

## CHAPTER 1

### INTRODUCTION AND STATEMENT OF PURPOSE

#### 1.1 Introduction

When a public institution is formed the purpose is to render a service to the public. There is no institution that is formed solely to create jobs. It is the motive and the nature of the particular service to be rendered which dictates how many employees are required, the types and levels of skills and experience required. Likewise when the Independent Electoral Commission (IEC) was established in terms of chapter 9 and section 190 of the Constitution of the Republic of South Africa, 108 of 1996, the aim was to meet a particular need which is to support and strengthen constitutional democracy by managing elections nationally, provincially and at municipal level; by ensuring that those elections are free and fair; and by declaring the results of those elections. Chapter 2, section 5(2) of the Electoral Commission Act, 51 of 1996, states that the Commission shall, for the purposes of the achievement of its objects and the performance of its duties acquire the necessary staff, whether by employment, secondment, appointment on contract or otherwise.

In South Africa, like in other countries world-wide, employers are from time to time compelled by economic, technical or structural reasons to review their staffing levels and may, for legitimate reasons, decide to terminate the employment of some of their workers (Grogan, 2001:185). The same situation occurred in the Independent Electoral Commission (IEC) when at the beginning of February 2001 the institution embarked on a process of retrenchment which culminated in the dismissal of some of its employees by the end of March 2001 (Independent Electoral Commission, February 08, 2001).

The economic and social consequences of retrenchment compel countries to require that retrenchments should not take place until an employer has complied with certain preliminary procedural requirements. Such requirements are often provided for in legislation (Grogan, 2001:185). In the South African context sections 185 and 189 of the Labour Relations Act, 66 of 1995, provide for the different types of fair dismissals.

As a point of departure chapter 1 of the dissertation gives a brief outline of the aim of the dissertation, the background thereof, the problem statement, the scope of the dissertation as well as the manner and the method of investigation. Furthermore the chapter provides clarification of certain terminology that is used prominently in the dissertation as well as giving an exposition of other chapters that comprise the dissertation, and it concludes with a summary of the rest of the chapter.

## 1.2 Aim of the dissertation

The dissertation looks at the process of retrenchment in a public institution with reference to the Independent Electoral Commission (IEC). It attempts to establish the fairness of the process undertaken by the IEC by gauging it against guidelines and principles entrenched in legislation such as the Constitution of the Republic of South Africa, 108 of 1996, the Labour Relations Act, 66 of 1995, the Basic Conditions of Employment Act, 75 of 1997 and any other existing workplace agreements.

According to Bendix (1996:107-108) labour legislation was introduced for the specific purpose of establishing parameters for the conduct of the labour relationship and to provide minimum regulations pertaining to the substantive conditions of employment. Labour legislation has, in the first place, been introduced to ensure the protection of employees. In the second place, labour legislation in a voluntary system provides the framework for the conduct of the collective labour relationship. Labour legislation provides for

aspects such as protection from victimisation and other freedoms and also promotes labour peace and dispute settlement procedures. Principles of social justice and the protection of society's members have led to the institution of welfare schemes in the form of unemployment funds. In order to promote more efficient and effective economic activity it is also necessary for the state to be involved in training and manpower planning programmes.

The Labour Relations Act, 66 of 1995, section 189(1) stipulates that when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must do so in consultation with the relevant parties. Section 189(2) stipulates that the consulting parties must attempt to reach consensus on appropriate measures to avoid dismissals, to minimise the number of dismissals, to change the timing of the dismissals, to mitigate the adverse effects of the dismissals, the method for selecting the employees to be dismissed and the severance pay for dismissed employees.

It has been the overall objective of the dissertation to attempt to ascertain if the IEC handled the dismissal of its employees in a fair manner.

Michaelson and White (1996:14-15) suggest that the fairness of a retrenchment process will be determined by the amount of planning that goes into the whole exercise. Some of the aspects that should be addressed are the extent to which the process was disclosed, the extent of worker involvement, the reasons for such retrenchment, whether possible alternatives to retrenchment were considered, whether the selection criteria was fair, the number of workers retrenched and the severance package payable. It is necessary to put in place specific guidelines for retrenchment before the process takes place, such as the following:

1. Development of an overall management plan for the retrenchments

The plan should analyse questions such as these:

- Were the retrenchments necessary?
- Who was involved in the decision and who had been consulted?
- Who was involved in the planning of the process?
- Who was the institutional spokesperson?
- Had alternatives been considered?
- Was the institution comfortable that its retrenchment planning and implementation would be above board?

2. Careful planning to identify persons or positions for retrenchment

The following questions should be analysed:

- Does the institution have a workable retrenchment policy?
- Did managers fully understand the criteria that were to be used to identify positions to be eliminated?
- Were the retrenchment criteria quantitative or qualitative? If qualitative, how were the criteria to be applied? Was the assessment in each case adequately documented?
- Were the reasons why employees or positions were selected for retrenchment internally consistent? If work performance was a criterion, did the personnel file of the retrenched employee support the determination that the employee should be retrenched while others are not?
- Was there disproportionate impact on "protected classes" of employees? If so, can there be assurance that the institution can prove that no invidious discrimination figured in termination decisions?

### 3. Careful preparation to notify affected employees

The following questions should be asked:

- Were the employees told the truth and were they treated throughout with dignity and respect?
- Did the employer make sure that the employees understood the criteria used to determine retrenchment sequence?
- How much notice was given?
- Who was responsible for notifying each individual?
- Did the employer ensure that trained human resource professionals were available to identify and address questions likely to arise?
- Was there respect for employee privacy?
- Did the employer prepare written materials on severance arrangements, outplacement assistance, re-employment rights, and appeal rights, and was the materials available at individual employee meetings?

### 4. Were the reactions and needs of remaining employees anticipated?

The following issues should be considered:

- Explanation of any reorganisation and restructuring necessitated by the retrenchments.
- Use of briefing sessions and group counselling to alleviate anxieties.

## 5. Debriefing afterwards

The following actions should be considered:

- Identifying a small group of key administrators who will be responsible for monitoring and evaluating the process.
- Considering whether institutional policies and practices should be modified based on the experience gleaned during the retrenchments.

6. Other questions that could be asked are:

- What did the institution hope to achieve by retrenching employees? Was this achieved?
- Was there a social plan in place to minimise the disruption in workers' lives as a result of the retrenchments, if so, what was the impact of such a social plan?

## 1.3 Background

The Independent Electoral Commission (IEC) is a public institution established in terms of chapter 9, section 190 of the Constitution of the Republic of South Africa, 108 of 1996, and chapter 2, section 3 of the Electoral Commission Act, 51 of 1996. In terms of section 190 of the Constitution the Independent Electoral Commission must manage national, provincial and municipal elections; ensure that those elections are free and fair, and declare the results of those elections. Sections 4 and 5 of the Electoral Commission Act, 51 of 1996, provide for the objects, powers, duties and functions of the IEC. Section 5(2) of the Electoral Commission Act, 51 of 1996, states that the Commission shall, for the purposes of the achievement of its objectives and the performance of its functions acquire the necessary staff, whether by employment, secondment, appointment on contract or otherwise. Chapter 3 section 12 of the Electoral Commission Act, 51 of

1996, provides for the appointment of a Chief Electoral Officer, who in turn shall, in consultation with Commissioners of the IEC, appoint such officers and employees of the IEC as he or she may consider necessary to enable the institution to perform its duties and functions effectively.

In order to be able to fulfil its mandate the IEC created an organisational structure and appointed staff, who delivered the national and provincial elections of June 1999 as well as the municipal elections of December 2000. The IEC initially appointed staff on the basis of 2-3 year fixed term contracts (Independent Electoral Commission, February 08, 2001). When the IEC employed staff on the basis of 2-3 year fixed term contracts, it was recognised that the IEC did not have the base or experience to project what would be the component of full time staff it would retain over time. In the subsequent period, the IEC recognised the need to institute its own regulations in respect of the conditions of service. In terms of these new regulations it was offered that staff could opt for an indefinite period of employment in the IEC and that those who wished to remain on fixed term contracts could do so. A fixed time scale for this process was agreed upon. That arrangement meant that the Commission had for a period of time employees on fixed term contracts and others on indefinite periods of employment (Independent Electoral Commission, February 08, 2001).

On the 9<sup>th</sup> of February 2001, during a staff meeting, the IEC announced its intention to rationalise. It was indicated that a number of environmental imperatives made it necessary for the IEC to consider restructuring. The key factors were:

- That it was necessary for the IEC to ensure that all staff were gainfully employed and are not bored and unproductive in the period of inactivity due to the lack of a general or local government election;
- That there was a need to justify an ever shrinking budget allocation; and

- That there was a need to ensure that the IEC delivers on its mandate in a cost-effective and efficient manner (Independent Electoral Commission, February 08, 2001).

In its communication to staff regarding the imminent rationalisation, the IEC (February 08, 2001) acknowledged that the process could lead to a radical change in its operations and organisational structure, that it could lead to a revised number of established posts which in turn could bring about a fairly drastic reduction of staff at all levels of the current structure.

The IEC, like any employer, is subject to the provisions of the Labour Relations Act, 66 of 1995. Its actions pertaining to the retrenchment of workers is therefore subject to scrutiny in order to establish whether they were done in a lawful and fair manner.

#### 1.4 Problem statement

According to Michaelson and White (1996:3) a retrenchment exercise has the potential to disrupt the effectiveness of an institution, to disrupt the lives of its workers and to lead to litigation. It is therefore necessary that each and every institution that contemplates the reduction of staff should take that route only as a last resort.

Where the process is unavoidable, proper and prudent planning should precede the process so that everything is done in a diligent, honest, caring and fair manner in accordance with the guidelines of section 189 of the Labour Relations Act, 66 of 1995.

Whereas legislation provides guidelines on how the question of retrenchment is to be approached, the thorny issue and problem statement of this dissertation is that there are instances where institutions proceed without having in place a good plan of action on how such a process is to be handled (Snyman 1983:7-8). The aim of this study is to establish the reasons the

IEC advanced for its desire to retrench and whether those reasons were substantively fair in terms of legislation. Furthermore the study aims to establish whether the principles of procedural fairness laid down in section 189 of the Labour Relations Act, 66 of 1995, were adhered to.

There are at least two reasons why the author chose this problem for research purposes. The reasons are as follows:

- The author is an employee of the IEC and it was also the first time for the author to experience the process of possible retrenchment. Throughout the whole process there were rumblings of discontent about the manner in which the process unfolded. It was for that reason that the author was curious to find out if the process was fair.
- Some of the retrenched staff took the IEC to the Commission for Conciliation, Mediation and Arbitration (CCMA). The author wanted to find out what the view of the CCMA would be regarding the fairness of the retrenchment of staff by the IEC.

## 1.5 Scope of the research

The scope of the research will in this regard cover the time dimension, the geographic dimension as well as the hierarchy dimension of the research.

### 1.5.1 Time dimension

The scope of the dissertation covered the period from the inception of the IEC to the retrenchments, that is from 1998 to 2001.

### 1.5.2 Geographic dimension

The IEC has a head office, provincial electoral offices as well as municipal electoral offices. The retrenchments affected staff from all three levels of the IEC.

### 1.5.3 Hierarchy dimension

The IEC is a public institution established in terms of chapter 9, section 190 of the Constitution of the Republic of South Africa, 108 of 1996, to support and strengthen constitutional democracy. Whereas it is publicly funded, it is independent and subject only to the Constitution and the law. In terms of the Constitution, the IEC is accountable to the National Assembly, and must report on its activities and the performance of its functions to the Assembly at least once a year. After the 1999 general elections and the 2000 local government elections it dawned on the IEC that the amount of staff it had on its payroll would not be gainfully employed during periods of low activity which is between elections. The element of low activity between elections also implied that the IEC would not be able to sustain its budget. The rationalisation of the IEC in 2001 brought about a change in the structure of the IEC, a reduction of posts and the consequent retrenchment of staff (see chapter 3 paragraphs 3.4.2.1.2 and 3.4.2.1.3). The central aim of this dissertation is to investigate the fairness of the retrenchment of staff conducted by the IEC.

### 1.6 Research methodology

The approach used in this dissertation is a combination of the descriptive and analytical approaches. Firstly, the dissertation described the process that was followed by the IEC in the retrenchment of workers. Secondly, the process was analysed using applicable legislation to establish the fairness of the process in terms of legislation.

## 1.7 Data collection techniques

The primary sources of reference for the study were archived or documented resources that were obtained from the IEC, such as official memoranda, speeches, reports and interviews being conducted. A written request was submitted to the IEC for the use of the above-stated resources and the institution agreed in writing. Applicable legislation such as the Labour Relations Act, 66 of 1995, also formed part of primary sources of reference. Published resources from libraries such as books, journals and articles comprised secondary sources of reference.

## 1.8 Referencing technique used in the dissertation

The sources of data cited in the text of the dissertation were duly acknowledged using the shortened Harvard referencing technique (Grogan, 2001:190). At the end of the dissertation, a complete list of bibliographical information of all sources of data used to write the dissertation is provided.

## 1.9 Clarification of terminology

Various concepts and terminology used in the different chapters are clarified in order to facilitate the correct understanding thereof and to clarify the context in which they were used. The following key concepts, used in the dissertation, are hereunder explained or defined:

### 1.9.1 Independent Electoral Commission (IEC)

The Independent Electoral Commission (IEC) is a chapter 9 institution established in terms of the Constitution of the Republic of South Africa, 108 of 1996 (hereafter referred to as "the Constitution"). It is one of those state institutions established to support constitutional democracy (Section 181(1) (f)). Section 181(2) of the Constitution states that the Electoral Commission,

amongst others, is independent, and subject only to the Constitution and the law, and that the Electoral Commission must be impartial and must exercise its powers and perform its functions without fear, favour and prejudice. The independence of the Electoral Commission is further supported by Section 3(1) and (2) of the Electoral Commission Act, 51 of 1996. It should be noted that in terms of the Interim Constitution of the Republic of South Africa, 200 of 1993, the electoral management body was referred to as the Independent Electoral Commission. Whereas current legislation refers to this institution as the Electoral Commission, the old name "Independent Electoral Commission" given to its predecessor by the Interim Constitution of the Republic of South Africa, 200 of 1993, seems to have become more popular in the public domain. The commissioners, management and staff also refer to it as the Independent Electoral Commission (IEC) so as to uphold the independence of the IEC that was bestowed upon it by the Constitution of the Republic of South Africa, 108 of 1996 and the Electoral Commission Act, 51 of 1996. In view of the above, the name "Independent Electoral Commission" (IEC) will be commonly used in this dissertation.

#### 1.9.2 The Labour Relations Act, 66 of 1995

The Labour Relations Act, 66 of 1995, is legislation that was passed in 1995 to change the law governing labour relations and, for that purpose: -

- “(1) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;
- (2) to regulate the organisational rights of trade unions;
- (3) promote and facilitate collective bargaining at the workplace and at sectoral level;
- (4) to regulate the right to strike and the recourse to lock-out in conformity with the Constitution;
- (5) to promote employee participation in decision-making through the establishment of workplace forums;
- (6) to provide simple procedures for the resolution of labour disputes

through statutory conciliation, mediation, and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose;

- (7) to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act;
- (8) to provide for a simplified procedure for the registration of trade unions and employer's organisation, and to provide for their regulation to ensure democratic practices and proper financial control;
- (9) to give effect to the public international law obligations of the Republic relating to labour relations;
- (10) to amend and repeal certain laws relating to labour relations; and
- (11) to provide for incidental matters" (Labour Relations Act, 66 of 1995).

### 1.9.3 The Basic Conditions of Employment Act, 75 of 1997

The Basic Conditions of Employment Act, 75 of 1997, is an Act that was passed to advance economic development and social justice by fulfilling the primary objects of the Act, which are: -

- "(a) to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution-
  - (i) by establishing and enforcing basic conditions of employment; and
  - (ii) by regulating the variation of basic conditions of employment;
- (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation."

#### 1.9.4 Retrenchment

According to Grogan (2001:186) the term retrenchment refers to the downsizing of a workforce because the employer does not need as many employees as it currently has on its books. Retrenchment takes place when jobs become redundant, and is aimed at effecting savings on the wage bill of an employer. There are other considerations which might make an employer to contemplate retrenching employees, such as the drop in demand for its products or services, the introduction of new technology which renders production less labour intensive, re-organisation or the introduction of more productive and cost-efficient work methods. Retrenchment does not happen as a consequence of misconduct or incapacity (Kumar, 1995:4). The Institute of Personnel Management (IPM) (1991:81) defines retrenchment as an indefinite separation from the payroll due to factors beyond the employee's control. An employee is thus redundant and can be retrenched if the employer's requirement for the employee to do the kind of work for which he or she is employed ceases or diminishes and no other suitable work can be found for that employee within the institution.

#### 1.9.5 Substantive fairness

In terms of section 188 of the Labour Relations Act, 66 of 1995, an employer who contemplates retrenching or dismissing employees must establish a fair reason for such retrenchments or dismissals. This requirement is placed in section 188 of the Labour Relations Act, 66 of 1995, to ensure that the reason that an employer advances has substance. In other words the employer is required to establish substantive fairness for its actions or that it has a *bona fide* reason to retrench (Van Niekerk, 2002:77). The question of substantive fairness was first stipulated in article 4 of the International Labour Organisation Convention 258 of 1982. Article 4 provides that the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or the conduct of the

worker or based on the operational requirements of the undertaking, establishment or service (see paragraph 2.4.1).

#### 1.9.6 Procedural fairness

The concept of procedural fairness emanates from article 13 of the International Labour Organisation Convention 158 of 1982 which requires that an employer who contemplates dismissing workers for operational reasons must:

- “(a) provide the workers or their representatives concerned with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;
- (b) give, in accordance with national law and practice, the workers’ representative concerned, as early as possible, an opportunity for consultation on the measures to be taken to avert or minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment” (Basson, 2002:89).

Section 188 of the Labour Relations Act, 66 of 1995, requires that a dismissal for operational reasons must be procedurally fair. Section 189 of the Labour Relations Act, 66 of 1995, provides for seven procedural requirements of a dismissal for operational reasons, namely the employer’s duty to consult, attempt by the consulting parties to reach consensus on certain matters, written disclosure of certain information, allowing the other party to make representations, consider representations made, the method of selecting the employees to be dismissed and the severance pay for the dismissed employees (see paragraph 2.4.2).

## 1.10 Exposition of chapters

This section on the exposition of chapters provides a summation of issues that are dealt with in the five chapters that comprise the dissertation.

Chapter 1 comprises the introduction to the dissertation. The chapter gives a brief outline of the aim of the dissertation, the background thereof, the problem statement, the scope of the dissertation as well as the manner and the method of investigation.

Chapter 2 concentrates on the legislative background to the dissertation. The chapter attempts to establish where and how retrenchment fits within the framework of legislation. The chapter also covers the background and the meaning of retrenchment. Furthermore the chapter informs on the position of legislation such as the Labour Relations Act, 66 of 1995, regarding the issue of dismissals on the basis of the employer's operational requirements. Substantive and procedural requirements for a fair retrenchment based on the employer's operational requirements are outlined and analysed. Reference is made to certain case law in order to highlight the position of the courts with regard to the application of the law in instances of dismissals for operational reasons. The focus is on chapter 8 of the Act with specific reference to sections 185, 186, 188 and 196. Relevant sections of the Basic Conditions of Employment Act, 75 of 1997, are also reviewed and analysed. The main focus is on section 189 of the Labour Relations Act, 66 of 1995, which specifically regulates retrenchment or dismissals based on the employer's operational requirements. In the end the aim is to review relevant legislation that would be used to test whether it was necessary for the IEC to dismiss employees for reasons based on its operational requirements and whether or not such dismissals were substantively and procedurally fair.

Chapter 3 examines the practice of the retrenchment of employees by the IEC. As a background the chapter gives an overview of the IEC and its place in the public sector. To that end the chapter looks at the establishment of the IEC and its role, powers, functions and duties in the public sector. Reference is made to the appointment of the Commissioners, the Chief Electoral Officer and other administrative staff of the IEC. The contract of employment between the employee and the employer and the conditions of service with specific reference to the question of the termination of employment by the employer is also explained. The chapter carries on dealing with the actual process that was carried out by the IEC to rationalise the institution, which eventually led to the retrenchment of employees. In this regard the chapter deals with substantive issues around the IEC's reason to retrench as well as the procedural fairness of the whole process. The focus is on procedural requirements such as prior consultation, attempts to reach consensus (dealing with those issues around which consensus had to be reached which are measures to avoid dismissals, measures to minimise the number of dismissals, measures to mitigate the timing of the dismissals, measures to mitigate the adverse effects of the dismissals), written disclosure of relevant information, allowing an opportunity to make representations, consideration of representations, selection of employees to be retrenched, as well as the payment of severance pay. The chapter furthermore explains the function and authority of the IEC and how this influenced the employment conditions of the employees.

Chapter 4 examines the process of retrenchment of employees by the IEC which started on 09 February 2001 and was finalized on 07 March 2001. The focus is on whether the IEC acted fairly when it retrenched its employees as is required by the Labour Relations Act, 66 of 1995. To achieve that, the reasons that the IEC advanced for its need to dismiss employees and whether or not those reasons were substantive are reviewed. Firstly, the steps that the IEC took after it had announced its intention to retrench employees is revisited and evaluated with the aim of establishing whether or

not the retrenchment process had been procedurally fair in terms of section 188(1) (b) of the Labour Relations Act, 66 of 1995. With that in mind the chapter evaluates whether the employer's consultation with affected staff was timeous and sufficient; whether the parties engaged in a meaningful joint consensus-seeking process; whether there were genuine attempts to reach consensus on appropriate measures to avoid dismissals, to minimize the number of dismissals, to change the timing of the dismissals and to mitigate the adverse effects of dismissals. Furthermore, consideration is given to whether the parties attempted to agree on the method for selecting the employees for dismissals and the severance pay for dismissed employees, whether there was written disclosure of relevant information by the employer, whether the employer allowed the other party an opportunity to make representations and also consideration of the representations that were made.

Chapter 5 summarises the dissertation, with proposals made on issues such as staffing, the timetable for the retrenchments and the problem of representation.

### 1.11 Conclusion

It has been the aim of chapter 1 to focus attention on giving an introduction to the dissertation. It states the aim of the dissertation, which is to study the process of retrenchment in a public institution with specific reference to the IEC.

The reason for the dissertation is to determine whether the institution followed procedures as laid down in applicable legislation when it retrenched workers. Perceptions and happenings during and after the retrenchment process provided the stimulus for the dissertation. The whole process was carried out within a mere 27 days, which was a major feat. On top of that, there were rumblings of discontent from certain quarters within the

institution as the process unfolded. After all was said and done, several of the retrenched staff approached the Commission for Conciliation, Mediation and Arbitration with allegations of unfair dismissals or labour practice.

In view of that the chapter proposes some guidelines that are to be followed in order to conduct the study. Furthermore the chapter highlights the scope of the research, the research method and data collection technique. Lastly, the chapters which comprise the dissertation are outlined.

In chapter 2 the legislative background to the dissertation is described. The aim is to inform on the position of legislation on the issue of retrenchment. Specific sections of the Labour Relations Act, 66 of 1995, are analysed and reference is made to certain case law in order to highlight the position of the courts in this regard.

## CHAPTER 2

### THE PLACE OF RETRENCHMENT WITHIN THE LAW

#### 2.1 Introduction

This chapter attempts to establish where and how retrenchment fits within the framework of the law and covers the background and the meaning of retrenchment. Legislation that deals with retrenchment, the most important of which is the Labour Relations Act, 66 of 1995, is analysed. The review focuses on chapter 8 of the Act with specific reference to sections 185, 186, 188, 189 and 196. Relevant sections of the Basic Conditions of Employment Act, 75 of 1997, are also analysed. The main focus is on section 189 of the Labour Relations Act, 66 of 1995, which specifically regulates retrenchment or dismissals based on the employer's operational requirements. Substantive and procedural requirements for a fair dismissal for operational reasons are outlined and analysed. Reference is made to case law so as to highlight the position of the judiciary with regard to the application of the law in instances of dismissals for operational reasons.

The conclusion highlights the fact that in the end, the purpose of the law as stated in this regard, is to test whether it was necessary for the IEC to dismiss employees for reasons based on its operational requirements and whether or not such dismissals were substantively and procedurally fair.

The fundamental principles governing the labour relationship are laid down in the Constitution (see section 23 of the Bill of Rights). This section affords every worker the right to fair labour practices, the right to form and join a trade union, the right to take part in the activities and programmes of a trade union and the right to strike. In the same breath section 23 also entrenches the right of every employer to form and join an employers' organisation, the right to take part in the activities and programmes of an employers' organisation. Furthermore every trade union and every employers' organisation has the right to determine its own administration

and programmes and activities, the right to organise and to form and join a federation, as well as the right to engage in collective bargaining.

These rights find expression in the Labour Relations Act, 66 of 1995(see chapter, section 1), whose basic premise is the advancement of economic development, social justice, labour peace and the democratisation of the workplace by providing a framework within which employees and their trade unions, employers and employers' organisations can:

- collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest;
- formulate industrial policy;
- promote orderly collective bargaining;
- promote collective bargaining at sectoral level;
- promote employee participation in decision-making in the workplace;
- and
- promote the effective and efficient resolution of labour disputes.

It is the existence of these rights which ensures that workers are protected from exploitation and unfair labour practices whenever the question of retrenchment is raised.

## 2.2 Meaning of retrenchment

Grogan (2001:186) sees the aim of retrenchment as being to downsize a workforce because the employer does not need as many employees as it currently has on its books. It takes place when jobs become redundant, and is aimed at effecting savings on the wage bill. There are other considerations which might make the employer to contemplate retrenching employees, such as the drop in demand for its products or services, the introduction of new technology which renders production less labour intensive, re-organisation or the introduction of more productive and cost-efficient work methods. Abner (1988:2) concurs that the existence of these conditions can cause insufficient

work for the existing workforce, thereby compelling an employer to dismiss surplus workers. In broad terms the termination of the service of a worker which is not a consequence of misconduct or incapacity, would fall within the definition of retrenchment (Kumar, 1995:4). The Institute of Personnel Management (IPM) (1991:81) defines retrenchment as an indefinite separation from the payroll due to factors beyond the employee's control. An employee is thus redundant and can be retrenched if the employer's requirement for the employee to do the kind of work for which he or she is employed ceases or diminishes and no other suitable work can be found for that employee within the institution.

Dismissal based on the employer's operational requirements is different from other forms of dismissals such as dismissal on the grounds of misconduct or dismissal due to incapacity of the employee because it does not happen as a result of the employee's fault but on the basis of economic, technological, structural or similar needs of the employer (Kantor, 2001:97-98,105).

Van Niekerk (2002:67) suggests that dismissal based on the employer's operational requirements is a "no fault" dismissal which happens because of difficulties that the employer experiences rather than a result of any act of omission on the part of the employee. Van Niekerk (2002:67) further suggests that it is for that reason that the law becomes more prescriptive in terms of both substance and procedure when dealing with dismissal based on the employer's operational requirements than in the case of a dismissal for misconduct or incapacity.

Although the law places specific obligations upon the employer, the intention is not to compel employers to retain employees on their payroll even when circumstances do not permit, but to ensure that in the event of a retrenchment the actions of the employer are substantially and procedurally fair. As a first step the employer is required to provide a *bona fide* economic rationale to do so, which implies that the contemplated retrenchment must

be aimed at effecting savings. The next step would be to ensure that lawful procedures are adhered to (Grogan 2001:186).

### 2.3 Permitted grounds for dismissal

Section 188 of the Labour Relations Act, 66 of 1995, states that a dismissal will only be fair if it is motivated by a fair reason and moreover, was effected in accordance with a fair procedure. Three broad categories of reasons for which an employer may dismiss a worker are misconduct, incapacity and the operational requirements of the business. In terms of the Labour Relations Act, 66 of 1995, a dismissal may also be considered fair if an employee has reached retirement age (section 187(2)), or an employee refuses to join a trade union in terms of a closed shop agreement, is refused union membership or is expelled from such union (section 26(6)).

For the purpose of this study the focus is on dismissal on the basis of the employer's operational requirements. Further explanation of dismissal for misconduct and incapacity is, however, necessary in order to clearly distinguish the latter forms from dismissal based on the employer's operational requirements.

#### 2.3.1 Dismissal for misconduct

Misconduct occurs when an employee knowingly behaves in a manner that contradicts a rule or a standard of conduct in the workplace. In other words rules or standards of conduct must be in place, such rules or standards must be valid or reasonable, the employee must be aware that such rules or standards exist. The purpose of the standards should first and foremost be to correct employees so that they can get used to and eventually abide by acceptable behaviours, not to punish them. Dismissal should be viewed as the last resort when counselling, written warnings and all other attempts have failed. Where the employee behaves in a manner that warrants

dismissal, the employer may be inclined to effect a dismissal provided certain procedures having been followed (Van Niekerk, 2002:119).

### 2.3.2 Dismissal for incapacity

Incapacity is referred to as poor performance or inability to perform to acceptable standards (Van Niekerk, 2002:121). There are three types of incapacity, namely poor work performance, ill health or injury and incompatibility (Basson, 2002:200). What the employer should keep in mind is section 188(1) (a) (i) and (b) of the Labour Relations Act, 66 of 1995, which states that a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's capacity, and that the dismissal was effected according to a fair procedure.

Van Niekerk (2002:121-122) states that whether it is a dismissal for misconduct or a dismissal for incapacity the employee should be afforded an opportunity to be heard before the final decision to dismiss is taken. Van Niekerk (2002:123) also indicates that incapacity can happen due to ill health or injury. Even in that regard certain guidelines, which will not be explored in this study, have to be followed.

### 2.3.3 Dismissal based on the operational requirements of the employer

In terms of Section 213 of the Labour Relations Act, 66 of 1995, operational requirements mean requirements based on the economic, technological, structural or similar needs of an employer. It has nothing to do with the behaviour or limitations of the employee.

The economic, technological, structural and other needs of an employer will be explained hereunder so as to provide a better understanding of the operational requirements of the employer.

#### 2.3.3.1 Economic needs

Van Niekerk (2002:124) states that an employer can contemplate to retrench when it is experiencing financial difficulties in its operations.

An example could be when an organisation experiences difficulties emanating from an economic downturn or a decrease in the demand for its products or services or a decrease in government subsidies. Difficulties may also be experienced due to the need to comply with the requirements of legislation such as the Basic Conditions of Employment Act, 75 of 1997. A case in point was the case of the *Democratic Nursing Organisation of SA & Others v Somerset West Society for the Aged (2001) 22 ILJ 919 (LC)* where the court concluded that the employer's reasons of retrenching could not be disputed because it was experiencing financial difficulties that arose as a result of a 40% reduction in government subsidies. The court also concluded that the implementation of the requirements of the Basic Conditions of Employment Act, 75 of 1997, as demanded by the union would add to the employer's financial burdens (Basson, 2002:225).

#### 2.3.3.2 Technological needs

In order to respond to the technological environment within which it operates, an organisation may be compelled to introduce new technology such as more advanced machinery, mechanisation or computerisation (Basson, 2002:226). The introduction of new technology does affect work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace (Van Niekerk: 2002:124).

#### 2.3.3.3 Structural needs

The structural needs of an organisation arise when jobs become redundant due to restructuring (Van Niekerk 2002:124). Restructuring often follows upon a merger or an amalgamation between two or more businesses or institutions (Basson, 2002:226). In the event that an amalgamation takes place, the concerned parties must take cognisance of the requirements of section 197(1) of the Labour Relations Act, 66 of 1995, which points out that in the event of an amalgamation taking place, the affected employee's consent must be sought, unless-

- “(a) the whole or any part of the business, trade or undertaking is transferred by the old employer to the new employer as a going concern; or
- (b) the whole or part of a business, trade or undertaking is transferred as a going concern-
  - (i) if the old employer is insolvent and being wound up or is being sequestered; or
  - (ii) because a scheme of arrangement or compromise is being entered into to avoid winding- up or sequestration for reasons of insolvency.”

#### 2.3.3.4 Similar needs

With regard to similar needs of the employer, Du Toit (2000:380) suggests that the Labour Relations Act, 66 of 1995 seems to restrict this to grounds similar to technological, economic and structural reorganisation of the enterprise. Thus, an employer cannot dismiss an employee on the basis of racial or gender grounds to promote racial or gender diversity in the workplace. On the same vein, the law does not allow an employer to retrench an employee on grounds of operational needs if the real reason for the retrenchment is the conduct or capacity of an employee.

Basson (2002:226) is of the view that “similar needs” is an extremely broad concept that must be determined with regard to the circumstances of a case. The existence of a reason is a matter of fact, and thus it is not possible to draw an exhaustive list of what constitutes “similar reasons” for dismissal. However, over the years the courts have had to consider various similar reasons, which to a certain extent make it possible to come up with the following categories of “similar reasons”:

- special operational needs of the enterprise;
- the employee’s actions or presence affect the business of the enterprise negatively;
- the employee’s conduct has led to a breakdown of the trust relationship;
- the enterprise’s business requirements are such that changes must be made to the employee’s terms and conditions of employment (Basson, 2002:226).

#### 2.4 Position of the law regarding dismissal or retrenchment resulting from operational requirements

The purpose of sections 188 and 189 of the Labour Relations Act, 66 of 1995, is to protect affected employees from unfair labour practices. To achieve this, the Act provides specific guidelines regarding the substantive fairness and the procedural fairness of actions taken by employers who contemplate dismissing employees for operational reasons. Both concepts of fairness as seen from the perspective of the Act will be explained below.

##### 2.4.1 Requirement to establish substantive fairness of dismissal for operational reasons

In terms of section 188 of the Labour Relations Act, 66 of 1995, an employer who contemplates retrenching or dismissing employees must establish a fair reason for such retrenchments or dismissals. This requirement is placed in

section 188 of the Act to ensure that the reason that an employer advances has substance. In other words the employer is required to establish substantive fairness for its actions or that it has a *bona fide* reason to retrench (Van Niekerk, 2002:77). In accordance with section 188(1) of the Act the employer is unfair if it cannot prove that the reason for the dismissal is a fair reason related to the employee's conduct or capacity; or based on the operational requirements of the employer and that the dismissal was effected in accordance with a fair procedure.

The question of substantive fairness was first stipulated in article 4 of the International Labour Organisation Convention 258 of 1982. Article 4 provides that the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or the conduct of the worker or based on the operational requirements of the undertaking, establishment or service. What is important in this respect is that the employer cannot dismiss a worker at will without substantiating such dismissal. The requirement to substantiate or justify relates to the substantive fairness of a dismissal (Basson, 2002:87). Du Toit (2000:380) supports the contention that the employer must substantiate the reason to retrench when the author suggests that the employer's actions must not be seen to be motivated by mere selfish interests but by a genuine need to make profit and to remain competitive in the industry within which it operates.

When is dismissal for operational reasons justified in a substantive sense? According to Basson (2002:236) no statutory definition of substantive fairness in regard to a dismissal for operational reasons existed before the introduction of section 189(A) of the Labour Relations Act, 66 of 1995. The onus was on the then Industrial Court and thereafter the Labour Court and the Labour Appeal Court to interpret and give meaning to the concept.

#### 2.4.2 Requirement to establish procedural fairness of dismissal for operational reasons

The requirement of procedural fairness, according to Basson (2002:89) emanates from article 13 of the International Labour Organisation Convention 158 of 1982 which requires that an employer who contemplates dismissing workers for operational reasons must-

- “(a) provide the workers or their representatives concerned with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;
- (b) give, in accordance with national law and practice, the workers’ representatives concerned, as early as possible, an opportunity for consultation on the measures to be taken to avert or minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.”

The content of section 188 of the Labour Relations Act, 66 of 1995, forms the nucleus of what is referred to as procedural fairness of dismissal for operational reasons, which requires that a dismissal for operational reasons must be procedurally fair (Basson, 2002:242).

Section 189 of the Labour Relations Act, 66 of 1995, provides that: -

- “(1) when an employer contemplates dismissing one or more employees for reasons based on the employer’s operational requirements, the employer must consult-
  - (a) any person whom the employer is required to consult in terms of a collective agreement;

- (b) if there is no collective agreement that requires consultation, a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum;
  - (c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals;
  - (d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.
- (2) The consulting parties must attempt to reach consensus
- (a) on appropriate measures-
    - (i) to avoid dismissals;
    - (ii) to minimise the number of dismissals;
    - (iii) to change the timing of the dismissals;
    - (iv) to mitigate the adverse effects of the dismissals;
  - (b) The method of selecting the employees to be dismissed; and
  - (c) The severance pay for the dismissed employees.
- (3) The employer must disclose in writing to the other consulting party all relevant information, including, but not limited to-
- (a) the reasons for the proposed dismissals; the alternatives the employer has considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
  - (b) the number of employees likely to be affected and the job categories in which they are employed; the proposed method for selecting which employees to dismiss;
  - (c) the time when, or the period during which, the dismissals are likely to take effect;
  - (d) the severance pay proposed;

- (e) the assistance that the employer proposes to offer to the employees likely to be dismissed; and
  - (f) the possibility of the future re-employment of the employees who are dismissed.
- (4) The provisions of section 16 apply, read with the changes required by the context, to the disclosure of information in terms of subsection (3).
  - (5) The employer must allow the other consulting party an opportunity during consultation to make representations on any matter on which they are consulting.
  - (6) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reason for disagreeing.
  - (7) The employer must select the employees to be dismissed according to selection criteria-
    - (a) that have been agreed to by the consulting parties; or
    - (b) if no criteria have been agreed to, criteria that is fair and objective."

Basson (2002:242) adds that section 189 (read with section 16 of the Labour Relations Act, 66 of 1995, and section 41 of the Basic Conditions of Employment Act, 75 of 1997) of the Labour Relations Act, 66 of 1995, lays down the requirements that have to be fulfilled in the event of both small – scale and large – scale retrenchments. Additional requirements are laid down in section 189(A) of the Labour Relations Act, 66 of 1995. Where small - scale retrenchments are carried out by either a small employer or a big employer and where large – scale retrenchments are carried out by a big employer, both have to comply with the seven procedural requirements that are stated in section 189 of the Act namely prior consultation; attempt to reach consensus over certain matters; written disclosure of relevant information; allow an opportunity to make representations; consider representations; selection of employees for retrenchment and severance pay (Basson, 2002:261). The difference lies in additional requirements stipulated

by section 189(A) of the Labour Relations Act, 66 of 1995, which states that where large – scale retrenchments are contemplated, either party is afforded the right to ask the Commission for Conciliation, Mediation and Arbitration to appoint a facilitator to assist the parties during the consultations. Section 189(A) also introduces a moratorium of 60 days during which the employer may not dismiss workers (Basson, 2002:262).

The employer may ask the Commission for Conciliation, Mediation and Arbitration to appoint a facilitator to assist the parties during consultation. The employer must request for a facilitator when it gives notice in terms of section 189(A) (3) (a). If the employer does not ask for a facilitator, the employee party representing the majority of the employees that the employer contemplates retrenching may ask for a facilitator. The employee party must notify the Commission for Conciliation, Mediation and Arbitration within 15 days of the employer's notice of contemplated dismissal of this request. If neither party asked for a facilitator within the stipulated timeframes, they may agree to ask for one to be appointed during the consultation process in terms of section 189(A) (4). In the event that both parties do not request for a facilitator, section 189(A) stipulates that a minimum period of 30 days, calculated from the date on which the employer gave notice in terms of section 189(3) of contemplating a large scale dismissal, must have lapsed before a dispute about the contemplated dismissal may be referred to the Commission for Conciliation, Mediation and Arbitration or a council for conciliation (section 189(A) (8) (a)). Section 64(1) (a) prescribes a minimum conciliation period at the Commission for Conciliation, Mediation and Arbitration or council of 30 days. Section 189(A) (8) provides that the employer may not dismiss until the 30-day conciliation period has lapsed. This implies that the soonest that an employer would be able to dismiss will be after the expiry of both of the 30-day periods, that is 60 days from the date on which it gave notice in terms of section 189(3) of contemplating a large scale dismissal. Only after the expiry of the 60 days can the employer be able to give notice of termination of the contracts of

employment of those employees that have been selected for dismissal. Section 37(1) of the Basic Conditions of Employment Act, 75 of 1997, regulates the giving of minimum notice (Basson, 2002:262-263).

To be procedurally fair, section 189 of the Labour Relations Act, 66 of 1995, stipulates that seven requirements must be complied with when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements. The following section analyses the seven requirements of a procedurally fair dismissal for operational reasons as prescribed by the law. These are prior consultation, attempts by the consulting parties to reach consensus over certain matters, written disclosure of relevant information, allowing an opportunity to make representations, consideration of representations, selection of employees to be dismissed and the payment of severance pay. Where relevant cases could be established, the interpretation of the courts on various matters has been highlighted in order to establish more or less what the position of the courts is in these matters.

#### 2.4.2.1 Prior consultation

Section 189 of the Labour Relations Act, 66 of 1995, states that an employer who contemplates dismissing one or more employees for reasons based on the employer's operational requirements must consult with the employees or their representatives.

In *National Union of Metal Workers of SA V Atlantis Diesel Engine (Pty) Ltd (1993) 14 ILJ 642 (LAC)* the court stated that consultation simply means that an employer, who senses that it might have to retrench employees in order to meet operational objectives, must consult with the employees likely to be affected (or their representatives) at the earliest opportunity in order to advise them of the possibility of retrenchment and the reasons for it (Basson, 2002: 243).

Consultation must be comprehensive and thorough and not merely sporadic, shallow and a charade. Although the distinction between adequate and inadequate consultation is often difficult to draw, case law suggests that the test is whether the employees concerned or their representatives were given a fair opportunity to suggest ways in which job losses might be avoided or the effects of retrenchment on the workforce as a whole or on particular individuals might be ameliorated (Grogan, 2001: 190).

#### 2.4.2.1.1 Meaning of consultation

In an attempt to clarify the meaning of consultation, Basson (2002:244) writes that the term consultation is not included in the list of definitions provided by section 213 of the Labour Relations Act, 66 of 1995. However, it is stated that in terms of section 189(2) the employer and the other consulting parties must engage in a meaningful joint consensus seeking exercise and attempt to reach consensus on issues of mutual interest. This means that the parties must engage each other with the aim of reaching consensus as far as they possibly can. This section (189(2)) specifies the points the parties must reach consensus on.

#### 2.4.2.1.2 Consultation initiator

Van Niekerk (2002:71) indicates that in terms of section 189(3) of the Labour Relations Act, 66 of 1995, the employer is the one who has a duty to take the initiative by issuing a written notice inviting the other consulting parties to consult with it. In the written notice the employer must disclose all the relevant information around its retrenchment proposal. The guidelines provided by the Act in terms of the kind of information required will be noted in paragraph 2.4.2.3 of this chapter.

#### 2.4.2.1.3 Parties to be consulted

Section 189 of the Labour Relations Act, 66 of 1995, states that the employer contemplating the retrenchment of one or more employees for operational reasons must consult-

- “(a) any person whom the employer is required to consult in terms of a collective agreement;
- (b) if there is no collective agreement that requires consultation, a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum;
- (c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals;
- (d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.”

The findings of the court in *FAWU & Others v National Sorghum Breweries [1997] 11 BLLR 1410 (LC)* makes it clear that the employers have to abide by this priority order of consultation. The court found the retrenchment to be unfair because the employer had consulted directly with its employees without notifying their union (Grogan, 2001:193).

Du Toit (2000: 389) concurs that any employer who consults directly with affected employees belonging to a registered trade union or induce them to enter into a retrenchment agreement without consulting their union will be in breach of section 189 of the Act and may render any subsequent dismissal unfair.

#### 2.4.2.1.4 When consultation must take place

Section 189 of the Labour Relations Act, 66 of 1995, states that consultation must take place when the employer contemplates dismissal. The word “contemplate” seems to suggest that the employer must consult at the stage when a final decision to dismiss has not yet been reached, but the possibility of dismissal has only been foreseen. In other words the affected employees must not be presented with a *fait accompli*. In *Manyaka v Van de Wetering Engineering (Pty) Ltd* [1997] 11 BLLR 1458 (LC) the Labour Court declared that retrenchment was unfair on the basis that the employer had kept the employee in the dark for some time after it had taken a decision that would lead to his/her retrenchment. The court also found that the employer had failed to show that the dismissal of the employee was the only reasonable option, as the re-training of the employee as a computer operator appeared to have been a viable alternative to retrenchment. In *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC) it was held that what it means is simply that an employer who senses that it might have to retrench employees in order to meet operational objectives, must consult with the employees likely to be affected (or their representatives) in order to advise them of the possibility of retrenchment and the reasons for it (Basson, 2002:243).

#### 2.4.2.2 Attempt to reach consensus over certain matters

The focus of this second procedural requirement for a fair retrenchment is the stipulations of section 189(2) of the Labour Relations Act, 66 of 1995, which states that the employer and the other consulting parties must in the consultation engage in a meaningful joint consensus seeking process and attempt to reach consensus on:

- “(a) appropriate measures-
  - (i) to avoid the dismissals;
  - (ii) to minimise the number of dismissals;

- (iii) to change the timing of dismissals;
- (iv) to mitigate the adverse effects of the dismissals;
- (b) the method for selecting the employees to be dismissed; and
- (c) the severance pay for dismissed employees.”

According to Van Niekerk (2002: 73), the implication is that when the parties begin to engage each other they must do so with a genuine desire to jointly seek and reach consensus and not just a mechanical application of the procedural steps set out in section 189 of the Labour Relations Act, 66 of 1995.

The issues on which the parties have to reach consensus will be explained in the ensuing sub-paragraphs.

#### 2.4.2.2.1 Measures to avoid dismissals

In terms of section 189(2) (a) (i) of the Labour Relations Act, 66 of 1995, the parties are expected to try and reach agreement on appropriate measures of avoiding dismissals, which means that they must try to find and agree on alternatives to retrenchment. Section 189(A) (19) of the Labour Relations Act, 66 of 1995, requires that there be proper consideration of alternatives to avoid such dismissals. Proper consideration entails that the employer must carefully apply its mind to the alternatives on the table. Should the employer finally decide that dismissal is the only option, it must be able to give strong and acceptable reasons in its defence. There must be proof beyond all reasonable doubt that dismissal was the measure of last resort (Basson, 2002: 247).

There are a number of alternatives that the parties can consider in the place of retrenchment, which are-

- the granting of either paid or unpaid leave;
- the reduction or elimination of overtime;

- the reduction or elimination of work on Sundays;
- the transfer of employees to other positions in the same undertaking;
- the spreading of dismissals over a period of time in order to allow time for a natural reduction in personnel numbers to occur;
- the training or retraining of employees to enable them to take up alternative positions in the same undertaking; and
- the reduction of wages (Basson, 2002:247).

For example in *Mkhize & Others v Kingsleigh Lodge (1989) 10 ILJ 944 (IC)* the then Industrial Court stated that the acceptance of a reduction in wages by employees could be a viable option to retrenchment (Basson, 2002:247).

#### 2.4.2.2.2 Measures to minimise the number of dismissals

Section 189 (2) of the Labour Relations Act, 66 of 1995, again requires that the parties must also try to agree on appropriate measures to minimise the number of dismissals. Basson (2002:247-248) suggests that at this stage of the consultation the parties will already have agreed that retrenchment cannot be avoided completely. What the parties must try to agree on is to come up with measures whereby the number of employees likely to be dismissed is kept as low as possible. Such measures may include-

- the transfer of redundant employees to other positions or sections in the same undertaking;
- asking employees to volunteer for retrenchment;
- the spreading of the dismissals over a period of time in order to allow for a natural reduction in personnel numbers through, for example, resignations; or
- the training or retraining of redundant employees to enable them to take up alternative positions in the same undertaking (Basson,2002: 247-248).

#### 2.4.2.2.3 Measures to change the timing of the dismissals

Again, the parties are required to try and reach consensus on appropriate measures to change the timing of the dismissals. The employer may want to see the whole process unfold as soon as possible, whereas the unions and the employees may prefer that retrenchment takes place at a later stage and that it must be spread over time (Basson, 2002:248).

#### 2.4.2.2.4 Measures to mitigate the adverse effects of the dismissals

The consulting parties must attempt to agree on appropriate measures to mitigate the adverse effects of the dismissals. The employer can implement a number of measures to relieve retrenched employees of the burden of dismissals. For example the employer may-

- assist the employees to find alternative employment by giving them time off, without loss of pay, to search for alternative work and to attend interviews;
- make an office available in which retrenched employees can complete job applications and to arrange job interviews; and
- provide retrenched employees with additional references on top of the certificate of service which must be furnished in terms of section 42 of the Basic Conditions of Employment Act, 75 of 1997(Basson,2002:248-249).

#### 2.4.2.2.5 The method of selecting the employees to be dismissed

In terms of section 189(2) (b) of the Labour Relations Act, 66 of 1995, the consulting parties must try to agree on the method for selecting the employees to be dismissed. What this means is that they must try to agree on the selection criterion or criteria according to which employees will be selected for retrenchment. Basson (2002:249) suggests that the provision in section 189(2) (b) must be read in conjunction with section 189 (7) which sets out the six guidelines for a procedurally fair dismissal for operational

reasons. Section 189(7) provides that if no selection criteria have been agreed to, the employer must select the employees to be dismissed according to selection criteria that are fair and objective. Basson (2002:249) writes that this procedural requirement is also one of the four requirements stipulated by section 189(A) (19) for substantive fairness.

Basson (2002:249-250) argues that fairness entails that the criterion should not be arbitrary but relevant in that it relates to attributes or conduct of the employee such as length of service, ability, capacity and productivity and the needs of the business. Objectivity entails that the criteria should not depend on the subjective prejudices of the person making the selection. In other words, the person making the selection should not use the pretext of redundancy to dismiss an employee who is regarded as a troublemaker or because the employee belongs to a union or is a shop steward.

Basson (2002:250) gives the following examples of selection criteria that may be used:

- Seniority:

This is what is commonly referred to as “last in first out” or LIFO. With regard to seniority those employees with a longer service record are retained at the expense of those employees with shorter service in similar or less-skilled categories of work. In most cases unions are inclined to prefer this criterion because it protects longer-service employees and minimises the temptation for employers to use subjective judgement to decide who shall be retrenched (Basson, 2002:250). Basson (2002:250) states that this criterion is also acknowledged as being fair and objective in terms of item 9 of the Code of Good Practice on Dismissals Based on Operational Requirements (16 July 1999). Basson (2002:250) further states that the Code points out that in cases where there is an agreed upon affirmative action programme, the LIFO

criterion must be adapted to ensure that its application does not undermine those agreements.

- Conduct:

When it comes to considering conduct as a criterion, such conduct must have been objectively determined and the employer will not be seen as having been fair and objective unless if the employee was informed at the time that the misconduct took place that such conduct was not acceptable. Examples of conduct that could be considered are absenteeism and previous warnings (Basson, 2002:250).

- Efficiency, ability, skills, capacity, experience, attitude to work and productivity:

Basson (2002:250) is of the opinion that employers generally favour these criteria since it is in their interest to retain hardworking workers who have proven to have aptitude or potential regardless of the time such workers have been employed. What is of importance is that the above stated criteria must be applied in an objective manner. Basson (2002:250) further suggests that these criteria may only be used if the employee is aware that the employer considered them as important.

In *NUMSA v Dorbyl Ltd t/a Dorbyl Automotive Technologies P365/99* the employer was considering the outsourcing of its press operations. One of the alternatives to retrenchment was that some of the employees could be placed on a new production line that manufactured seat frames for the export market. However, workers on this new line would be required to produce more effectively than workers on the line producing for the South African market. The selection criterion used by the employer was whether employees were trainable to meet the requirements of the new line. In order to determine whether they were trainable, the employer argued that all

employees had to undergo a test administered by an independent party. The court found the test to be fair and reasonable (Basson, 2002:250-251).

- Attendance:

For an employer to be able to use the criterion of attendance in a manner that is seen as being fair and objective, there must be proof that the employees had always known that the employer regarded absence from work in a serious light (Basson, 2002:251).

- Bumping:

According to Basson (2002:251) if retrenchment is to affect only one department in an institution, the practice is sometimes to retrench on the basis of LIFO, and to drain off remaining employees in that department into other departments. If the skills of the longer – serving employee cannot be used, he or she is given the option of going to a less - skilled job and to replace a less skilled employee. In *Raad van Mynvakbonde & Andere v Harmony Goudmynmaatskappy Bpk (1993) 14 ILJ 183 (IC)* the mine implemented this criterion on a shaft basis and not across the mine. It retrenched those employees working on a particular shaft on the LIFO basis and then drained off the remaining workers to the vacancies left by the retrenched workers. The then Industrial Court found this to be fair. The mine had convinced it that selection on a mine basis would have broken up shift teams which would have impacted negatively on the mine's profitability.

- Early retirement:

Basson (2002:252) writes that this criterion is most of the time applied in jobs which requires physical fitness and strength, the argument being that a person's physical fitness and strength lessons with age. Those employees who have reached the minimum retirement age are identified as the first

target population for retrenchment. After those employees have been retrenched, LIFO is applied to the remaining employees. Even though physical fitness is a consideration, the ageing employees should choose themselves whether they want to retire early or not, otherwise coercing someone to take early retirement may constitute an automatically unfair dismissal in terms of section 187 of the Labour Relations Act, 66 of 1995.

- Volunteers:

The parties may agree that the employer will first ask for volunteers to take a voluntary severance package before embarking upon any selection process (Basson, 2002:252).

- Non-residency:

In *National Union of Metalworkers of SA & Others v Televisions and Electrical Distributors (Pty) Ltd (1993) 14 ILJ 738 (IC)* the then Industrial Court held that the selection of employees who are not residents within a particular area could be a fair criterion (Basson, 2002:252). However, Basson (2002:252) argues that retrenchment on this basis may amount to an automatically unfair dismissal in terms of section 187 of the Labour Relations Act, 66 of 1995. This is so because section 187(1) (f) states that a “dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.”

- Double income families:

In *Manquidi & Others v Continental Barrel Plating (Pty) Ltd (1994) 15 ILJ 400 (IC)* the then Industrial Court upheld the employer's decision to retrench a woman employee whose husband was also an employee so as to mitigate the adverse economic consequences of the retrenchment both on her family (achieved by the continued employment of her husband at an increased salary) and on the remainder of the workforce, who were for the rest single income families (Basson, 2002:252). Basson (2002:252) argues that this may amount to an automatically unfair dismissal because in terms of section 187(1) (f) of the Labour Relations Act, 66 of 1995, the employer will be seen to have unfairly discriminated against the woman employee on the basis of her marital status and or family responsibility.

- "FIFO" or "first in first out":

According to Basson (2002:252)), in *United People's Union of SA v Grinaker Duraset (1998) 19 ILJ 107 (LC)* the union suggested that the longer serving employees should be the first to be selected for retrenchment. It suggested this criterion as most of its members were recruited from people who had recently started to work for the employer. The court held that it was not an acceptable criterion.

#### 2.4.2.2.6 The severance pay for dismissed employees

Section 189(2) (c) of the Labour Relations Act, 66 of 1995, states that the parties must attempt to reach consensus on the severance pay for the dismissed employees. Section 41(2) of the Basic Conditions of Employment Act, 75 of 1997, creates an obligation on the part of the employer who is in the process of dismissing employees for operational reasons, to pay severance pay and it stipulates the minimum severance pay that must be paid (Basson, 2002:253). Although section 41(2) of the Basic Conditions of

Employment Act, 75 of 1997, regulates the minimum severance pay which an employer must pay, it is not prescriptive. The parties may, for instance, agree on a settlement in excess of the minimum severance pay (Basson, 2002:253). According to section 189(2) of the Labour Relations Act, 66 of 1995, the parties must still attempt to reach consensus on the issue of severance pay.

#### 2.4.2.3 Written disclosure of relevant information

This is the third requirement for a procedurally fair dismissal for operational reasons as set out in section 189(3) of the Labour Relations Act, 66 of 1995, which must be read in conjunction with section 189(4) of the same Act. Section 189(3) contains provisions regarding the kind of information that the employer must disclose in writing to the other party when it initiates consultations. The required information includes, but is not limited to-

- the reasons for the proposed dismissals;
- the alternatives that the employer considered before proposing the dismissals, and the reason for rejecting each of those alternatives;
- the number of employees who are likely to be affected and the job categories in which they are employed;
- the process or method that will be used to select employees that will be dismissed;
- the time when, or the period during which, the dismissals are likely to take effect;
- the severance pay proposed;
- any assistance that the employer proposes to offer to those employees likely to be dismissed;
- the possibility of future re-employment of those employees who are to be dismissed;
- the number of employees who are employed by the employer; and
- the number of employees that the employer has retrenched in the preceding 12 months (Basson, 2002:253-254).

According to Basson (2002:254) it is not enough that the employer provides verbal assurances, explanations and information. The employer must disclose all relevant information in writing or provide documentation that will strengthen its case, such as financial reports. Also, it is not just any information that must be disclosed but such information as is relevant. Such information is not limited to what is listed in section 189(3) of the Labour Relations Act, 66 of 1995.

On the question of the relevancy of information, section 16(3) of the Labour Relations Act, 66 of 1995, provides some guidelines when it states that the employer must disclose all relevant information that will allow the other party to engage effectively in the consultations. Any dispute in which an arbitrator or Labour Court is required to decide whether or not any information is relevant, the onus is on the employer to prove that any information that it has refused to disclose is not relevant for the purposes for which it is sought (Basson, 2002:255).

In *National Union of Metalworkers of SA & Others v Comark Holdings (Pty) Ltd (1997) 18 ILJ 516 (LC)* the Labour Court held that if the reason for retrenchment relates to financial difficulties experienced by the employer, it may be required to make its financial statements available to the other party. However, if the reason for retrenchment relates to a decline in orders for one of the employer's products rather than to financial difficulties, it might not be necessary for the employer to make its financial statements available (Basson, 2002:255).

- There are exceptions to the requirement of disclosure of information. Section 16(5) of the Labour Relations Act, 66 of 1995, restricts the disclosure of certain information. It states that the following information, namely information that is legally privileged, confidential information that may cause harm if disclosed, and private personal information relating to

an employee, cannot be disclosed by the employer (Basson, 2002: 255-256):

- Information that is legally privileged

Basson (2002:256) states that the Supreme Court has laid down two requirements for a document to be legally privileged. Firstly it must have been obtained for professional legal advice. A document that has been obtained for legal advice must have been prepared for the purpose to give legal advice. Secondly, the document must have been obtained in reference to actual pending legal litigation or litigation which is contemplated or anticipated. Basson (2002:256) adds that the question whether or not litigation was contemplated or anticipated is one of fact, which must be determined on all the circumstances of the case.

- Confidential information that may cause harm if disclosed

Section 16(5)(c) of the Labour Relations Act, 66 of 1995, restricts the employer from disclosing information that is confidential and which, if disclosed, may cause substantial harm to an employee or the employer. If information can impact negatively on the employer's competitiveness should it be made public, such should not be disclosed. Examples of such information are trade secrets, price concessions obtained from customers and price reductions, which have been negotiated with suppliers of raw material, or of components necessary for the production of the employer's products (Basson, 2002:256). Chapter 4, section 44(1) of the Promotion of Access to Information Act, 2 of 2000, states that the information officer of a public body may refuse a request for access to a record of the public body –

“(a) if the record contains-

- (i) an opinion, advice, report or recommendation obtained or prepared; or

- (ii) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, the minutes of a meeting, for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; or
- (b) if-
- (i) (aa) the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting the candid communication of an opinion, advise, report or recommendation; or
  - (bb) conduct of a consultation, discussion or deliberation; or
  - (iii) the disclosure of the record could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy."
- Private personal information relating to an employee

Section 16(5) (d) of the Labour Relations Act, 66 of 1995, restricts the employer from disclosing information that is private personal information relating to an employee, unless by agreement of the employee. Private personal information includes an employee's medical record, which was compiled following obligatory regular medical check-ups with the company doctor. The information that the employer is not required to disclose in terms of section 16(5) may still be relevant. Section 16(11) makes it clear that legally privileged information and information, which the employer cannot disclose as a result of any law or a court order can never be disclosed. The restriction on disclosure of certain information is not an absolute one. In terms of section 16(6)-(12), any party which has a dispute regarding the disclosure of information can refer the dispute in writing to the Commission for Conciliation, Mediation and Arbitration. The Commission for Conciliation, Mediation and Arbitration must attempt to resolve the dispute

through conciliation, failing which any party may request that the dispute be resolved through arbitration (Basson, 2002:256-257).

#### 2.4.2.4 Allow an opportunity to make representations

An opportunity to make representations is the fourth requirement for a procedurally fair dismissal for operational reasons as is stipulated in section 189(5) of the Labour Relations Act, 66 of 1995. This section states that “the employer must allow the other consulting party an opportunity during consultations to make representations about any matter dealt with in terms of subsections (2), (3) and (4) as well as any other matter relating to the proposed dismissals.”

According to Basson (2002:258) subsection (5) firstly requires that representations must be allowed about any matter on which parties are consulting. The employer must thus allow representations on items such as the reasons for dismissal, alternatives to dismissal, measures to minimise the number of dismissals, the timetable for dismissal, assistance to the dismissed employees, selection criteria and severance pay. Secondly, the subsection requires the employer to allow representations about the disclosure of information. Thirdly, it allows representations about other matters relating to the proposed dismissals. This might include issues that are not covered in section 189 in one way or another such as the negative socio-economic impact that a mass dismissal would have on the local community.

#### 2.4.2.5 Consider representations

The fifth requirement for a procedurally fair dismissal for operational reasons is regulated by section 189(6) of the Labour Relations Act, 66 of 1995, which states that “ the employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.” Section 189(6)

again requires that "if any representation is made in writing the employer must respond in writing."

Basson (2002:258) stresses the fact that it is not enough for the employer to merely allow the other party to make suggestions or recommendations regarding the various matters on which they are consulting. The employer must as a matter of fact seriously and carefully consider the suggestions or recommendations and respond properly in accordance with the law.

#### 2.4.2.6 Selection of employees for dismissal

The selection of employees for dismissal is the sixth requirement for a procedurally fair dismissal for operational reasons, which is regulated by section 189(7) of the Labour Relations Act, 66 of 1995. This section states that "the employer must select the employees to be dismissed according to selection criteria that have been agreed to by the consulting parties; or if no criteria have been agreed, criteria that are fair and objective."

Basson (2002:259) adds that the requirement becomes relevant once the parties have accepted that dismissal is necessary. In terms of section 189(2) (b), selection criteria are one of the matters in respect of which the parties must attempt to reach consensus on. If the employer and the trade union have reached consensus, the employer must use that criterion to select the employees for dismissal.

Basson (2002:259) brings to remembrance the fact that one of the four requirements for substantive fairness is that the selection criteria used by the employer must be fair and objective. This implies that even if the parties agree on the criteria to be used, the test is that such criteria must in the eyes of the law be seen to be fair and objective. In case the parties disagree on the selection criteria, the employer is obliged to use criteria that are fair

and objective. Again the law has the final say with regard to the fairness and objectivity of the criteria.

#### 2.4.2.7 Severance pay

The payment of severance pay, which is the seventh requirement for a procedurally fair dismissal for operational reasons, is regulated in terms of section 41 of the Basic Conditions of Employment Act, 75 of 1997. Subsection (2), which is one of the most important provisions in this regard, states that an employer who dismisses an employee for reasons based on that employer's operational requirements must pay such an employee severance pay.

Basson (2002:259) concurs that the provision in section 41(2) creates an obligation for the employer to pay severance pay to workers that are dismissed for operational reasons. Section 41(5) provides some guidelines as to what severance pay amounts to. It states that "the payment of severance pay in compliance with this section does not affect an employee's right to any other amount payable according to law."

Basson (2002:259-260) writes that severance pay is therefore an amount which is paid in addition to any other amount which is payable in law. Amounts which are payable in law include those amounts payable in terms of the Basic Conditions of Employment Act, 75 of 1997, upon termination of employment such as notice pay and unpaid leave pay. The minimum amount that can be paid as severance pay is regulated in terms of section 41(2) read with section 35 of the Basic Conditions of Employment Act, 75 of 1997, which states that "an employer must pay severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35."

Whereas section 41(2) stipulates that severance pay must only be paid for each completed year of continuous service with the particular employer, section 84 of the Basic Conditions of Employment Act, 75 of 1997, states that for the purpose of determining the length of an employee's service, previous employment with the employer must be taken into account if the break between the periods of employment is less than one year. In *Insurance & Banking Staff Association obo Aucamp v Old Mutual Life Assurance Co (2000) 21 ILJ 2515 (CCMA)* it was held that sections 41(2) and 84(1) are not irreconcilable and that previous employment should be taken into account if the break between the periods of employment was less than one year (Basson, 2002:260).

Basson (2002:261) indicates that an employer's duty to pay severance pay is not absolute. This is in view of the provision of section 41(4) of the Basic Condition of Employment Act, 75 of 1997, which states "that an employee who unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer is not entitled to severance pay in terms of subsection (2)." In other words, an employee who unreasonably refuses an alternative position loses the right to severance pay. The question of whether or not an employee's refusal is unreasonable is one of fact. Item 11 of the Code states that reasonableness is determined by a consideration of the reasonableness of the employee's refusal. As regards the offer, objective factors such as remuneration, status and job security are relevant. If the employee refuses a position which is similar to the old one, the refusal may be unreasonable. However, if the offered position amounts to a demotion, the employee's refusal will probably not be regarded as unreasonable.

The Institute of Personnel Management (IPM) (1991:6) is of the view that whereas procedures are necessary and good in terms of establishing fairness, fair procedures are not enough when dealing with retrenching people. Retrenchments should be carried out in a humane way. Institutional

response to economic hardships has traditionally been the reduction of the workforce, which is a purely commercial response based on the philosophy that labour, like several other inputs in the production process, is an element of cost. In order to cope with decreased revenue and increasing costs, it is necessary to either increase the price of goods or reduce the elements of costs. Labour is a very visible and tangible cost element and as a result the reduction of employees is normally viewed as a logical cost cutting measure. The argument presented by the Institute of Personnel Management (IPM) (1991:7) is that whereas some institutions uphold the principle of social responsibility, such institutions should be true to their declarations. Those institutions should no longer see employees as an element of cost, nor see retrenchment as a purely commercial decision. An institution with a social responsibility should view the workforce as one of the stakeholders (together with shareholders, customers, suppliers, unions and other institutions). Reducing the size of the workforce and leaving a number of employees without job security or source of income in a country with high rates of unemployment and poor social conditions cannot be a commercial decision for institutions with a degree of conscience. The Institute of Personnel Management (IPM) (1991:7) further argues that the best form of retrenchment is no retrenchment at all, but if it has to happen, it must be done in a humane way. More time should be spent on preventing the need for retrenchment through long term strategic planning which should negate the need for staff reductions. Humane retrenchment for the Institute of Personnel Management (IPM) means that staff should be trained so that when retrenchment occurs, they can be marketable. Other ways of dealing with this in a humane way is genuine consultations to ensure that everybody's views are explored, relevant information which could help in finding solutions to retrenchment should be shared, the employer should assist in finding other jobs for retrenched employees, retrenchment insurance should be considered, and retrenched employees should have the first option to return to a job from which they were retrenched.

## 2.5 Position of the courts regarding the fairness of a dismissal or retrenchment for operational reasons

According to Bendix (1996:374), the establishment of a consistent meaning of the concept of fairness is problematic. Bendix (1996:374) suggests that if there was a balance between the parties, if both of them received equitable treatment, if the actions or behaviours of the parties conformed to universally accepted standards and if there was consistency in such actions or behaviours, then such actions or behaviours could be regarded as being fair. The main consideration was whether each party is seen to be reasonable, but the problem has always been that the interpretation of reasonableness depended on the circumstances so that it would be almost impossible to establish delimited standards of fairness (Bendix, 1996:374).

Bendix (1996:375) adds that in the past the Industrial Court was given the discretion to determine what would be considered as fair but it could not establish an absolute precedent through its decisions. When the Industrial Court first started to implement its unfair labour practice jurisdiction, much argument and time was spent on trying to establish whether an action was lawful or not. It was commonly suggested that as long as an action was lawful it was fair. As a result it was argued that if by common law the employer had the right to dismiss an employee, then such dismissal was essentially fair. The Industrial Court, however, refuted such arguments after which it was held that lawfulness does not constitute fairness; that an action may be lawful, but may still be unfair. The corollary, however, is not true. An action, which is unlawful, cannot be fair. It is for that reason that the Industrial Court used to be referred to as a court of equity and not a court of law. In terms of the Labour Relations Act, 66 of 1995, this view has changed as the Labour Court is now regarded as a court of law (Bendix, 1996:375).

### 2.5.1 Substantive fairness from the perspective of the courts

Basson (2002:236) states that in the past the onus to interpret and give meaning to the concept of substantive fairness was on the then Industrial Court and thereafter the Labour Court and the Labour Appeal Court. The courts have concluded that the question of whether or not an employee's dismissal for operational reasons is substantively fair is a factual one. In terms of the courts it is incumbent upon the employer to firstly prove that the reason it advances for dismissal falls within the statutory definition of operational requirements. Secondly, the employer is required to prove that an operational reason actually existed and that it was the real reason for the dismissal and not a cover up.

Du Toit (2000:380) is of the contention that there is a thin line dividing the questions of substance and procedure. The operational needs of an employer are equated to its interests, which also makes it difficult to separate the two. It is suggested that an employer's actions must not be seen to be motivated by mere selfish interests but by a genuine need to make profit and to remain competitive in the industry within which it operates. If an employer cannot prove during negotiations that there is a feasible alternative to dismissal, that might be indicative that there is self-interest and not operational need behind the desire to retrench. The important thing, as the argument goes, is that the other party has to expressly or tacitly concede that there is no alternative to the action of dismissal. That should give proof that an employer is driven by a genuine need. In case of a dispute, it is incumbent upon the court to make a finding of fact. Van Niekerk (2002:77) shares the view that the requirements relating to substantive fairness have always been controversial. Despite what the Labour Relations Act, 66 of 1995, provides for in section 188, that an employer must establish a fair reason for dismissal, the courts have been unwilling to subject the employer's rationale for retrenchment to extensive scrutiny. Earlier cases suggested that all that the employer had to do to establish substantive fairness was to demonstrate

that it had a *bona fide* reason to retrench. Du Toit (2000:381) adds that allowing the courts to enquire into the merits of management decisions would amount to an intrusion into managerial prerogative by an institution ill qualified to do so.

Some judgements have, however, asserted a greater role for the court. In *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd (1993) 14 ILJ 642 (LAC)* the previous Labour Appeal Court held that – “Fairness in this context goes further than a *bona fide* and commercial justification for the decision to retrench. It is concerned, first and foremost, with the question whether termination of employment is the only reasonable option in the circumstances. It has become trite for the courts to state that the termination of employment for disciplinary and performance related reasons should always be a measure of last resort. That, in our view, applies equally to termination of employment for economic or operational reasons”. Also, in *UPUSA v East Rand Proprietary Mines Ltd [1996] 8 BLLR 985 (IC)* it was held that “management should consider every outstanding issue before taking the final decision” (Du Toit, 2000:381-382).

The implication of court decisions such as the above stated is that employees have a real contribution to make to the substantive decision-making process, and that important decisions, such as those involving retrenchment, should be subject to the greatest possible degree of consultation with employees or their representatives. This should be done not merely to ensure that there is substantive fairness but to establish whether substantive grounds for retrenchment exist and, if so, the most appropriate manner of mitigating the consequences of a retrenchment. That, in essence, is the approach that is required by the Labour Relations Act, 66 of 1995. The Act has defined a clear role for the court, which is to ensure that the provisions of the Act are adhered to. Section 192 of the Labour Relations Act, 66 of 1995, requires the employer to prove that any dismissal is fair. Should the employer’s evidence be disputed by the other party, the court has a duty to weigh up

the opposing arguments and make a finding, as in any other contested matter, as to whether the employer's grounds for dismissal are valid within the meaning of section 189 of the Act (Du Toit, 2000:382).

There are instances where the employer has used operational reasons to cover up its real intentions. For instance in *SA Chemical Workers Union & Others v Toiletpak Manufacturers (Pty) Ltd & Others (1988) 9 ILJ 295 (IC)*, the then Industrial Court found that the operational reasons advanced by the employer did not constitute the real reason for dismissal. The truth was that Toiletpak Manufacturers transferred its business to another company. The business transferred necessitated the dismissal of workers for operational reasons. The then Industrial Court held that the real reason for the transfer was Toiletpak's desire to rid itself of a number of employees whom it suspected of misconduct. It had tried to avoid having to hold disciplinary hearings by disguising the dismissal as one for operational reasons (Basson, 2002:236-237).

The courts held that a dismissal for operational reasons need not be restricted to the cutting of costs and expenditure. Profit, or an increase in profit, or gaining some advantage such as a more efficient and effective enterprise, can also be acceptable reasons for dismissal for operational reasons. A case in point is what happened in *Seven Abel CC t/a The Crest Hotel v Hotel & Restaurant Workers Union & Others (1990) 11 ILJ 504 (LAC)*. In this situation the Crest Hotel retrenched certain employees and obtained the services of an outside contractor to do the retrenched employees' work. The aim was to cut costs and thereby improve the hotel's financial position. The then Industrial Court held that the employer was unfair in dismissing the workers because no direct savings could be proved. However, the Labour Appeal Court overturned the decision. The Labour Appeal Court found that the Labour Court had erred in confining itself to a comparison between the contractor's charges and the expenditure necessary to employ workers directly. The Labour Appeal Court found that there had been an indirect

saving because the work and expenditure involved in supervising the retrenched employees by the managerial staff had fallen away. This meant that the managerial staff was in a position to devote more time to the performance of their management functions than supervising the retrenched staff. This should therefore result in the improvement of management's functions and in the long run the improvement of the hotel's financial position (Basson 2002:237).

#### 2.5.2 Procedural fairness from the perspective of the courts

The interpretation of the courts on matters relating to the procedural fairness of a dismissal for operational reasons is covered under paragraph 2.4.2 and to avoid unnecessary duplication, the views of the courts in this regard will not be repeated.

#### 2.6 Conclusion

In this chapter the requirements of the Labour Relations Act, 66 of 1995, regarding retrenchment or dismissal for operational reasons were dealt with. Guidelines, which comprise substantive and procedural guidelines for a fair dismissal, were detailed and those will be used to test and examine the process of retrenchment that took place at the IEC.

What remains clear in this chapter is that retrenchment is not a process that can be wished away or be done away with, precisely because a public sector institution, like any other, does not function in isolation. The institution operates within and is influenced by certain external environments on which it has no control, such as the legal, economic, political and social environments. Events within those environments can have an effect on the functioning of the institution to an extent where the institution might be compelled to consider cost cutting measures such as restructuring or downsizing, which might lead to retrenchments. It is also clear that the

worker has no control over retrenchments because when they happen, it is not because of his or her fault. What seems to be critical, though, is that when the need to retrench is considered, the process should be handled in a humane way. This implies that the staff must be consulted and presented with the problems that are there, not with a final decision to retrench. All information, which could assist the employees to come up with alternatives to retrenchment, must be made available to them and all processes that are required by law must be followed. In the end the affected employee must look at the whole issue and agree that the situation was indeed beyond the control of both the employer and the employee party, and that after all was said and done, retrenchment was the last option.

Legislation such as the Labour Relations Act, 66 of 1995, was passed to safeguard the interests of workers in the event that the employer contemplates retrenchment. This chapter clarified that an employer cannot just dismiss workers without taking into account the requirements of the law in that regard. In that regard substantive and procedural requirements for a fair dismissal for operational reasons was outlined. Reference was made to previous cases of dismissals that the courts have handled. From those cases it became clear to what extent the law will go in order to safeguard the rights of workers and to ensure that the requirements of the law are upheld.

Chapter 3, which deals with the process of retrenchment as it occurred in the IEC, is based on material that was obtained from the employer. Such material was in the form of documents relating to the establishment of the institution and the retrenchment process. The actions of the employer were tested parallel to the requirements of the law regarding dismissals for operational reasons.

CHAPTER 3  
THE RATIONALISATION OF THE INDEPENDENT ELECTORAL  
COMMISSION

### 3.1 Introduction

The aim of this chapter is to analyse the practice of the retrenchment of employees by the Independent Electoral Commission (IEC). For background purposes the chapter looks at the establishment of the IEC and its role, powers, functions and duties in the public sector. Also for background purposes, the chapter takes a brief look at the IEC which managed and delivered the elections of 1994. The reason for the existence of the IEC, its powers, functions and duties are reviewed. Reference is made to the appointment of the Commissioners, the Chief Electoral Officer and other administrative staff. The contract of employment between the employee and the employer and the conditions of service with specific reference to the question of the termination of employment by the employer is also explained. The chapter goes ahead to deal with the actual process that was carried out by the IEC to rationalise the institution, which eventually led to the retrenchment of employees. In this regard it deals with substantive issues around the IEC's reason for retrenchment as well as the procedural fairness of the whole process. The focus is on procedural requirements such as prior consultation, attempts to reach consensus (dealing with those issues around which consensus had to be reached which are measures to avoid dismissals, measures to minimise the number of dismissals, measures to mitigate the timing of the dismissals, measures to mitigate the adverse effects of the dismissals), written disclosure of relevant information, allowing an opportunity to make representations, consideration of representations, selection of employees to be retrenched, as well as the payment of severance pay.

### 3.2 Background to the establishment of the Independent Electoral Commission (IEC)

On 2 February 1990 the South African government under former State President F.W. De Klerk announced the release of Mr Nelson Mandela from prison and the unbanning of all political movements including the African National Congress. Since then negotiations aimed at bringing about a democratic dispensation in South Africa started between the then ruling National Party, the African National Congress and other political movements until substantial consensus was reached on a transition to majority rule. An interim constitution (Constitution of the Republic of South Africa, 200 of 1993) was negotiated and this constitution established a National Assembly and nine provincial legislative and executive authorities (IEC, 2000).

The negotiators also agreed that the elections for the national and provincial legislatures would be regulated in terms of the interim Constitution of the Republic of South Africa, 200 of 1993, and that those elections would be administered, supervised and certified by a body created in terms of the interim constitution. This body was known as the IEC. The IEC, which was a fairly broadly representative body made up of eleven members and five others from the international community, was appointed by the then State President and mandated to administer, organise, supervise, conduct, monitor and adjudicate the country's first democratic national and provincial elections which took place from 26 to 27 April 1994 (IEC, 2000). The IEC of 1993 was established as a transitional body, which meant that it was completely dismantled following those elections (Camay and Gordon, 2001:43). In its report on the 1994 elections, the transitional IEC made several strong recommendations regarding the future management of elections in South Africa. Of those, the most pertinent were-

- (1) that the future administration of national elections should be entrusted to a permanent electoral agency, publicly funded but manifestly

independent of the government of the day (see paragraph 3.3.1, second sub-paragraph for comments on the independence of the IEC).

- (2) that no electoral agency should ever again be called upon to plan or implement an election in a hurry. "Haste is the thief of administrative and financial efficiency. In the glow of elections of national reconciliation the electorate was indulgent. Its forbearance should not be tried again" (Camay and Gordon, 2001:43).

The provincial executives and administrations managed the municipal elections of 1995/6. Those municipal elections were co-ordinated by a Local Government Elections Task Team composed of Judge Johan Kriegler, Khehla Hlubane, and Dr Frederick Van Zyl Slabbert (Camay and Gordon, 2001:44). When the Electoral Task Team was disbanded in 1996, the government asked a few key individuals from the previous structures of the transitional IEC and the Election Task Group to continue to act as an Election Steering Committee until the required legislation could be passed by Parliament to formalise a new and permanent IEC (Camay and Gordon, 2001:44).

### 3.3 The new Independent Electoral Commission and its role in the public sector

This section looks at the establishment and operation of the IEC in terms of the Constitution of the Republic of South Africa, 108 of 1996 and the Electoral Commission Act, 51 of 1996. This IEC (referred to as the Electoral Commission in terms of the Constitution of the Republic of South Africa, 108 of 1996 and the Electoral Commission Act, 51 of 1996) is the predecessor of the interim Independent Electoral Commission mentioned in paragraph 3.2 of this chapter, which was formed in terms of the Interim Constitution of the Republic of South Africa, 200 of 1993.

### 3.3.1 The Constitutional foundation for the Independent Electoral Commission's existence

As already pointed out in chapter 1 section 1.9.1, the IEC is a chapter 9 institution established in terms of the Constitution for the purpose of supporting constitutional democracy (Section 181(1) (f)). In terms of section 181(2) of the Constitution, the IEC is independent and subject only to the Constitution and the law. Camay and Gordon (2001: 29) observe that the independence of the IEC is protected under the Constitution, as are the independence of the other statutory bodies created in chapter 9 of the Constitution. However, the Constitution omits to establish exactly how the IEC and the others will perform their mandated functions, be accountable to Parliament, and relate to the Department of Finance in terms of their budget requests, while at the same time remaining free from the political, fiscal and bureaucratic pressures of the state. Ultimately the Constitution leaves these issues to be prescribed by national legislation (Section 190(2)).

### 3.3.2 The powers, functions and duties of the Independent Electoral Commission

Section 190 (1) of the Constitution broadly outlines the functions of the IEC, which are to-

- “(a) manage elections of the national, provincial and municipal legislative bodies in accordance with national legislation;
- (b) ensure that those elections are free and fair; and
- (c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as is reasonably possible.”

The Constitution (section 190(2)) makes provision for the promulgation of national legislation, and national legislation such as the Electoral Commission Act, 51 of 1996, provides for additional powers, functions and duties of the

IEC. These powers, functions and duties are outlined and explained in detail in the Electoral Commission Act, 51 of 1996 (chapter 2, section 3 (1) and (2)) which states that there is an Electoral Commission for the Republic of South Africa, which is independent and subject only to the Constitution and the law (see paragraph 3.3.1, second subparagraph for comments on the independence of the Electoral Commission). The Commission shall be impartial and shall exercise its powers and perform its functions without fear, favour or prejudice.

In terms of section 5(1) the Act states that the functions of the Commission are to-

- “(a) manage any election;
- (b) ensure that any election is free and fair;
- (c) promote conditions conducive to free and fair elections;
- (d) promote knowledge of sound and democratic electoral processes;
- (e) compile and maintain voters’ rolls by means of a system of registering of eligible voters by utilising data available from government sources and information furnished by voters;
- (f) compile and maintain a register of parties;
- (g) establish and maintain liaison and co-operation with parties;
- (h) undertake and promote research into electoral matters;
- (i) develop and promote the development of electoral expertise and technology in all spheres of Government;
- (j) continuously review electoral legislation and proposed electoral legislation, and to make recommendations in connection therewith;
- (k) promote voter education;
- (l) promote co-operation with and between persons, institutions, governments and administrations for the achievement of its objectives;
- (m) demarcate wards in the local sphere of government or to cause them to be demarcated;
- (n) declare the results of elections for national, provincial and municipal legislative bodies within seven days after such elections;
- (o) adjudicate disputes, which may arise from the organisation,

- administration or conducting of elections and which are of an administrative nature; and
- (p) appoint appropriate public administrations in any sphere of government to conduct elections when necessary.”

### 3.3.3 Funding of the Independent Electoral Commission (IEC)

In terms of chapter 3, section 13(1) of the Electoral Commission Act, 51 of 1996, the expenditure in connection with the exercise of the IEC's powers and the performance of its duties and functions shall be defrayed out of money appropriated by Parliament for that purpose or received by the IEC from any other source.

Section 13 (2) of the Act states that the IEC shall budget for the necessary resources or additional resources to enable it to exercise its powers and perform its functions effectively. The IEC does not submit its own budget to the Cabinet budgetary committee directly but through the Department of Home Affairs. In effect the IEC budget becomes an item on the total budget of Home Affairs (Camay and Gordon, 2001:29).

### 3.3.4 Appointment of Commissioners

In accordance with section 6 of the Electoral Commission Act, 51 OF 1996, the IEC is comprised of five members, appointed by the President. The Act requires that one of the Commissioners shall be a Judge (section 6(1) of the Electoral Commission Act, 51 of 1996). The President appointed the first five Commissioners in July 09, 1997. When Judge Johan Kriegler resigned shortly before the 1999 elections Judge Ismail Hussein replaced him (Camay and Gordon, 2001:50, 60). The terms of office of Commissioners, conditions of service of Commissioners, removal from office and suspension of Commissioners and conduct of Commissioners is stipulated in chapter 2 of the Electoral Commission Act, 51 of 1996.

### 3.3.5 Appointment of the Chief Electoral Officer and other administrative staff

In line with section 5(2) (a) of the Electoral Commission Act, 51 of 1996, which states that the IEC shall, for the purposes of the achievement of its objects and the performance of its functions acquire the necessary staff, whether by employment, secondment, appointment on contract or otherwise, a Chief Electoral Officer (CEO) was appointed in 1997 to head the administration of the IEC (Camay and Gordon, 2001:51). Section 12(4) of the Electoral Commission Act, 51 of 1996, states that the Chief Electoral Officer in consultation with the Commissioners of the IEC appoints such officers and employees of the IEC as he or she may consider necessary to enable the IEC to exercise its powers and perform its duties and functions effectively and efficiently. Section 12(5) of the Act states that the conditions of service, remuneration, allowances, subsidies and other benefits of the Chief Electoral Officer, the Acting Chief Electoral Officer and the other administrative staff shall be prescribed by the IEC.

From April 1998 the Commissioners, with the assistance of the CEO, began the process of appointing officials and employees, which culminated in the employment of 159 staff at national office and 198 staff at the nine provincial offices, all of whom were appointed on contracts of two to three years (Independent Electoral Commission, 2001). From the onset it was felt that the IEC needed to establish an effective and efficient structure which would permit it to fulfil its mandate to conduct all national elections, provincial and local elections (Camay and Gordon, 2001:52). However, due to the fact that the IEC was established relatively shortly before the general elections of 1999 and had to start preparations for the 1999 elections and the municipal elections of 2000, it was at that time difficult, if not impossible, to determine the exact administrative needs of the IEC. Consequently staff was employed as the need arose on short term two-to-three year contracts with the view of rationalising its administration once it could more accurately

determine its permanent needs in terms of core staff. Such core staff could then be supplemented with temporary staff or secondments from Government departments and / or industry as the need arose during times of high electoral activity (IEC Media Release, 7 March 2001). Consultants were also appointed to assist with the design and implementation of core IEC functions. This move was, however, met with resentment and frustration by many staff who felt that consultants did not transfer the necessary skills and knowledge, as should have been the case (Camay and Gordon, 2001: 56).

### 3.3.6 The contract of employment between the Independent Electoral Commission and its employees

When the IEC appointed staff in 1998/99 no contracts of employment were signed between the institution and its employees (Independent Electoral Commission, 2001). What employees received were letters offering appointment. The letters stated that the offer would be for a contract period of two to three years, subject to a probationary period of six months, commencing on the date stated in the letter of appointment addressed to that employee (IEC, 1998/99). The issue of the contract of employment remained outstanding until June 2000 when the IEC restructured for the first time thereby offering the staff an opportunity to be permanently appointed (IEC, 2000).

### 3.3.7 Termination of employment by the employer

At the time of the retrenchments the termination of employment in the IEC was implemented in terms of Notice No. R514 of 2000 (Government Gazette, 2000:1-5). According to Notice No. R514, regulation 8, the employer may terminate the employment of an employee by giving to the employee at least 30 days notice of termination and the reason for the termination must be stated in the notice. If the reason for the termination of employment is the abolishment of the post in which the employee has been serving, or the

reduction of staff, or the fact that the employee has reached the age of 65, the minimum period of notice to be given in terms of sub regulation (1) is increased by 15 days for every period of 12 months that the employee has been in the service of the employer. The employer may decide to pay to the employee in lieu of the required minimum period of notice or part thereof, the remuneration the employee would have been entitled to for that period or part thereof. When the employer terminates the employment for a reason mentioned in sub regulation (2), the employee may demand, and is entitled to be paid the remuneration mentioned in sub regulation (3) in lieu of the required minimum period of notice.

### 3.4 Rationalisation of the Independent Electoral Commission

Since its establishment, the IEC has experienced two rationalisation processes. The first process took place in the year 2000 and is mentioned here for background purposes only. It should be noted that during the rationalisation of 2000 no staff was dismissed. The focus of this study is the process of rationalisation and retrenchment that was carried out by the IEC in the year 2001 (see paragraph 1.3).

#### 3.4.1 The first rationalisation of the Independent Electoral Commission: 2000

On 15 May 2000 the IEC published a document entitled "The Electoral Commission- Its Workforce and Its Future". The aim of the document was-

"(1) to review the functions of the IEC which are to:-

- (a) manage any election;
- (b) ensure that any election is free and fair;

- (c) promote conditions conducive to free and fair elections;
- (d) promote knowledge of sound and democratic electoral processes;
- (e) compile and maintain voters' rolls by means of a system of registering of eligible voters by utilising data available from government sources and information furnished by voters;
- (f) compile and maintain a register of parties;
- (g) establish and maintain liaison and co-operation with parties;
- (h) undertake and promote research into electoral matters;
- (i) develop and promote the development of electoral expertise and technology in all spheres of government;
- (j) continuously review electoral legislation and proposed electoral legislation, and to make recommendations in connection therewith;
- (k) promote voter education;
- (l) promote co-operation with and between persons; institutions, governments and administrations for the achievement of its objects;
- (m) demarcate wards in the local sphere of government or to cause them to be demarcated;
- (n) declare the results of elections for national, provincial and municipal legislative bodies within seven days after such elections;
- (o) adjudicate disputes which may arise from the organisation, administration or conducting of elections and which are of an administrative nature; and
- (p) appoint appropriate public administrations in any sphere of government to conduct elections when necessary" (IEC, 2000: 1).

After having carried out a review of its functions, the IEC developed and adopted a new organisational structure. Fixed term contracts of employees which came into effect in 1997/1998 with appointment of the Chief Electoral Officer and other staff, were confirmed. The contracts of those employees, whose contracts came to an end before July 2001, were extended until 31 July 2001. All newly confirmed appointments were subject to regulations on

the conditions of service, remuneration, allowances and other benefits of the Chief Electoral Officer (IEC, 2000: 2-3).

In terms of section 12(5) of the Electoral Commission Act, 51 of 1996, the IEC is required to prescribe by way of regulations the conditions of service, remuneration, allowances and other benefits of the Chief Electoral Officer, an Acting Chief Electoral Officer and the other administrative staff of the IEC. Initially, for reasons of expediency, a bare minimum of such conditions were prescribed by regulations while those regulations authorised the rest to be incorporated in individual contracts of service (see Government Notice No. R514, 2000). This was rectified and all the necessary conditions of service, remuneration, allowances and other benefits were prescribed in the regulations. The IEC attached copies of those regulations on conditions of service when it provided letters of confirmation to staff (see Government Notice No. R514, 2000).

The IEC concluded the 2000 rationalisation exercise and went about its business of preparing for and delivering the 2000 Local Government Elections. At the beginning of 2001, the IEC invited staff to a general meeting to discuss the future of the IEC. During the meeting the IEC outlined its intention to embark on another rationalisation exercise.

#### 3.4.2 The second rationalisation of the Independent Electoral Commission and the retrenchment of staff in 2001

On 09 January 2001 the IEC called a staff meeting to table proposals and the time scales for its rationalisation. The notice invited staff and management to fully participate in the meeting (IEC, 2001:1-4). This meeting was the initial step towards the second rationalisation exercise, which is the subject of this study.

The intention of the following sections is to analyse how far the IEC was prepared to go so as to comply with the requirements for fairness as is required by the Labour Relations Act, 66 of 1995. These requirements were discussed and analysed in chapter 2 of this dissertation.

#### 3.4.2.1 Substantive requirement for a fair retrenchment

Section 188 of the Labour Relations Act, 66 of 1995, requires that an employer who contemplates retrenching or dismissing employees for operational reasons, must establish a fair reason for wanting to do so (see paragraph 2.5.1). The meeting of 9 February 2001 between the IEC and staff was its initial attempt at informing them of the intention to rationalise the institution with the possibility of job losses. This intention was articulated in writing to staff on the day of the meeting (IEC, 2001:1-4).

##### 3.4.2.1.1 The IEC's statement of intent regarding its rationalisation

The IEC's Statement of Intent provided a background to the matter of the envisaged rationalisation; the reason the IEC contemplated going the rationalisation route and what the IEC saw as possible implications of the rationalisation exercise. The IEC pointed out that it was committed to ensuring that the process unfolded in a diligent, caring and fair manner (IEC, 2001: 1-4).

In its statement of intent, the IEC highlighted that –

- “(1) It was established by an Act of parliament namely the Electoral Commission Act, 51 of 1996, with the purpose of strengthening constitutional democracy and to promote democratic electoral processes. In order to pursue these aims, the IEC was expected to perform all the functions laid out in section 5 of the Act.
- (2) In that context, it was empowered by the Act to acquire

the necessary staff, whether by employment, secondment, appointment on contract or other means.

- (3) In pursuance of its mandate, the IEC initially employed all staff on the basis of 2-3 year fixed term contracts and paid salaries that were slightly higher than those prescribed in the civil service in recognition of this fact. The fixed term contracts were instituted because it was recognised that the IEC did not have the base or experience to project what component of full time staff it would retain over time.
- (4) In the subsequent period, the IEC recognised the need to institute its own regulations in respect of the conditions of service.
- (5) Initially it was agreed that staff could opt for an indefinite period of employment in the IEC and that those who wished to remain on fixed term contracts could do so. A fixed time scale for this process was agreed upon. The implication was that the IEC ended up with some staff under fixed term contract and others with indefinite periods of employment. In time the IEC came to a realisation that this could not be sustained, and it became inevitable to consider rationalisation (IEC, 2001: 1-4)."

#### 3.4.2.1.2 The reasons for rationalisation of the Independent Electoral Commission

The IEC indicated that a number of environmental factors/imperatives made it necessary to consider restructured. The following were cited as key factors that accounted for the position of the IEC:

- National and provincial elections take place every four years, so the IEC needed to ensure that during the period of low activity all staff were gainfully employed and were not bored and unproductive.
- As a result of the period of low activity which is between elections, the IEC could not sustain its election time budget. The implication was that the institution had to cut back on some of its resources.

- The need to ensure that the IEC delivers on its mandate in a cost-effective and efficient manner (IEC, 2001:1-4).

#### 3.4.2.1.3 Implications of rationalisation

The IEC perceived that the rationalisation process could lead to-

- A radical change in its operations and organisational structure.
- A revised number of established posts.
- A fairly drastic reduction of staff at all levels of the current structure (IEC, 2001:1-4).

Staff was assured of the IEC's commitment to engage in the process in a diligent, honest, caring and fair manner within the guidelines suggested in section 189 of the Labour Relations Act, 66 of 1995(see paragraph 2.5.2), and that no effort would be spared to assist staff who would be affected by the process (IEC, 2001:1-4).

#### 3.4.2.1.4 The road to rationalisation seen from the perspective of the IEC

The IEC suggested the following process which in its view would ensure that everything was done speedily, effectively and efficiently:

- “(a) Having reviewed its core functions and operations, the IEC submitted a draft organogram thereof to management and staff for consideration and advice as well as for counter proposals.
- (b) It was proposed that staff appraises the proposed draft through their line function managers and through a staff representative mechanism and submit written proposals to the IEC's project managers who were temporarily appointed for that purpose. Staff also had the liberty to submit individual proposals to the same project managers.
- (c) Once both parties had sufficiently discussed the proposals, the criteria

for the appointment of managers in the new structure would also be discussed. The selection and appointment of managers would follow in conformity with defined competencies. The IEC's staff would receive priority in the new appointments except where the required competencies could not be found within the IEC's staff. The recruitment and selection of the Chief Electoral Officer and the Deputy Chief Electoral Officer did not form part of the process in question.

- (d) Assuming the reduction of staff, criteria for their selection would be proposed, discussed and approved by the IEC and then be implemented by the appointed line managers.
- (e) That the target date for completion of the whole process be 31 March 2001 to enable the IEC to be in line with the new budget year.
- (f) The IEC called for the staff's understanding, commitment and contributions throughout the process" (IEC, 2001:1-4).

#### 3.4.2.1.5 Key principles in reviewing the proposed structure of the Independent Electoral Commission

According to the IEC, the following key principles needed to be taken into account when reviewing the proposed organisational structure:

- The need for the IEC to comprehensively carry out its mandate.
- The need for a lean but effective and efficient institution.
- The need for creating teamwork and flexibility within the institution.
- The need for responsiveness and quick decision making.
- The need for a sufficiently wide but limited span of control.
- The need to eliminate confusion by defining clear authority lines, hierarchy and one on one reporting and remaining as flat as possible (IEC, 2001:1-4).

The fundamental mandate and therefore the core business of the IEC is to manage national, provincial and local elections, to promote conditions

conducive to free and fair elections, to ensure that such elections are free and fair, to promote knowledge of sound and democratic electoral processes, to compile and maintain voters' rolls by means of a system of registering of eligible voters by utilising data available from government sources and information furnished by voters, to compile and maintain a register of parties, to establish and maintain liaison and co-operation with parties, to undertake and promote research into electoral matters, to develop and promote the development of electoral expertise and technology in all spheres of Government, to continuously review electoral legislation and proposed electoral legislation, and to make recommendations in connection therewith, to promote voter education, to promote co-operation with and between persons, institutions, governments and administrations for the achievement of its objectives, to demarcate wards in the local sphere of government or to cause them to be demarcated, to declare the results of elections for national, provincial and municipal legislative bodies within seven days after such elections, to adjudicate disputes, which may arise from the organisation, administration or conducting of elections and which are of an administrative nature and appoint appropriate public administrations in any sphere of government to conduct elections when necessary (see paragraph 3.3.2). Whereas the IEC has been given a clear and unambiguous mandate, the IEC still has to contend with the fact that as a newly established entity it is basically still going through an experimentation phase. Since its establishment in 1998 the institution had to grapple with its organisational structure which seems to have been created only to ensure that the 1999 and 2000 elections were successfully delivered. The IEC was at that stage not in a position to correctly predict what its reasonable staff component should be, so the main concern was to focus on an election that was only a few months away. Hence in order to ensure that the elections were successful, what was then considered to be the required amount of staff had to be appointed. Consequently after the elections of 2000 the IEC found itself faced with what appeared to be a bloated organisational structure. This was compounded by the fact that during non election periods (from 2001 to

2003) the IEC did not need to retain the same amount of staff it used in 1999 and 2000. So even if it had desired to keep all staff, it would have had to justify that in its budget, which at any rate showed a decreasing trend since the inception of the institution. Despite the above-mentioned challenges, scientifically speaking it does make business sense for any institution to develop and maintain a lean but effective and efficient organisational structure. Such a structure would give rise to the creation of teamwork and flexibility, responsiveness and quick decision making, a wide but limited span of control and would eliminate confusion by defining clear lines of authority, hierarchy and one on one reporting while still remaining as flat as possible. These principles would not be realised in the case of a bloated organisational structure.

#### 3.4.2.2 Procedural requirements for a fair retrenchment

The issue of procedural fairness emanates from section 188(1) (b) of the Labour Relations Act, 66 of 1995, which requires that a dismissal for operational reasons must be procedurally fair. There are seven procedural requirements for a fair retrenchment which are required in terms of section 189 of the Labour Relations Act, 66 of 1995. These are the employer's duty to consult parties to be affected by the action, the consulting parties' duty to attempt to reach consensus, the method for selecting the employees to be dismissed, written disclosure by the employer of relevant information, allowing an opportunity to make representations, consideration of representations, selection criteria and severance payment (see paragraph 2.4.2).

The following sections deal with the process of retrenchment carried out by the IEC. These sections attempt to align the IEC's actions *vis a vis* the procedural requirements of the Labour Relations Act, 66 of 1995.

#### 3.4.2.2.1 The employer's duty to consult

When it announced its intention to retrench, the IEC took cognisance of the fact that there was no collective agreement, neither was there a workplace forum nor a representative trade union. Hence in proposing the way forward, the IEC suggested that staff should appraise its proposal through a representative staff mechanism or submit individual proposals through its project management team (IEC, 2001:1-4).

In line with section 189 (3) of the Labour Relation Act, 66 of 1995, which requires that the employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, the IEC issued a Declaration of Intent on 09 February 2001. In that Declaration of Intent, the IEC covered the reasons for the proposed dismissals and the period during which the dismissals were likely to take effect. However, the employer seemed to have omitted to mention any possible alternatives that it might have considered before proposing the dismissals, and the reasons for rejecting each of those alternatives; the number of employees likely to be affected and the job categories in which they are employed; the proposed method for selecting which employees to dismiss; the time when, or the period during which, the dismissals are likely to take effect; the severance pay proposed; the assistance that the employer proposes to offer to the employees likely to be dismissed; the possibility of the future re-employment of the employees who are dismissed; the number of employees employed by the employer; and the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months(IEC Staff, 2001).

Soon after the IEC announced its intention to rationalise, the staff met to discuss the way forward. In the absence of a collective agreement, a workplace forum, a representative trade union, staff decided that they were better off negotiating as a collective than as individuals. During that

gathering a negotiating team was nominated and entrusted with the task of consulting and negotiating with the Commission. The nine IEC provincial offices nominated their representatives on 12 February 2001 who together with the head office component formed a joint negotiating team (IEC Staff, 2001:1).

Subsequent to the IEC's announcement and the nomination of a negotiating team, the staff negotiating team met on Monday 12 February 2001 to discuss and scrutinise the IEC's proposal, after which a statement of intent was prepared and released. The staff negotiating team's statement of intent pointed out the mandate given to the team by staff and also highlighted the principles upon which the team would negotiate with the IEC.

#### (1) Negotiating team's Statement of Intent

The Statement of Intent of the negotiating team disclosed the names of the nominated team members, their mandate, the team's acknowledgements and the demands of staff. The negotiating team confirmed their mandate as being to act on behalf of all employees by engaging the IEC in accordance with the requirements of section 189 (2) of the Labour Relations Act, 66 of 1995, which states that consulting parties must engage in a meaningful joint consensus-seeking process and attempt to reach consensus on-

- (a) appropriate measures -
  - (i) to avoid dismissals;
  - (ii) to minimise the number of dismissals;
  - (iii) to change the timing of dismissals if necessary; and
  - (iv) to mitigate the adverse effects of dismissals;
- (b) the method for selecting the employees to be dismissed; and
- (c) the severance pay for dismissed employees.

The team acknowledged the fact that there was no collective agreement with the IEC, neither was there a workplace forum, or a representative trade

union. With that in mind, the team was prepared to consult and negotiate in accordance with section 189(1) (d) of the Labour Relations Act, 66 of 1995. Like the IEC, the team was committed to consult and negotiate in a diligent, honest, caring and fair manner as outlined in section 189 of the Labour Relations Act, 66 of 1995(IEC Staff, 2001). The team also acknowledged the proposals of the IEC, at the same breath voicing their disappointment at what they felt was the lack of information or the insufficient disclosure of relevant information in accordance with the spirit and letter of section 189(3) of the Labour Relations Act,66 of 1995 (IEC Staff, 2001). The team's disappointment had to do with –

- (i) the reasons advanced for the proposed dismissals, which they regarded as having been vague and unsubstantiated;
- (ii) the absence and vagueness of alternatives that the IEC considered before proposing dismissals;
- (iii) the excessive number of staff to be dismissed and the fact that the reduction of staff proposed in the organogram submitted by the IEC was drastic and represented a 66% cut of the existing staff complement;
- (iv) the non-disclosure of the selection criteria to be used to dismiss employees;
- (v) the failure of the IEC to make proposals concerning the severance packages;
- (vi) the failure of the IEC to identify the type of assistance which it would offer to the employees likely to be dismissed before the actual date of retrenchment;
- (vii) the failure of the IEC to state whether it ever considered the possibility of the future re- employment of the employees who would be retrenched; and
- (viii) the full disclosure of all relevant information (IEC Staff, 2001).

## (2) Negotiating team's principles of negotiation

As background to the team's "Negotiating Principles" reference was made to the first restructuring or rationalisation process which took place in the year 2000. It stated that during the process of 2000 the Commission had indicated to staff that they would not be retrenched and that all contracts would be honoured. "It was with that expectation and understanding in mind that some staff members opted for permanent positions as was offered by the IEC subject to the Regulations concerning the Conditions of Service, Remuneration, Allowances and Other Benefits" (IEC Staff, 2001).

The negotiating team felt that the afore-mentioned created a legitimate expectation that the staff would be retained during the non-election years. The team was therefore of the opinion that the envisaged restructuring process of 2001 was not conducted in good faith and that no proper consultation process was followed. The team felt that it was not easy to make counter-proposals with regard to the new organogram seeing that the team was not informed of the rationale behind the decisions that led to the drafting of the new organogram (IEC Staff, 2001).

It was the negotiating team's belief that the drastic reduction in the staff establishment was not in line with 29.6% savings on the annual salary bill and that consensus had to be reached to reduce the number of staff to be dismissed. It was further proposed that the new organogram be revisited in view of the fact that there was no consultation in its preparation. Also, in view of the fact that the proposed performance management system was abandoned in its infancy, no criteria existed to justify the drastic cut in the staff establishment (IEC Staff, 2001). The team suggested that the IEC should make a commitment that those staff members who would be retained in positions in the new organogram would not be retrenched before the next general elections in 2004 (IEC Staff, 2001).

The following stance was adopted by the negotiating team:

- (i) that the negotiating process should be entered into “without prejudice” to any rights in terms of the law and recourse to any further action;
  - (ii) that the IEC should select employees to be dismissed according to selection criteria-
    - (a) the consulting parties have agreed to; and
    - (b) if no criteria have been agreed upon, that such criteria be fair and objective;
  - (iii) that the IEC and the negotiating team should endeavour and attempt to reach consensus on appropriate measures to avoid and minimise as well as to mitigate the adverse effects of dismissals;
  - (iv) that the IEC should pay severance packages and compensation to the retrenched staff according to selection criteria agreed to by the consulting parties;
  - (v) that in the event of a breakdown or a deadlock in negotiations, the negotiating team had the mandate to seek the intervention of independent conciliators, mediators or arbitrators;
  - (vi) that the Labour Relations Act, 66 of 1995, applies to all sectors including the IEC. The sectors exempted being the South African National Defence Force, the National Intelligence Agency and the South African Secret Service (Labour Relations Act, 66 of 1995, Section 2).
- (3) The negotiating team proposed the following negotiating principles as a way forward:
- (i) That as alternatives to dismissals (retrenchments) and in an attempt to avoid or minimise dismissals-
    - (a) the IEC’s proposed national and provincial organogram be reviewed;
    - (b) the IEC reviews the consultants’ contracts and consideration of replacement of consultants with full-time staff;
    - (c) there be a moratorium on all new national, provincial and local

- appointments;
- (d) national and provincial staff be deployed to newly established local offices; and
- (e) staff be assisted with re-deployment to other government institutions (IEC Staff,2001).
- (ii) That in order to mitigate the adverse effects of dismissals-
- (a) a voluntary severance package option be offered to all staff, irrespective of whether the staff member has opted for a permanent position or whether he or she was still employed on a contractual basis, including temporary staff re-employed on a month-to-month basis. That the voluntary severance package be negotiated on the following basis:
- compensation of 12 months pay for loss of income and high levels of unemployment be considered;
  - consideration of severance package pay of 15 days a year for a period of three years across the board, irrespective of whether an employee had completed a period of three years;
  - all annual leave gratuities accumulated over the full three-year period according to the maximum those employees were entitled to, be paid;
  - compensation for maternity leave to staff that would be entitled to such leave;
  - compensation for benefits lost in respect to the Provident Fund, Group Life Policy Cover and Retirement Annuities;
  - compensation in respect of medical aid benefits lost;
  - that any resignations subsequent to Friday, 9 February 2001 (the day the impending rationalisation was first announced by the IEC), be regarded as null and void only for the purposes of the agreement reached between the consulting parties with regard to retrenchments; and
  - compensation in respect of training and tuition fees (IEC Staff, 2001).

- (iii) That with regards to the method for selecting employees for retrenchments-
  - (a) the negotiating team be part of all discussions pertaining to the selection criteria to be agreed before any dismissals take effect.
- (iv) That as part of the IEC's social responsibility plan-
  - (a) assistance should be given to staff regarding the income tax implications should a person decide to accept a voluntary severance package;
  - (b) compensation for relocation and general assistance with regard to trauma counselling;
  - (c) the development of a social responsibility programme and the establishment of a skills development fund; and
  - (d) that all outstanding payments which staff was legally entitled to in terms of the law be paid in terms of section 196 of the Labour Relations Act, 66 of 1995(IEC Staff, 2001).

Whereas the Statement of Intent and the negotiating principles was a way for the staff to express how they felt about the IEC's announcement regarding the rationalisation of the institution and whereas it was an opportunity to state what they believed to be the way forward, on 19 February 2001 the team submitted a document entitled "Staff Position 2001". This document marked the beginnings of real consultations and negotiations between employees and the employer. It outlined the principle of constructive participation, defined the consulting parties, and requested further information, recourse to further legal action and timelines for consultations (IEC Staff, 2001).

In terms of section 189(5) (a) and (b) of the Labour Relations Act, 66 of 1995, the employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing. Also, if any representation is made in writing the employer must respond in writing.

### 3.5 Staff position regarding the proposed structure

The purpose of the "Staff Position 2001" document was to obtain more information in writing from the IEC around points of concern that the staff had. Amongst other things, the staff sought clarity on the following:

- whether the proposed organogram was new or the current one with certain posts having been removed;
- whether the posts were vacant or occupied;
- how the IEC intended to fill the posts;
- if the posts were already occupied who were the incumbents;
- whether the posts had job descriptions;
- whether the IEC was aware in 2000 during the first rationalisation process when it offered staff permanent status, that there would be a need to retrench;
- whether the IEC intended to continue using the services of the consultants after employees had been dismissed (IEC Staff, 2001).

### 3.6 The IEC's response to the staff position document

In its written response the IEC stated that-

- its proposed draft organogram was a new structure and therefore subject to review;
- the posts in the organogram were neither vacant nor occupied;
- regarding the filling of the posts, staff were still going to be consulted on selection and retrenchment criteria options;
- job descriptions and profiles were still being developed;

- communication to staff on 9 February 2001 reflected the realities of the moment;
- regarding the position of consultants, out-sourced functions would be continuously reviewed in respect of where those functions could be performed most effectively and frugally (in-house or out-sourced) (IEC, 2001).

### 3.7 Attempt to reach consensus on appropriate measures

Section 189(2) of the Labour Relations Act, 66 of 1995, states that the consulting parties must attempt to reach consensus on appropriate measures to-

- avoid dismissals;
- minimise the number of dismissals;
- change the timing of dismissals if necessary; and
- mitigate the adverse effects of dismissals (see paragraph 2.4.2.2).

The following paragraphs provide an explanation of representations made by the IEC regarding appropriate measures to avoid dismissals, to minimise the number of dismissals, to change the timing of dismissals as well as to mitigate the adverse effects of dismissals.

#### 3.7.1 Measures to avoid or minimise the number of dismissals

In order to avoid or minimise the number of dismissals, the IEC agreed that the organogram should be subjected to review. The organogram was opened to individual suggestions when staff was given the opportunity to make and submit written counter proposals through their line managers and/or through the project management team. With regard to the question of consultants, the IEC maintained the view that out-sourced functions would be continuously reviewed in respect to where those functions could be

performed most effectively and frugally (in-house or out-sourced). No further appointments were made during the consultation process (IEC, 2001).

### 3.7.2 Measures to change the timing of the dismissals

In terms of the notification of rationalisation document, it was clear that the IEC did not see a way out of proceeding with the rationalisation process, which would eventually result in the elimination of certain posts. The IEC's point of view was that the budgetary constraints that the institution was experiencing were a reality that was beyond its control (IEC, 2001).

### 3.7.3 Measures to mitigate the adverse effects of the dismissals

In order to mitigate the impact of job losses as a result of the rationalisation process, the following proposals were put forward by the IEC and were accepted by the staff negotiating team:

#### 3.7.3.1 Career assistance

It was proposed that the IEC engage the services of professional career guidance personnel to assist staff that would have been selected for retrenchment with the following:

- career counselling;
- professional writing and presentation of *curriculum vitae*; and
- training in managing employment interviews (IEC, 2001).

#### 3.7.3.2 Employment placement

It was proposed that the IEC engage the services of professional employment agencies that could assist each of the selected employees with placement.

The cost of the services provided in the placement of the potential candidates was to be at an agreed fee for a specific time frame and was to be borne by the IEC (IEC, 2001).

It was also proposed that the IEC compile a database of the competencies of the staff who have been selected for retrenchment and use its influence, where possible, to seek employment opportunities for such staff with other government departments and/or other international agencies (IEC, 2001).

#### 3.7.3.3 Enterprise training

It was proposed that the IEC consider paying for the training of the selected staff on recognised enterprise development, management and IT programmes of the employee's choice to a determinable cost (IEC, 2001).

Staff selected for retrenchment was to be encouraged to apply for such assistance and provide evidence of acceptance in such training and the curriculum for a course that they have selected (IEC, 2001).

#### 3.7.3.4 References and certificates of employment

It was proposed that the IEC should offer references and/or certificates of employment to all staff selected for retrenchment in order to assist them with placements (IEC, 2001).

#### 3.7.3.5 Assistance with tax matters

It was proposed that the IEC engage the services of a tax expert to assist staff with tax advice in respect of the total package to be paid out. Staff was to be informed about the application of tax concessions in respect of those who were going to be retrenched for the first time (IEC, 2001).

### 3.7.3.6 Employee enterprise contracting

It was proposed that the IEC considers contracting out special areas such as data capturing on voters' rolls to specialist groups of staff who could organise themselves into companies to provide such services, at times of need. This would assist to recognise the experience and expertise that those former employees had gained from the IEC. The IEC could also assist to promote such enterprising groups to other countries in Africa and the West. A relationship could be established with the Department of Foreign Affairs in that regard (IEC, 2001).

### 3.7.3.7 Other assistance

It was proposed that from the date of announcement of the staff selected for retrenchment, that staff be allowed to use the IEC's time, telephone, fax, e-mail and internet facilities to seek employment elsewhere and/or attend relevant training that would enhance their chances of employment. Permission from managers for that purpose was to be requested and could not be denied. Staff was to provide proof of their request (IEC, 2001). A social plan resource centre was put in place to cater for the following facilities:

- (a) Sections: Outplacement, stress management, re-skilling, issues desk and provincial help desk.
- (b) Facilities: Telephones, e-mail, Human Resources data base, provincial help desk, fax machines, and a typing pool.
- (c) A Human Resources administrative back-up for aspects such as the Provident Fund and Medical Aid.

## 3.8 Written disclosure of relevant information

Section 189(3) of the Labour Relations Act, 66 of 1995, states that the employer should disclose all relevant information in writing. After the tabling

of the "Staff Position 2001" document by the negotiating team, which was a way of getting more information from the IEC, the latter responded to questions and/or concerns raised (IEC, 2001).

### 3.9 Allowing opportunity to make representations

Section 189(5) of the Labour Relations Act, 66 of 1995, states that the employer must allow the staff an opportunity to make representations. From the time when the IEC opened the proposed organogram to scrutiny, the negotiating team had the opportunity to make not less than seven written representations. The team submitted the following documents to state their case, to make demands and to offer proposals:

- Statement of intent
- Negotiating principles
- Staff position
- Exit packages
- Selection criteria
- Mechanisms to monitor the selection process
- Social plan (IEC, 2001).

### 3.10 Consideration of representations

Section 189(6)(a) and (b) of the Labour Relations Act, 66 of 1995, requires the employer to consider and respond to representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing. If any representations are made in writing the employer must respond in writing.

Representations were made by staff around measures to avoid dismissals, measures to change the timing of dismissals, measures to mitigate the timing of dismissals, written disclosure of relevant information, options for redundancy selection criteria. Proposals and counter proposals were made

by both management and staff until sufficient consensus was reached (see paragraph 3.7).

### 3.11 Options for redundancy selection criteria

The method for selecting the employees to be dismissed is covered by section 189(2)(b) of the Labour Relations Act, 66 of 1995, which states that the consulting parties must try to agree on the method of selecting the employees to be dismissed. Section 189(7) adds that if no selection criteria have been agreed to, the employer must select the employees to be dismissed according to selection criteria that are fair and objective (see paragraph 2.4.2.6).

A discussion document with proposed options for redundancy selection criteria was put together and submitted by the IEC to enable both the IEC's Negotiating Team and the Staff's Negotiating Team to make further inputs. The objective was to ensure that both teams were able to reach sufficient consensus on criteria that can be seen to be the most fair and practical. The following options were proposed by the IEC with a statement of advantages and disadvantages:

- Confirmation of posts that have not changed
- Head hunting within the IEC for specific positions
- Voluntary retrenchments in specific staff categories with the right of the Commission to decline
- Contract staff
- Request for new applications for re-defined posts
- In post and contract and/or consultant staff
- Last In First Out

### 3.11.1 Confirmation of posts that have not changed

The proposal was that those positions whose job descriptions, specifications and areas of competence have not changed in the new organisational structure, be confirmed with the incumbents (IEC, 2001).

#### Advantages

The advantages of this option are-

- Continuity is maintained in posts and key competencies are retained in the institution
- Performance standards can be maintained due to familiarity with job roles and there is little or no necessity to incur new costs and time delays for recruitment (IEC, 2001).

#### Disadvantages

The disadvantages of this option are-

- A perception could be created that certain staff were favoured
- The opportunity for personal growth and change for staff is lost and other staff may perceive and/or feel barred from applying for new positions in which they might perform better (IEC, 2001).

#### Procedure for implementation

The following procedures to implement this option were proposed:

- Review all positions in the new organisational structure
- Review competences for all positions
- Determine which positions have not changed

- Review the competencies of current incumbents
- Write letters to confirm their positions (IEC, 2001).

### 3.11.2 Head hunting within the IEC for specific positions

The proposal was that individuals with the required competencies be approached to occupy those posts in the organisational structure which match their competencies (IEC, 2001).

#### Advantages

The advantages of this option are-

- The IEC is able to retain the competencies it requires in order to perform its functions
- People do not have to apply for positions they will not be offered in any case
- No additional recruitments costs are incurred
- Time is saved from reviewing a long list of applicants who do not qualify for the positions they have applied for (IEC, 2001).

#### Disadvantages

The disadvantages of this option are-

- A selection bias may occur due to the halo effect that the task team may have about certain individuals
- Qualifying staff who have not been selected for head hunting may feel aggrieved and perceive the process as being unfair
- Rigour in the selection process through head hunting may be compromised

- Head hunted staff may feel that they must demand a higher salary and therefore may come at a premium (IEC, 2001).

#### Procedure for implementation

The following procedures to implement this option were proposed:

- Appoint the recruitment task team
- Review positions and competencies required in the new organisational structure
- Review profile of possible incumbents for the positions
- Approach, discuss and negotiate positions with the possible incumbents
- Confirm in writing offers to the incumbents and secure their commitment
- Appoint incumbents (IEC, 2001).

#### 3.11.3 Voluntary retrenchments in specific staff categories with the right of the IEC to decline

The proposal was to offer voluntary retrenchments to specific staff categories where there is an oversupply of labour and skills with the proviso that the IEC has the authority to decline the voluntary resignation on the grounds that the allocated budget for this purpose is not sufficient to meet the retrenchment packages required by the employees taking up this option (IEC, 2001).

#### Advantages

The advantages of this option are-

- It is a process of self selection and helps employees who no longer

desire to serve the IEC to withdraw on their own accord

- It is likely to be successful where there is an over supply of labour and skill shortages are not an issue
- It lessens conflict as staff chooses for themselves to leave (IEC, 2001).

## Disadvantages

The disadvantages of this option are-

- The approach can be very expensive for the institution in that often the packages offered must be attractive to entice people to volunteer to leave
- It is not uncommon that the best skills leave the institution because the incumbents are mobile and are in demand in the job market. A rider in the South African situation is that the best skills are often in demand and people are poached into better paying jobs, often at a premium to the recruitment company almost daily
- This is often a frustrating option for those who are not sure of their competencies
- In a situation where people have reached a mature age without having accumulated sufficient pension benefits they are unlikely to take this offer
- The approach is also likely to engender a conflict in the institution as staff who were turned down will be dissatisfied with the fact that they did not get what was due to them and could not move on in their careers
- The self esteem of some staff might be seriously dented (IEC, 2001).

## Procedure for implementation

The following procedures to implement this option were proposed:

- Determine the over supply of labour and the skills required by the institution as well as the desired number that can be absorbed in this manner
- Determine packages that the institution can afford and their level of attractiveness to entice staff
- Announce offer for voluntary packages and the date of termination of the offer
- Review the number of applicants who have applied
- Accept/decline applications
- Pay agreed packages (IEC, 2001).

#### 3.11.4 Contract staff

The proposal was that all fixed term contracts be reviewed before they expire. The IEC should then select those competencies that it requires for continued employment so that when the fixed term contracts expire, staff that has the required competencies can be appointed permanently and be governed by the indefinite employment regulations of the IEC (IEC, 2001).

#### Advantages

The advantages of this option are-

- Both parties will have met the terms of the contract
- Strictly speaking there would be no additional payments for contracts that expire by 31<sup>st</sup> March 2001. Only those contracts that have been budgeted for and agreed to will be paid
- Required competencies can be renegotiated on new terms and conditions (IEC, 2001).

## Disadvantages

The disadvantages of this option are-

- The IEC may not have any or sufficient number of staff whose contracts terminate by the desired date
- Key competencies that the IEC requires may be compromised either by the new conditions of the contracts or by the fact that the IEC must renegotiate with employees that they should be keeping anyway
- The IEC might have to pay more because the employee has a new basis of negotiation (IEC, 2001).

## Procedure for implementation

The following procedures to implement this option were proposed:

- Review contract positions and their expiry date
- Determine competencies required in the expiring contracts
- Lapse undesired contracts
- Renegotiate new contracts to regulations of the IEC (IEC, 2001).

### 3.11.5 Request for new applications for re-defined posts

It was proposed that all current posts be abolished and that the new posts be advertised with defined competencies. All staff should apply for the said positions. All those who have submitted their applications should be reviewed and those qualifying be appointed. Those who have not submitted their applications will be considered to be having no interest in working for the IEC and will be duly selected for retrenchment (IEC, 2001).

## Advantages

The advantages of this option are-

- This approach can be said to be fair in that all staff have an equal opportunity to be selected for employment and/or retrenchment
- Appointments are done on an objective basis of published competencies for available posts as defined in the new organisational structure (IEC, 2001).

## Disadvantages

The disadvantages of this option are-

- This can be seen as a one size fits all approach. It presupposes that all employees have an equal value in the institution and that competencies are the only deciding factor in the employment situation over and above one's positive predisposition to one's work and employment environment
- Employees who believe that they possess special attributes may feel unappreciated and opt not to apply unless they are somewhat assured that they would be appointed
- The process may be elaborate and does not guarantee satisfactory results as employees may perceive themselves as having been treated unfairly
- If there are no objective selection processes and criteria in place, the process can be seriously flawed with selection errors (IEC, 2001).

## Procedure for implementation

The following procedures to implement this option were proposed:

- Review positions available
- Advertise all positions internally
- Review applications
- Conduct interviews
- Appoint relevant staff (IEC, 2001).

### 3.11.6 In post and contract and/or consultant staff

It was proposed that the employment of all contract staff and/or consultants who are performing work that can be delegated to indefinite employment staff be terminated and that such work be duly allocated to indefinite employment staff (IEC, 2001).

#### Advantages

The advantages of this option are-

- The jobs of indefinite staff can be enlarged/enriched with the result that jobs are made meaningful and fulfilling
- Motivation levels as a result of job enrichment and/or enlargement are likely to increase and boredom can be substantially reduced
- New opportunities and personal challenges are likely to contribute to better productivity and performance
- The institution can retain only a core staff of those they need
- Staff can be effectively redeployed (IEC, 2001).

#### Disadvantages

The disadvantages of this option are-

- Core and desired competencies could be compromised and lost to the institution

- The learning curve for staff in acquiring new skills could significantly impact negatively on productivity levels
- The cost of training to do the jobs of the consultants could be high in the initial period and there is no guarantee that the said staff will retain the jobs after training
- Staff whose jobs have been enriched or enlarged may not be suited for those jobs and/or may not like them and/or may not perform as expected
- Staff that is already overloaded could get an additional load of work that they can not realistically carry out (IEC, 2001).

#### Procedures for implementation

The following procedures to implement this option were proposed:

- Review all consultants and in-post and contract staff jobs
- Review gaps in the jobs of indefinite staff
- Conduct a skill audit and job matching exercise for categories of indefinite staff
- Allocate jobs to indefinite staff
- Negotiate remuneration and grading issues for indefinite staff with added responsibilities (IEC, 2001).

#### 3.11.7 Last In First Out

It was proposed that the IEC selects staff on the basis that those who were last to be employed, be the first to be retired, subject to competencies required by the IEC (IEC, 2001).

#### Advantages

The advantages of this option are-

- Employees in this category are new in the institution and may not have developed allegiance or close affinity with the institution. Under these circumstances these employees might find it easier to leave
- Retrenchments costs in this category are likely to be lower than those of staff who have been longer with the institution (IEC, 2001).

## Disadvantages

The disadvantages of this option are-

- The institution might be compromised as it might lose new skills, excitement and energy that might be found in new employees
- New employees might think that they are not liked and become poor ambassadors for the institution
- New employees might have entered into new and long term debts as a result of their new found employment that might not be covered by whatever amount of package that may be offered (IEC, 2001).

## Procedures for implementation

The following procedures to implement this option were proposed:

- Identify employees in this category
- Review competencies of employees in this category against competencies required by the IEC
- Select employees for retrenchment
- Advise selected employees on their prospective packages
- Pay packages (IEC, 2001).

After careful consideration of the proposals tabled by the IEC, the team submitted their own inputs. The inputs by the team were weighted and consensus around the preferred options was reached. The preferences were as follows:

1. Reapplication for posts that had been redefined;
2. Confirmation of posts that had not changed;
3. Voluntary packages;
4. Contract staff;
5. In-post and/or contracts.

The IEC agreed with the negotiating team that Head hunting and Last In First Out options were not preferred, but stated that it reserved the right to include them should the preferred options not work.

### 3.12 Monitoring mechanisms to assess the fairness and objectiveness of the selections made

The staff representatives suggested that given the fact that the selection process takes place under conditions of retrenchment, it would not be proper for the IEC's Human Resources Department to sit in as observers to fulfil the normal oversight role. The staff representative forum could therefore have a way of assessing the fairness and objectivity of the selections made (IEC Staff, 2001).

There were two possible options for consideration:

#### 1. Ideal Case Option

In this case two elected representatives at a time (and then on a revolving basis) could sit in at all times during the selection process by the IEC, with observation rights to assess whether the selection process is done in an objective, fair and transparent manner. The two observers were not to be allowed to intervene, dispute or attempt to influence the selection process (IEC Staff, 2001).

## 2. Minimum Requirement

The selection team was to be required to make available to the staff negotiating team detailed minutes of the selection process. Minutes were to include arguments on why each and every appointment was made, and the reasons for the subsequent retrenchment of each retrenched employee. Obviously, in cases where the matter under discussion affected a staff negotiating team member who is also a member of the selection team, such individuals were to recuse themselves as observers so as to allow for the effective discussion and argument by the selection team (IEC Staff, 2001).

The IEC accepted the monitoring mechanism suggested by the staff Representatives (IEC, 2001).

### 3.13 Severance pay

Section 41(2) of the Basic Conditions of Employment Act, 75 of 1997, which regulates the payment of severance pay, states that an employer who dismisses an employee for reasons based on that employer's operational requirements must pay such an employee severance pay.

The initial proposal for redundancy payments was tabled by the IEC. The IEC proposed that the following exit packages be made to all staff that had been selected for retrenchment:

- (i) In terms of the Regulations on Remuneration and Conditions of Service:
  - One month's salary in lieu of notice.
  - The equivalent of 15 days' salary for every year in the employ of the IEC in lieu of extended notice.
- (ii) The equivalent of one week's salary for every year in the employ of the IEC.
- (iii) The pay-out of vacation leave due.

The IEC's proposal was accepted by the Staff Negotiating Team (IEC, 2001).

### 3.14 Conclusion

Whereas the main emphasis and focus of chapter 3 is on how the process of retrenchment unfolded within the IEC, it is important to note that certain environmental factors seem to have made the IEC to consider rationalisation. When its predecessor was established to manage the elections of 1994, it was meant to be disbanded after the elections. The current IEC was established in terms of section 9 of the Constitution, with the intention of establishing a permanent electoral management body. Whereas some lessons were learnt from the 1994 experience, it was clear that the new Electoral Commission was going to be a pioneer in South Africa in as far as the management of democratic elections was concerned. No other institution existed before it which had the managerial capacity and the experience to manage elections in the new democratic order, so on the main there was no electoral institution within the boundaries of South Africa with which the IEC could benchmark. In terms of the Constitution the IEC has to operate as an independent institution which should exercise its powers and to perform its functions impartially and without fear, favour and prejudice. Section 5 (1) of the Electoral Commission Act, 51 of 1996, provides for a myriad of functions that the institution has to perform. However, what is clear is that from the onset the IEC was faced with two main challenges which existed in the political environment and on which it has limited influence. Those challenges are (1) financing elections and (2) having to deal with low levels of electoral activity during the four years between elections. It is clear that when the IEC offered its staff employment contracts of two to three years, it was motivated by the fact that it was not competent to make a projection of how much full time staff it would retain over time.

As far as the process of retrenchment is concerned, the chapter reviewed the process of the retrenchments carried out by the IEC in terms of guidelines on

substantive and procedural fairness of a dismissal for reasons based on the employer's operational requirements as is required by the Labour Relations Act, 66 of 1995. To that end an attempt is made to match the actions of the employer with the requirements of the law in order to establish whether or not the institution could be said to have behaved in a manner that is deemed fair.

Chapter 4 examines and analyses the process of retrenchment of employees by the Independent Electoral Commission (IEC) which started on 09 February 2001 and was finalized on 07 March 2001. The focus is on whether the IEC acted fairly when it retrenched its employees. To achieve that, the reasons that the IEC advanced for its need to dismiss employees and whether or not those reasons were substantive are reviewed. The steps that the IEC took after it had announced its intention to retrench employees is revisited and evaluated with the aim of establishing whether or not the retrenchment process had been procedurally fair in terms of section 188(1) (b) of the Labour Relations Act, 66 of 1995. Section 188(1)(b) of the Labour Relations Act, 66 of 1995, requires that a dismissal for operational reasons must be procedurally fair. In terms of section 189 of the Labour Relations Act, 66 of 1995, there are seven procedural requirements for a fair retrenchment which the employer is required to observe. These are the employer's duty to consult parties to be affected by the dismissal action, the consulting parties' duty to attempt to reach consensus, the method for selecting the employees to be dismissed, written disclosure by the employer of relevant information, allowing an opportunity to make representations, consideration of representations, selection criteria and severance payment.

## CHAPTER 4

### EVALUATION OF THE RETRENCHMENT PROCESS CARRIED OUT BY THE INDEPENDENT ELECTORAL COMMISSION (IEC)

#### 4.1 Introduction

The focus of chapter 4 is to establish whether or not the dissertation achieved what it set out to achieve, which was to study the fairness of the process of retrenchment that was carried out by the IEC. The chapter reviews the reasons that the IEC advanced for the retrenchment of staff. Reviewing the reasons of the retrenchment is aimed at establishing whether or not the IEC was substantively fair when it retrenched staff as required by the Labour Relations Act, 66 of 1995 (see chapter 2 paragraph 2.4.1). Secondly, the chapter reviews the procedures that the IEC followed throughout the whole process of retrenchment. Procedures are reviewed to establish whether or not the IEC was procedurally fair when it retrenched staff as required by the Labour Relations Act, 66 of 1995 (see chapter 2 paragraph 2.4.2.).

#### 4.2 The Independent Electoral Commission's reason for dismissing employees

In terms of section 188(1) (a) (ii) of the Labour Relations Act, 66 of 1995, a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for dismissal is a fair reason based on the employer's operational requirements. What is of essence is whether the IEC managed to prove that the reason for the dismissal of its employees was in fact a fair one based on the operational requirements of the institution.

In its initial presentation to staff, the IEC indicated that a number of environmental factors or imperatives necessitated the need for restructuring.

The following were cited as key factors that accounted for the position of the IEC:

- The need for the IEC to ensure that all staff were gainfully employed and were not bored and unproductive in the period of inactivity due to the lack of a general or local government election.
- The need to justify an ever shrinking budget allocation.
- The need to ensure that the IEC delivers on its mandate in a cost-effective and efficient manner (see paragraph 3.4.2.1.2).

In its Media Release dated 19 February 2001 (see paragraph 3.4.2.1.2) the IEC reiterated that a budgetary constraint, particularly the necessity to expend state funds frugally, made it an imperative to rationalise all its activities and resources. An interview with the Chief Financial Officer of the IEC (September 19, 2003), confirmed the cutting of the institution's budget for the 2001/2002 financial year. In order to adapt to the new budgetary circumstances, the IEC decided to take the rationalisation route which eventually led to retrenchments.

#### 4.3 Evaluation of the procedures employed by the Independent Electoral Commission in the dismissal of its employees

Section 188 (1) (b) of the Labour Relations Act, 66 of 1995, states that a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the dismissal was effected in accordance with a fair procedure. The implication of this guideline is that there must be proof that the way in which the IEC handled the process was indeed fair.

The ensuing sections review and evaluate how the IEC applied its mind to the requirements of the law regarding the question of procedural fairness when dismissing employees on the basis of its operational requirements.

#### 4.3.1 The consultative process

The requirement of section 189(1) of the Labour Relations Act, 66 of 1995, is that when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult-

- “(a) *any person* whom the employer is required to consult in terms of a collective agreement;
- (b) if there is no collective agreement that requires consultation, a *workplace forum*, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum;
- (c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, *any registered trade union* whose members are likely to be affected by the proposed dismissals;
- (d) if there is no such trade union, *the employees* likely to be affected by the proposed dismissals or their representatives nominated for that purpose” (see paragraph 2.4.2).

Evidence suggests that the consultative process unfolded in the spirit of acceptable practice in terms of the Labour Relations Act, 66 of 1995. In chapter 3 (paragraph 3.4.2.2.1) it was pointed out that when the IEC engaged staff on the issue of retrenchments, it took cognisance of the fact that there was no collective agreement, a workplace forum or a representative trade union. In that regard the IEC initially invited all staff to a general meeting on the day that it declared its intentions to rationalise. On that day, the IEC suggested that staff should appraise its proposal through a representative staff mechanism or submit individual proposals through its project management team. The staff nominated their own representatives to negotiate with the IEC on their behalf (see paragraph 3.4.2.2.2).

#### 4.3.2 Attempts by the consulting parties to reach consensus on appropriate measures to avoid and or minimise the number of dismissals

The proposal by the staff negotiating team had been that-

- (a) the organogram proposed by the IEC be reviewed;
- (b) a moratorium be placed on all new national, provincial and local appointments;
- (c) the IEC reviews the contracts of consultants and consider replacing them with full-time staff;
- (d) national and provincial staff be deployed to newly established local offices; and
- (e) staff be assisted with re-deployment to other government institutions (see paragraph 3.4.2.2.2(3)).

Although the IEC did not initially suggest alternatives to dismissals, it did consider the representations made by staff in this regard and reacted as follows:

The IEC had agreed that the organogram was in draft form and was therefore still a proposal. Staff was given the opportunity to make collective or individual submissions through their line managers or the project management team of the IEC or their representative (see paragraph 3.4.2.1.4). Regarding the issue of consultants, the IEC had suggested that all outsourced functions would be continuously reviewed in respect to where those functions could be performed most effectively and frugally. With regard to the suggestion of replacing consultants with full-time staff, there has been no evidence to suggest that the IEC regarded this as an immediate solution to minimize the dismissal of employees. Consultants continued to be involved in the running of some directorates of the IEC such as Financial Administration, Financial Management and Information Technology which required their expertise. Only in the second half of 2002 did the IEC appoint permanent staff to fill up most of the posts in those directorates (IEC, 2002).

With regard to new positions, no new placements were done until after the redundancy selection criteria had been agreed to. One of the selection criteria that was approved was that of inviting staff to apply for those posts where the job content had been re-defined (IEC, 2001). The suggestion that national and provincial staff could be deployed to newly established local offices did not become a consideration by the IEC. Any employees who got new positions had to apply for them when they were advertised internally. As one of its social plan proposals, the IEC had agreed that dismissed staff would be assisted with finding alternative employment. The IEC would use its influence, where possible, to seek other employment opportunities for dismissed staff from other government departments and /or other agencies. A recruitment agency was appointed to assist dismissed staff to seek re-employment (see paragraph 3.7.3).

#### 4.3.3 Changing the timing of the dismissals

In chapter 2 (paragraph 2.4.2.2.3) it was mentioned that the parties are required to try and reach consensus on appropriate measures to change the timing of the dismissals. It was also indicated that usually an employer may want to see the whole process unfold as soon as possible, whereas the unions may prefer that retrenchment takes place at a later stage and that it should be spread over time.

In the case of the retrenchments by the IEC, it looked like changing the timing of the dismissals was no longer an option for the IEC because the end of its financial year (which is the 31<sup>st</sup> of March) was only a month away. Postponing the dismissals after the budgetary cuts would have placed the institution in an unenviable and a precarious position in that in the new financial year no funds would have been forthcoming to finance the salary bill of the full staff complement. The IEC was therefore clearly under pressure to rationalise before the new financial year. Also, going into the new financial

year would have presented it with the problem that there would be no funds to handle retrenchments packages (see paragraph 3.4.2.1.2).

#### 4.3.4 Mitigating the adverse effects of the dismissals

In chapter 2 (paragraph 2.4.2.2.4) it was stated that the consulting parties must attempt to agree on appropriate measures to mitigate the adverse effects of the dismissals. In that regard an employer could implement a number of measures to relieve retrenched employees of the burden of dismissals. For example the employer could assist the employees to find alternative employment by giving them time off, without loss of pay, to search for alternative work and to attend interviews; make an office available in which retrenched employees can complete job applications and to arrange job interviews; provide retrenched employees with additional references on top of the certificate of service which must be furnished in terms of section 42 of the Basic Conditions of Employment Act 75, of 1997. Furthermore the employer could also undertake to give priority to a dismissed employee should a vacancy arise.

In chapter 3 (paragraph 3.7.3) proposals had been put forward by the IEC and agreed to by the staff, that in order to mitigate the adverse effects of the dismissals, the following be done: -

- Career assistance

Career assistance entailed the provision of career counselling, professional writing and presentation of *curriculum vitae* and training in managing employment interviews (IEC, 2001).

- Employment placement

The services of a professional employment agency were engaged to assist each of the selected employees with placement. The cost of the services provided in the placement of the potential candidates was at an agreed fee for a specific time frame and was borne by the IEC (IEC, 2001).

It was also agreed that the IEC would compile a database of the competencies of the staff who had been selected for retrenchment and use its influence, where possible, to seek employment opportunities for such staff with other government departments and / or other international agencies (IEC, 2001).

- Enterprise training

The IEC paid for the training of the selected staff on recognised enterprise development, management and IT programmes of the employee's choice to a determinable cost. Staff selected for retrenchment was encouraged to apply for such assistance and provide evidence of acceptance in such training and the curriculum for a course that they have selected (IEC, 2001).

- References and certificates of employment

The IEC offered references and certificates of employment to all staff selected for retrenchment in order to assist them with placements (IEC, 2001).

- Assistance with tax matters

The service of a tax expert was engaged to assist staff with tax advice in respect of the total package to be paid out. Staff was informed about the

application of tax concessions in respect of those who were going to be retrenched for the first time (IEC, 2001).

- Other assistance

Retrenched staff was allowed to use the IEC's time, telephone, fax, e-mail and internet facilities to seek employment elsewhere and to attend relevant training to enhance their chances of employment. A social plan resource centre was put in place to cater for an Outplacement Section, a Stress Management Section, a Re-skilling Section and an Issues or Queries Section. Facilities such as telephones, e-mail, human resource data base, provincial help desk, fax machines, and a typing pool were also made available. A human resources administrative back-up for aspects such as the Provident Fund and Medical Aid was also set up (IEC, 2001).

#### 4.4 Written disclosure of relevant information

Chapter 2 (paragraph 2.4.2.3) referred to written disclosure of relevant information as the third requirement for a procedurally fair dismissal for operational reasons as set out in section 189(3) of the Labour Relations Act, 66 of 1995, read in conjunction with section 189(4) of the same Act. Section 189 (3) of the Labour Relations Act, 66 of 1995, requires that the employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to-

- (a) the reasons for the proposed dismissals;
- (b) the alternatives the employer has considered before proposing the dismissals and the reasons for rejecting each of those alternatives;
- (c) the number of employees likely to be affected and the job categories in which they are employed;
- (d) the proposed method for selecting which employees to dismiss;
- (e) the time when, or the period during which, the dismissals are likely to

- take effect;
- (f) the severance pay proposed;
- (g) the assistance that the employer proposes to offer to the employees likely to be dismissed;
- (h) the possibility of the future re-employment of the employees who are dismissed;
- (i) the number of employees employed by the employer; and
- (j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months (see paragraphs 2.4.2.3 and 3.8).

During the announcement of its intention to rationalise, the IEC stated the reasons for the proposed dismissals and the period during which the dismissals were likely to take effect. There was no evidence indicating whether the IEC had prior to announcing its intentions, considered any possible alternatives before proposing the dismissals, and the reasons for rejecting each of those alternatives; the number of employees likely to be affected and the job categories in which they are employed; the proposed method for selecting which employees to dismiss; the severance pay proposed; the assistance that the employer proposes to offer to the employees likely to be dismissed; the possibility of the future re-employment of the employees who are dismissed; the number of employees employed by the employer; and the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months (IEC, 2001). In the absence of such details, the IEC came up with a proposed organisational structure to use as a point of departure during its negotiations with staff (IEC, 2001). The perceived lack of information was not well received by staff because it created the impression that the IEC was not willing to conduct proper consultation and to negotiate in good faith. For instance, the fact that the IEC already came up with an organogram on the day of the announcement was viewed negatively by the staff representatives. The perception was that the staff was not

informed of the rationale behind the decisions which led to the drafting of the organogram. However, the IEC opened the organogram to scrutiny and counter proposals (IEC, 2001). As pointed out in chapter 3 (paragraph 3.8), the IEC provided additional information in response to questions and concerns raised by the staff negotiating team.

#### 4.5 Allowing an opportunity to make representations

Section 189(5) of the Labour Relations Act, 66 of 1995, states that the employer must allow the staff an opportunity to make representations. Chapter 3 (paragraph 3.9) shows that the staff negotiating team submitted no less than seven presentations to the IEC. Section 189(6) (a) and (b) of the Labour Relations Act, 66 of 1995, requires the employer to consider and respond to representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing. If any representations are made in writing the employer must respond in writing.

Chapter 3 (paragraphs 3.9 and 3.10) suggests that with regard to all the representations by the staff negotiating team, the IEC indeed considered the representations put forward and responded in writing, and even went to the trouble of putting forward written counter proposals.

#### 4.6 Attempts by the parties to reach consensus on the method for selecting the employees to be dismissed

The method for selecting the employees to be dismissed is covered by section 189(2) (b) of the Labour Relations Act, 66 of 1995, which states that the consulting parties must try to agree on the method of selecting the employees to be dismissed. Section 189(7) adds that if no selection criteria have been agreed to, the employer must select the employees to be

dismissed according to selection criteria that are fair and objective (see paragraph 3.11).

Negotiations between the IEC and staff revolved around re-application for posts that had been redefined; confirmation of posts that had not changed; voluntary packages; contract staff and in-posts and/or contracts (see paragraph 3.11). The IEC agreed with the staff negotiating team that head hunting and Last In First Out options were not preferred, but reserved the right to include them should the preferred options not work (see paragraph 3.11).

#### 4.7 Attempts by the parties to reach consensus on the severance pay for dismissed employees

The payment of severance pay is regulated in terms of section 41 of the Basic Conditions of Employment Act, 75 of 1997. Subsection (2) states that an employer who dismisses an employee for reasons based on that employer's operational requirements must pay such an employee a severance pay. In chapter 3 (paragraph 3.13) it was stated that the parties aligned themselves with the terms of the Basic Conditions of Employment Act, 75 of 1997 (section 41 (2)) and the Regulations on Remuneration and Conditions of Service (regulation 8(2) and (3)) that dismissed staff should receive:

- One month's salary in lieu of notice;
- The equivalent of 15 days' salary for every year in the employ of the IEC in lieu of extended notice;
- The equivalent of one week's salary for every year in the employ of the IEC;
- The pay-out of vacation leave due.

#### 4.8 Referrals to the Commission for Conciliation, Mediation and Arbitration and/or Labour Court

An interview with the Manager Human Resources of the IEC (September 10, 2003) revealed that a total number of 8 cases, which comprise 4.9% of the total number of persons retrenched (164) by the IEC were either referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) or the Labour Court for adjudication. Two of the cases went through arbitration during 2001 where the CCMA's ruling was in favour of the IEC. Two other cases were settled out of court because the IEC was of the opinion that pursuing them was going to be a long-drawn out process which would be more expensive in the long run.

Four cases were referred to the CCMA without success. Those cases were then referred to the Labour Court where judgment is still awaited. It is again the opinion of the IEC that even those cases will be long and drawn out. Apparently the IEC has suggested to the complainants that the matter be settled out of court, but this has been declined.

It is the view of the IEC that considering the number of employees that were dismissed, the amount of issues taken up with the CCMA and/or the Labour Court is negligible. It is felt that the issue is not whether or not cases of unfair dismissal were brought before the courts, but what percentage of the total retrenched staff those cases constitute (Interview with Elsabe During: HR Manager: Independent Electoral Commission; 10 September 2003).

#### 4.9 Conclusion

Like any retrenchment, the process undertaken by the IEC caused much distress and consternation. However, information gleaned from chapter 3 suggests that the IEC did everything in its power to carry out the process in a transparent and fair manner. After what transpired in May 2000 during the

IEC's first attempts at rationalisation, the events of 2001 were unfortunate and were not without its skeptics, particularly those who felt that the IEC was reneging on earlier promises to keep staff on a permanent basis (see paragraph 3.4.1). Despite those perceptions, the actions of the IEC during the rationalisation process of May 2000 seem to have emanated from a genuine desire to retain staff on a permanent basis (see paragraph 3.4.1).

The turn of events in the first quarter of 2001 was totally unexpected and unprecedented. That was so because it was not easy to reconcile the events of May 2000 during the first rationalisation and the second rationalisation in 2001. Nevertheless the rationalisation in 2001 had become a reality. From the evidence provided in chapter 3 the IEC did conduct itself in a fair manner. The dismissals were substantively fair in that the IEC no longer had the funds it required to keep all the staff that it needed due to subsequent budgetary constraints placed upon its budget by National Treasury. With regard to procedural fairness the IEC seems to have conducted itself well in that whereas information was not initially as forthcoming as the staff had expected it to be, all procedural aspects in terms of the law were eventually addressed accordingly during negotiations.

Chapter 5 of the dissertation summarises the whole dissertation. Proposals are made on issues such as staffing, the timetable for the retrenchments and the problem of representation.

## CHAPTER 5

### SUMMARY, CONCLUSIONS AND PROPOSALS

#### 5.1 Introduction

Chapter 5 summarises, concludes and submits proposals to the dissertation. A summary of each preceding chapter of the dissertation is provided, followed by conclusions and proposals on pertinent issues that came up during the process of retrenchment, such as the problem of staffing, the timetable for the retrenchments as well as the problem of staff representation.

#### 5.2 Summary

In chapter 1 the study introduced the process of retrenchment in a public institution with reference to the IEC. The aim was to attempt to establish the basis for the study of the retrenchment process undertaken by the IEC. It was noted that labour legislation such as the Labour Relations Act, 66 of 1995, and the Basic Conditions of Employment Act 75, of 1997, would provide the necessary legal direction to the conduct of the employer in the event of a retrenchment. The purpose of the introduction of labour legislation such as the Labour Relations Act, 66 of 1995, was stated, which is to establish parameters for the conduct of the labour relationship, to provide minimum regulations pertaining to the substantive conditions of employment, ensuring that employees are protected against arbitrary actions of the employer, provide the framework for the conduct of collective bargaining and to provide employees with certain freedoms such as freedom from victimisation and also to promote labour peace and dispute settlement procedures. Without pre-empting the authority of labour legislation, a number of basic guidelines which an employer needed to take into account when contemplating retrenchments were explored (see paragraph 1.2). The need for proper planning prior to retrenchments taking place was highlighted,

and that the employer has to reflect on issues such as whom to consult and when to consult, statement of the reason for retrenchments and disclosure of relevant information in that regard, consideration of alternatives to retrenchment, selection criteria and severance pay (see paragraph 1.2). The study advocated the fact that a retrenchment exercise has the potential to disrupt the effectiveness and efficiency of an institution and to disrupt the lives of its workers. The view was that it is therefore pertinent for each and every institution that contemplates the reduction of staff to take that route only as a last resort. Alternatively if there be no other way out, the study supported the need for fairness in terms of substance and procedures as well as the manner in which possible retrenchment candidates employees were to be dealt with. The principle of diligent, honest, caring and fairness is covered in section 189 of the Labour Relations Act, 66 of 1995.

In chapter 2 the study examined the place of retrenchment within the law, with reference to the Labour Relations Act, 66 of 1995, as well as the Basic Conditions of Employment Act, 75 of 1997, to see how the concept of retrenchment is addressed. The examination focussed on stipulations covered in chapter 8 and sections 185, 186, 188 and 196 of the Labour Relations Act, 66 of 1995, as well as related sections of the Basic Conditions of Employment Act, 75 of 1997. The primary focus was on section 189, which specifically regulates retrenchment or dismissals based on the employer's operational requirements. Substantive and procedural requirements for a fair dismissal for operational reasons as laid down in the Labour Relations Act, 66 of 1995, were outlined and discussed. The study also referred to case law in order to highlight the position of the judiciary with regard to the application of the law in instances of dismissals for operational reasons.

It was noted that Chapter 2 of the Constitution (Section 23 of the Bill of Rights), provides for the rights of both employer and employee in the labour relationship. In the case of the employee party it was noted that the

Constitution gave them rights to form trade unions; to determine own administrations, programmes and activities; to organise; to strike, to join a federation as well as engaging in collective bargaining. The employer party also has rights such as to form and join an employers' organisation; and to take part in the activities and programmes of an employers' organisation; to determine its own administration, programmes and activities; to organise; to form and join a federation and to engage in collective bargaining (see paragraph 2.1).

Chapter 3 analysed the process of retrenchment of employees by the IEC. For background purposes the establishment of the IEC was revisited, as well as the appointment of Commissioners and staff and the contract of employment that would determine the obligations of the employee and the employer. Various reasons can compel an employer to consider retrenchment of staff, such as the redundancy of certain positions in the institution's structure, the drop in demand for the institution's products or services, the introduction of new technology which renders production less labour intensive, re-organisation or the introduction of more productive and cost-efficient work methods. The study found that the IEC retrenched due to the fact that no funds would be allocated to enable it to keep the kind of staff that it required. To add to its problems, since its inception, the IEC had been showing a decline which made it all the more difficult to motivate for an increase in funding. During non-elections times, the level of activity within the IEC was obviously going to subside. Given that reality, it would seem that the IEC needed to justify to the National Treasury why more funds were justifiable. In that regard the study concluded that the IEC had a *bona fide* economic rationale for proceeding with the retrenchment exercise, that rationale being that no further funding was forthcoming to meet its intended goals.

In line with the requirement of procedural fairness as required by the Labour Relations Act, 66 of 1995 (section 188), the study found that to a large extent the IEC was in a position to fulfill those requirements; that is consultation with affected staff, the provision of relevant information including the reasons for the contemplated terminations, affording affected employees an opportunity to make representations and negotiate with the IEC staff on the measures to be taken to avert or minimise the terminations, measures to mitigate the adverse effects of any terminations on the workers concerned, to change the timing of the dismissals; to mitigate the adverse effects of the dismissals; the method of selecting the employees to be dismissed; and the severance pay for the dismissed employees (see paragraphs 3.4.2 to 3.13). With regard to consultation the study found that in the absence of a collective agreement, a trade union or a workplace forum, the IEC after having announced its intention to retrench, initiated the consultations by advising the staff to nominate representatives who would engage it during negotiations (see paragraph 3.4.2.1.4). Prior to negotiations proceeding, the IEC did submit a written notice inviting the other consulting parties to consult with it. In the written notice the IEC disclosed certain relevant information around its retrenchment proposal. On the requirement that the parties must attempt to reach consensus over certain matters, the study found that the parties engaged in meaningful and vigorous consultations and negotiations over a period of a month with a desire to reach consensus on appropriate measures to avoid the dismissals; to minimise the number of dismissals; to change the timing of dismissals and to mitigate the adverse effects of the dismissals (see paragraph 3.7). Attempts were also made to reach consensus on the method for selecting the employees to be dismissed and the severance pay for dismissed employees (see paragraphs 3.11 to 3.13). From the look of things and the manner in which the whole process unfolded, the study concluded that the parties engaged each other with a genuine desire to jointly seek and reach consensus and not to just mechanically apply procedures as is required in terms of the Labour Relations Act, 66 of 1995.

In chapter 4 the process of retrenchment of employees by the IEC which started on 09 February 2001 and was finalised on 07 March 2001 was examined. The focus was on whether the IEC acted fairly when it retrenched its employees. To achieve that, the reason that the IEC advanced for its need to dismiss employees and whether or not that reason was substantial was reviewed, as well as the steps that the IEC took after it had announced its intention to retrench employees. The objective was to establish whether or not the retrenchment process had been procedurally fair in terms of section 188 (1) (b) of the Labour Relations Act, 66 of 1995. The issue of whether the IEC complied with provisions of the Labour Relations Act, 66 of 1995, pertaining to questions of substantial and procedural fairness was analysed. The aim was to establish compliance and to test how effective and fair the implementation of procedure was during the whole process of retrenchment. The study found that the consultative process unfolded in the spirit of acceptable practice in terms of the Labour Relations Act, 66 of 1995. With regard to attempts by the parties to reach consensus on issues such as changing the timing of the dismissals, avoiding dismissal, mitigating the adverse effects of the dismissals, the method for selecting the employees to be dismissed and the severance pay for dismissed employees, the study found that sufficient consensus was reached by the parties to warrant the conclusion that in terms of procedures, the process was reasonably fair.

### 5.3 Conclusions and proposals

The following sections provide conclusions with proposals on some issues that were noted during the process of retrenchment. These issues are staffing, the timetable for the retrenchments and the problem of staff representation.

### 5.3.1 Staffing issues

By its own admission, when it appointed staff, the IEC had to do so through fixed term contracts, because it recognised that it did not have the base or experience to project what component of full time staff it would retain over time (see paragraph 3.4.2.1.1). Immediately after the general elections of 1999, the IEC should have done a review of all positions in its structure and embarked on ways to come up with a lean but effective and efficient structure. The new positions should have been advertised so that the best possible candidates could be retained. Everybody else who did not make it into the structure should have been left to remain on the fixed term contracts until the said contracts expired.

The vision and the mission of an institution should determine the kind of skills required to fulfill such a vision. The IEC needed to ensure that its human resources planning met its immediate and short term requirements. As was recommended by the transitional IEC that managed the elections of 1994, haste can be the thief of administrative and financial efficiency (see paragraph 3.2). Even if an institution is under pressure to immediately deliver on its mandate, as was the case with the IEC in 1998, certain issues such as staffing issues need to be handled properly and discreetly to avoid problems such as retrenchments.

### 5.3.2 The timetable for the retrenchments

After the IEC had announced its intention to retrench, it took about 27 days for the institution to finalise the retrenchments. The IEC must have known well in advance that it would need to retrench staff. This realisation might have dawned on the IEC around the year 2000. Even though the IEC might have known about the likelihood of retrenchments before they happened, the possibility was that bringing up talks about retrenchments would have had a demoralising effect on the staff considering that the Local Government

Elections of 2000 which took place on 5 December 2000 still needed to be delivered. Notwithstanding the predicament the IEC might have found itself in, more time should have been dedicated to the process of retrenchment. The presentation made by the IEC on the day of the announcement indicated that the IEC had done its homework well in terms of substantive and procedural requirements of the Labour Relations Act, 66 of 1995. The staff was, however, not properly prepared for what was about to unfold, given the limited amount of time within which the process was allowed to run. Under normal circumstances, no retrenchment process should be allowed to come to conclusion without affording the affected employees a chance to fully understand the legal implications of such a process and therefore to go into negotiations armed with all necessary facts. In all fairness, affected employees should never be made to feel that there is no other way out but to succumb to the demands of the employer.

### 5.3.3 The problem of representation

The IEC staff did not have a workplace forum, a representative trade union or a collective agreement at the time of the retrenchments (see paragraph 3.4.2.2.2). If the staff of the IEC had been represented by a trade union or a workplace forum, such representatives would have had the opportunity to be more exposed and knowledgeable about the issues at hand. It would have enabled such representatives to be more focussed on the nitty-gritty issues pertaining to the retrenchment. The fact that staff did not have representation prior to the process taking place seems to have weakened their position at the negotiating table. It is inconceivable that staff representatives that were nominated after the IEC had announced its intention to retrench could have been better positioned and focussed to deal with retrenchment issues in a decisive manner.

It is proposed that proactive measures should be taken to ensure that staff, with the encouragement and co-operation of management, is fully

represented. This will help in facilitating any future negotiations between management and staff.

#### 5.4 Conclusion

It is the conclusion of this dissertation that the retrenchment of staff by the IEC was inevitable. Firstly, the IEC had initially been overstaffed due to the fact that the institution was from its establishment not competent enough to foresee how many staff it would require to fulfil its mandate. Secondly, budgetary constraints made it impossible for the IEC to retain the number of staff that it had initially intended to keep. It was this oversight and the subsequent budgetary constraints that led to the shedding of excess staff in 2001. Furthermore, the timing of the retrenchment placed staff at a disadvantage in that prior to the announcement, the staff had no representation. Even the representatives that were put together immediately after the announcement did not possess the competency to have a good grasp of all the issues at stake and to therefore present their case in a decisive and compelling manner. The swiftness of the process compelled staff to try to understand the underlying principles of fairness while at the same time trying to negotiate a better deal. Notwithstanding those concerns, it is the conclusion of this dissertation that given the fact of the existence of budgetary constraints, the process had been substantially fair. It is also clear from the contents of the dissertation that the IEC had been procedurally fair in its overall handling of the retrenchment in line with the Labour Relations Act, 66 of 1995.

## BIBLIOGRAPHY

Abner, J. 1988. *Retrenchment procedure guide for union negotiators*. Salt River: Labour Research Service.

Basson, A, Christianson, M, Garbers, C, le Roux PAK, Mischke, C and Strydom, EML. 2002 (3<sup>rd</sup> Edition). *Essential Labour Law Volume 1: Individual Labour Law*. Houghton: Labour Law Publications.

Bendix, S.1996 (3<sup>rd</sup> Edition). *Industrial Relations in the new South Africa*. Kenwyn: Juta.

Camay, P and Gordon, A.J. 2001. *The People have spoken: A Review of the 1999 South African Elections*. South Africa: Co-operative for Research and Education.

Du Toit, D, Woolfrey, D, Murphy, J, Godfrey, S, Bosch, D, Christie, S and Rossouw, J. 2000 (3<sup>rd</sup> Edition). *Labour Relations Law: A comprehensive Guide*. Durban: Butterworths.

Government Gazette Notice No. R 514. 2000. *Electoral Commission Regulations on the Conditions of Service, Remuneration, Allowances and other benefits of the Chief Electoral Officer and other administrative staff*. May 19, 2.

Grogan, J. 2001(6<sup>th</sup> Edition). *Workplace Laws*. Lansdowne: Juta.

Independent Electoral Commission. 2001. *Communication to Staff Regarding the Rationalisation of the Electoral Commission*. Pretoria: IEC.

Independent Electoral Commission. 1999. *Report: Electoral Commission of the Republic of South Africa: National and Provincial Elections*, 2 June 1999. Pretoria.

Independent Electoral Commission. 1998. *Offer of Employment*. October 7, 1.

Independent Electoral Commission. 2000. *Confirmation of Appointment*. June 30, 1.

Independent Electoral Commission. 2000. *The Electoral Commission: It's Workforce and Its Future*. May 15, 1-4.

Independent Electoral Commission. 2001. *Staff Negotiating Team's Statement of Intent*. February 12, 1-2.

Independent Electoral Commission. 2001. *Media Release on the Restructuring of the Electoral Commission*. February 19, 1-2.

Independent Electoral Commission. 2001. *Electoral Commission Proposed Options for Redundancy Selection Criteria*. February 22, 1-15.

Independent Electoral Commission. 2001. *Staff Negotiating Team Proposal on Options for the Redundancy Selection Criteria*. February 23, 1-6.

Independent Electoral Commission. 2001. *Internal Memorandum to announce Approved Retrenchment Criteria*. February 23, 1.

Independent Electoral Commission. 2001. *Staff Negotiating Team Submission on Exit Packages and Social Plan*. February 26, 1-3.

Independent Electoral Commission. 2001. *Proposed Electoral Commission Redundancy Payment Plan*. February 27, 1.

Independent Electoral Commission. 2001. *Proposed Electoral Commission Social Plan*. February 27, 1-3.

Independent Electoral Commission. 2001. *Negotiating Team's Report on the Observation of the Selection Process*. March 7, 1-6.

Independent Electoral Commission. 2001. *Media Release on the Finalisation of the Restructuring of the Electoral Commission*. March 7, 1.

Independent Electoral Commission. 2001. *Communication to Staff regarding the Rationalisation of the Electoral Commission*. February 8, 1-4.

Independent Electoral Commission. 2001. *Negotiating Team's Negotiating Principles*. February 13, 1-18.

Independent Electoral Commission. 2001. *Staff Position 2001*. February 19, 26.

Independent Electoral Commission. 2001. *Staff Position on the Proposed Organogram*. February 19, 1-5.

Independent Electoral Commission. 2001. *Commission Response to Information Requested by the Negotiating Team*. February 20, 1-3.

Independent Electoral Commission. 2001. *Electoral Commission Proposed Options for Redundancy Selection Criteria*. February 22, 1-15.

Independent Electoral Commission. 2001. *Staff Negotiating Team Proposal on Options for the Redundancy Selection Criteria*. February 23, 1-6.

Independent Electoral Commission. 2001. *Internal Memorandum to announce Approved Retrenchment Criteria*. February 23, 1.

Independent Electoral Commission. 2001. *Staff Negotiating Team Submission on Exit Packages and Social Plan*. February 26, 1-3.

Independent Electoral Commission. 2001. *Proposed Electoral Commission Redundancy Payment Plan*. February 27, 1

Independent Electoral Commission. 2001. *Proposed Electoral Commission Social Plan*. February 27, 1-3.

Independent Electoral Commission. *Interview with the Chief Financial Officer*, September 19, 2003.

Independent Electoral Commission. *Interview with the Human Resources Manager*, September 10, 2003.

Institute of Personnel Management. 1991. *Retrenchment Resource Kit*. Braamfontein: IPM.

Kantor, P. 2001. *CCMA: A Commentary on the Rules of the Commission for Conciliation, Mediation and Arbitration*. Claremont: SiberInk.

Kumar, H L, 1995 (2<sup>nd</sup> Edition). *Cases and Materials on Retrenchment, Layoff and Closure*. Allahabad: Law Publishing House.

Michaelson, M and White, L. 1996. *Staff Layoffs and Terminations- Managing the Risks: Is Your Institution prepared?* Washington: National Association of College and University Officers.

Piron, J. 1984. *Recognising Trade Unions*. Halfway House: Southern Book Publishers.

Snyman, I. 1983. *The Economic Recession and The Retrenchment of Breadwinners: The Effects on the Welfare Services*. Pretoria: Human Sciences Research Council.

Van Niekerk, A. 2002. *Unfair Dismissal*. Claremont: SiberInk.

#### Acts

*Basic Conditions of Employment Act, 75 of 1997*

*Constitution of the Republic of South Africa, 108 of 1996*

*Electoral Commission Act, 51 of 1996*

*Employment Equity Act, 55 of 1998*

*Labour Relations Act, 66 of 1995*

*Promotion of Access to Information Act, 2 of 2000*