

Compliance with the retrenchment process in South Africa's second wave of Covid-19

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Introduction:

Almost one year ago 2020 was hit by COVID-19 causing many Employees to regrettably be retrenched. With the second wave having just occurred, 2021 may very well be an even more difficult year. It is a very real possibility that many more retrenchments will occur in 2021 due to COVID-19. Of course, we as South Africans are hoping for the best, but the reality of further retrenchments is real.

What should Employers have learned regarding compliance in 2020?

As an attorney, I dealt with an enormous number of claims for unfair retrenchment in 2020, which if proved to be unfair is an unfair dismissal. Most Employers, in the panic of COVID-19 commencing from the hard lockdown in March 2020, failed to follow the procedure set out in the [Labour Relations Act 66 of 1995](#) (the "LRA") in respect of retrenchments. Though they may have had a substantive reason (financial difficulty), many Employers did not follow the process as per the LRA. The consequence of non-compliance: an unfair retrenchment referral to the [Commission for Conciliation, Mediation and Arbitration](#) (the "CCMA") or relevant Bargaining Council for compensation for lack of due process along with an Employee being entitled to be paid one week for each continuous year worked.

Should your business have no alternative but to consider retrenchment during the second wave. What is the process?

Employers need to comply with the LRA, or they will find themselves in further financial difficulties, possibly having to pay compensation for non-compliance.

The process is set out clearly in section 189 and 189A of the LRA. The retrenchment process includes consultations with Employees and a joint consensus seeking exercise between the Employer and the Employee to consider all options to avoid retrenchment or at the very least mitigate the impact the retrenchment will have on the Employee. In these circumstances, alternatives to retrenchment could include temporary remote working arrangements or utilizing short term measures of placing Employees on short time work. Employers should be proactive in engaging with their Employees in respect of the aforementioned alternatives to retrenchment. Retrenchment should be the last resort and the purpose of the consultations and the joint consensus seeking exercise is law and set out clearly in the LRA.

What to do if you find yourself unfairly retrenched?

Most Employees, in my experience have trouble completing the referral form and serving the Employer and the CCMA or Bargaining Council correctly.

It is advisable to get a lawyer to assist you with this. Once the form is completed, it may be served via email on the former Employer and then proof of that email would need to be attached to the CCMA or Bargaining Council referral form and emailed to ctn@ccma.org.za (Western Cape Region) or HO@ccma.org.za (CCMA Head Office) if you are not in the Western Cape.

Bargaining Councils of course have a different email address to the CCMA and therefore a quick internet search should bring up the Bargaining Council in your sector of work. If you are having trouble do seek the advice of an attorney so you may ensure your referral has been timeously lodged within the prescribed 30-day period from date of retrenchment, failing which you would need to apply for condonation for the late referral which could be denied.

Conclusion:

For those unfairly retrenched employees having trouble finding the forms, it can be downloaded from <https://www.ccma.org.za/Advice/CCMA-Referral-Forms> and the form required is named “LRA 7.11: Referring A Dispute To The CCMA For Conciliation (Including Con-Arb)” and is downloadable.

See also:

- [The ins and outs of condonation applications for late referrals of labour disputes](#)
- [Coronavirus – Rights and obligations of employers and employees](#)
- [COVID-19 may not be killing your Employees, but it could be killing your business. Is Retrenchment an instant option?](#)
- [The CCMA – What’s it all about?](#)
- [What is constructive dismissal?](#)
- [Demotion as an alternative to retrenchment – One way to assist employers with the COVID-19 outbreak](#)

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