Retrenchments and the Botswana Employment Act

By Thabiso Tafila

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Section 25(1) of the Botswana Employment Act Cap 47:01 provides that, where an employer terminates contracts of employment for the purpose of reducing the size of his workforce, he shall do so in respect of each category of employee, whenever reasonably practicable, in accordance with the principle commonly known as first in last out.

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Provided that in so doing the employer shall take into account:

i. the need for the efficient operation of the undertaking in question; and
ii. the ability/experience, skill and occupations qualifications of each employee concerned.

Thus, retrenchment could be defined as the process whereby the service of an employee or employees is/are terminated by the employer due to the alleged financial/economic viability of the enterprise. The purpose should be to reduce labour costs in order to safeguard the survival of the organisation. The assumption is that if business improves, those retrenched could be offered re-employment in their previous positions.

Section 25 sub-section 3 provides that where contracts of employment have been terminated for the purpose of reducing the size of a workforce, the employer shall, if he again seeks employees in the occupations to which those contracts related, give priority of engagement, to such extent as is reasonably practicable, to those persons whose contracts of

employment were so terminated; provided that this subsection shall not apply where the employer seeks such employees more than six months immediately after the contracts in question were terminated.

Sub-section 4 provides that an employer who contravenes this section shall be guilty of an offence and liable to the penalties prescribed in the act which basically is a fine of P1,000 (one thousand pula) and or six months imprisonment or to both.

Overflow of work

This article seeks to pose a question regarding the provisions of section 25 sub-section 3, which makes it a criminal offence for an employer who after retrenching employees and terminating their contracts, fails to employ the same employees within six months after their retrenchment, where he suddenly has an overflow of work and has a need to increase his workforce.

Section 25 sub-section 3, as indicated above, provides..."the employer shall, if again seeks employees in the occupations to which those contracts related, give priority of engagement, to such an extent as is reasonably practicable, to those persons whose contracts of employment were so terminated".

It is not clear what the implications of these provisions are regard being had to the contents of the contract of employment. Some people tend to argue that if the employees are to be rehired within six months from the period of their retrenchment, in the occupations to which those contracts related, then the terms and conditions of the previous contracts should prevail as though they were just temporarily suspended and that the employer is not entitled to draft new contracts with different terms and conditions of service.

Act is silent

The Employment Act is silent on that issue but if one considers that retrenchment is another form of termination of employment and if it has been carried out in a way that is both substantively and procedurally fair, then the termination is absolute and the employer does not owe the retrenched employee any other obligation once all benefits that the retrenched employee is entitled to have been paid.

The only obligation that the employer owes to the retrenched employee is the one imposed by the law to re-employ the retrenched employee if the employer seeks to employ some workers in the same positions that employees were previously retrenched.

The employer would under such circumstances therefore be free to negotiate new terms and conditions of service with the employees provided that there is no suspicion whatsoever that the retrenchment in the first place was for the employer to get out of contracts of employment which did not favour the employer only to come back later with new terms and conditions of service which favours it under the guise of rehiring.

Different case

If the situation described above were to occur, however, that will be a different case as the employees can take up the matter with the Commissioner of Labour and eventually the Industrial Court citing unfair retrenchment both procedurally and substantively.

If the retrenchment process was carried out in a way that was both substantively and procedurally fair, then in my view the employer would be entitled to re-employ the previously retrenched employees under new terms and conditions of employment.

The six months provided should not be interpreted as an umbilical cord tying the employer to his previously retrenched employees for that length of period under the same terms and conditions of the previously terminated employment.

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