreement through a lock-out after failed collective bargaining?

(b) If the employer has recourse to retrenchment in question (a), will the employer also be able to justify the retrenchment if the consequences of not implementing the proposed changes to terms and condition of employment is only that the business does not operate at optimum efficiency or profitability, or is lock-out the only option in this situation?

(c) If the employer initially follows a collective bargaining approach, and only later, when agreement proves illusive, embark upon a retrenchment exercise where a materially similar alternative is offered, will that result in an adverse inference being drawn against the employer, rendering dismissals automatically unfair under the proposed section 187(1)(c)?

Whereas, under the Labour Appeal Court and Supreme Court of Appeal's reading of the existing section 187(1)(c), there may not have been a conflict between sections 189 or 189A and section 187(1)(c),²¹ there is now clearly a potential conflict under the LRA Bill. This conflict will create uncertainty regarding the appropriate manner of classifying operational changes, and the appropriate process to follow to achieve necessary adaptation to market changes.

The difficulty is of course primarily that of the employer. It bears the onus of proving the reason for its dismissals, and the fairness thereof. It now also carries the risk that a mistake could be doubly costly.

3 3 Suggested Interpretation of Section 187(1)(c) Under the LRA Bill

At one extreme, it is possible to interpret the proposed section 187(1)(c) to have the effect that, in the event of an attempt to restructure an organisation by amending terms and conditions of employment, no operational requirement dismissal ought to be possible in the face of an inability to reach agreement with the appropriate bargaining parties, and that lock out should be the only weapon in the employer's arsenal.

A potentially less intrusive impact may be achieved if an operational requirement dismissal (for failure to agree to changes in terms and conditions of service) will only be prohibited in the event that the reason

²¹ Grogan 2003 *Employment Law* 46.

for the restructure is purely to increase profitability in an already profitably business. Thompson²² opined in 1999 (before the *Fry's Metals* case settled the question of what the current section 187(1)(c) sought to achieve), that:

[w]hen the contest between management and labour is 'purely' over the wage-work bargain – in other words, the substantive terms of the next collective agreement – dismissal will never be permissible. The 'for-profit' termination offends against section 187(1)(c). An employer may argue, however, that not a quest for profit but sheer operational requirements oblige a particular economic outcome, even to the point of sanctioning the discharge of those who hold out. But the Labour Court should lean against a result that allows a dispute on a wage-work deal to escape the protected zone of collective bargaining. When in exceptional circumstances the case for migration is made, the employer must still overcome a formidable fairness hurdle in the judicial process. When labour and management go into dispute over business restructuring (at the end of whatever kind of process), on the other hand, dismissal may unfold from the very logic of the exercise.

Such a reading would however require a limiting and strained interpretation being given to the term "mutual interest", so as to limit the proposed section 187(1)(c)'s effect to only some retrenchments, differentiated based on the employer's intended result (survival as opposed to increase in profits or efficiency). Such a differentiation would be a novel one.

We find both of these possible interpretations unpalatable. Zondo JP expressly pointed out (in the *Fry's Metals* case) that nothing in the LRA precluded employers from retrenching in order to increase profits. This view has been expressed often before and since.²³ It seems illogical to read the proposed section 187(1)(c) to restrict employers' possible use of alternatives to retrenchment, when the whole structure and logic behind sections 189 and 189A is geared towards finding viable alternatives to retrenchment that would keep employees in employment.

We instead suggest that sections 189 and 189A ought not to be made subservient to the proposed section 187(1)(c), nor indeed should a rigid distinction be drawn between the subject matter of a mutual interest collective bargaining process protected by section 187(1)(c), and that of an operational requirement process. The two are too often inextricably linked to each other, and an attempt to create a strained division will only hamstring effective collective bargaining and indeed efficient business management.

Instead, insofar as the LRA Bill may become law, the enquiry as to how the proposed section 187(1)(c) ought to be interpreted, should largely be

22 Thompson: "Bargaining, Business Restructuring and the Operational Requirements Dismissal" (1999) 20 *ILJ* 755-756.

23 See for instance *General Food Industries Ltd v FAWU* 2004 *ILJ* 1260 (LAC); *Mazista Tiles (Pty) Ltd v NUM* 2004 *ILJ* 2156 (LAC); *Van Rooyen v Blue Financial Services (SA) (Pty) Ltd* 2010 *ILJ* 2735 (LC).

a factual one, where the primary reason for employer action should be determined with reference to the test suggested in *SA Chemical Workers Union v Afrox*.²⁴ In establishing the reason for a dismissal (*in casu* for participation in a protected strike), the Labour Appeal Court held that:

... one first has to ascertain whether such participation or conduct [in a protected strike] was a factual cause for the decision to dismiss. To do this one must ask whether the dismissal would have taken place had there been no participation in the strike (or had there been no strike) ... Once it is accepted that participation in the strike was ... a factual cause for the dismissal of the employees, the next question is whether participation in the strike was, as a matter of probable inference from the facts, the only real or proximate cause of the dismissal (in other words, whether such participation was the legal cause of the dismissals).

It is further, in our view, preferable to apply the following dictum from *ECCAWUSA & Others v Shoprite/Checkers t/a OK Bazaars Krugersdorp*²⁵ (which predated the Fry's Metals case):

In my view, care should be taken not to equate a bona fide retrenchment exercise which is aimed at avoiding job losses to a negotiating exercise which is aimed, not at avoiding job losses, but is primarily aimed at unilaterally amending terms and conditions of employment to suit the operational requirements of an employer. In other words, where the amendment to terms and conditions of employment is proffered by an employer as an alternative to dismissal upon a bona fide retrenchment exercise and it is a reasonable alternative based upon the employer's operational requirements, the employer will be justified in dismissing employees who refuse to accept the alternative on offer.

True enough, in this case, the employer was faced with financial ruin. However we would submit that there is no justifiable basis to rewrite the interpretation currently given to what constitutes a substantively fair operational requirement dismissal, simply because of the proposed amendment to section 187(1)(c). The mere fact that a restructure has as its purpose the increase of profitability or efficiency, and involves amendments to terms and conditions of employment, should not exclude the potential use of sections 189 or 189A if agreement proves illusive.

4 Conclusion

Had the *Fry's Metals* case been determined under the LRA Bill, the union's urgent application to prevent the employer from implementing its threat of dismissal would have succeeded, and the dismissals would have constituted automatically unfair dismissals.

Even if the proposed interpretation of the proposed section 187(1)(c) is accepted, it may well be that the process which an employer elects to

²⁴ 1999 *ILJ* 1718 (LAC) 1729F-1730A.

²⁵ 2000 *ILJ* 1347 (LC) 1351G-H.

follow, when trying to bring about changes to terms and conditions of employment, will result in an inference being drawn that the true nature of the intended action is one that lies closer to section 187(1)(c), as opposed to sections 189 and 189A of the LRA. The motive of the employer will be carefully scrutinised, and the initial process followed (and content of communications exchanged at this stage) may well be the factor that sways the factual enquiry towards an inference that section 187(1)(c) is applicable.

It appears therefore that, should the LRA Bill become law in its current form, employers will have to step very carefully in future, when indicating what the consequences may be if agreement cannot be achieved in collective bargaining and of course when following through on any such threat. Threats of dismissal would in most instances be a very poor choice of bargaining technique and could very well lead to a conclusion that a refusal to accept a mutual interest demand was the real reason for the later dismissal.

The authors foresee that the proposed section 187(1)(c) may (at least until such time as the courts have pronounced on its true effect), have a stifling effect on collective bargaining, as in borderline cases employers would be safer to approach the matter as a retrenchment exercise from the start, rather than first engaging in collective bargaining. Where the matter was initially broached around the collective bargaining table, but no agreement is achieved, employers should consider whether the lock-out mechanism ought not to be used in preference to a retrenchment exercise.