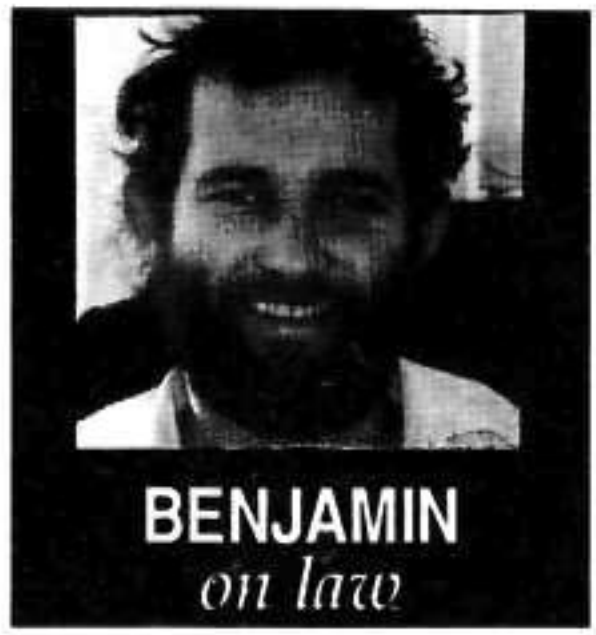


Recent developments on retrenchments

by PAUL BENJAMIN of the Centre for Applied Legal Studies, University of the Witwatersrand

The guidelines for fair retrenchment were laid down by the industrial court in the mid-1980s. These include procedural requirements such as the obligation on the employer to consult with a trade union and explore alternatives to the retrenchment and disclose relevant information; as well as substantive guidelines like the use of objective tests such as 'last in, first out' (LIFO) in selecting employees for retrenchment.

The economic recession has meant that high levels of retrenchment have continued. In the last three years there has been considerable uncertainty on the rules for retrenchment. Different members of the industrial court have differing views on issues such as

- whether there must be consultation over the decision to retrench,
- what steps the court should take against employers who have not complied with the procedural guidelines,
- whether there is a legal obligation on employers to pay severance pay.

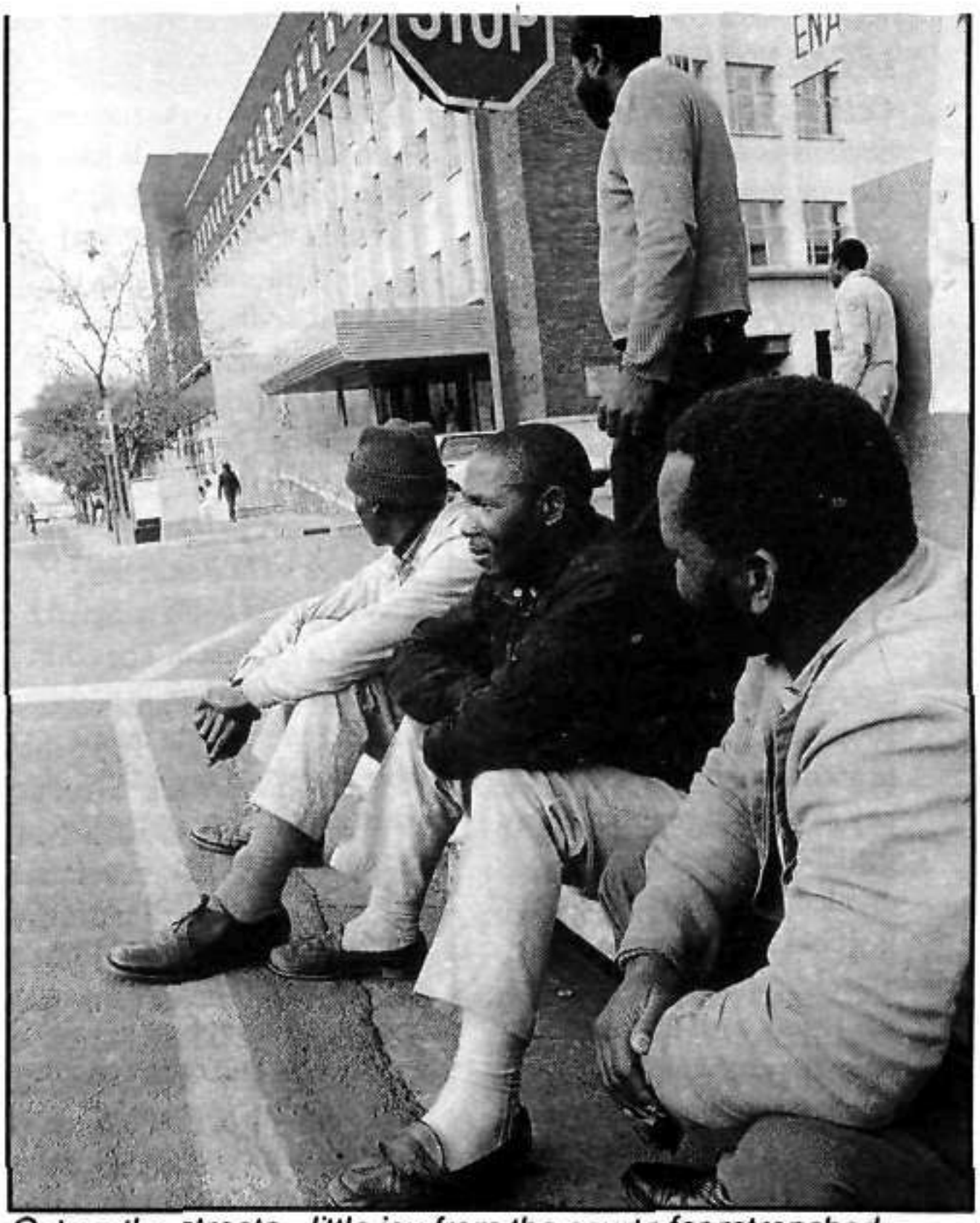
The labour appeal court has now given a number of decisions in retrenchment cases and this has brought greater clarity to the law, although there are remaining areas of uncertainty.

What is a retrenchment?

The language used to describe retrenchment has been confusing. However, the labour appeal court in *Young v Lifegro*, makes accurate use of the relevant terms. A *retrenchment* is the dismissal of *redundant* employees. An employee is redundant when he or she is not needed by the employer to run its business. The reason for this may be a down-turn in business, mechanisation, rationalisation or closure of a business or a section of business. The reason does not effect the nature of the dismissal as a retrenchment.

In the *Young* case, the employees were senior officials in an insurance

company taken over by another insurance company. They were both offered jobs of equivalent status in the new corporation created as a result of the merger. They refused the offer and requested instead that they be paid severance benefits. The court said that the employees had not been retrenched because the reason for their dismissal was their refusal to accept an offer of suitable alternative employment. Where a worker refuses an offer of suitable alternative employment, he or she will not be entitled to any severance benefits. Whether or not an offer of alternative employment is considered 'suitable' depends on the nature of the new job and whether it will involve the employee in hardship. For instance, if the new position involves a major change in job, a demotion or decrease in earnings, or requires the employee to travel excessive distances or move house, the court would accept that the employee was entitled to refuse the offer and still receive severance benefits.



Out on the streets - little joy from the courts for retrenched workers

Photo: Shariff

Are employers obliged to pay severance pay?

In the *Young* case as well as another labour appeal court judgment *(Cele v Bester Homes)* the court has held that there is no obligation on an employer to pay severance benefits to retrenched workers. It will therefore not be an unfair labour practice for an employer to refuse to pay severance benefits and the court will not order the payment of severance benefits. The court said that in the absence of an express statutory duty (for instance, a duty to pay severance benefits introduced into the Basic Conditions of Employment Act) there is no obligation to pay severance benefits.

The effect is that severance benefits have to be achieved through collective bargaining. Trade unions are well advised to demand (either during wage negotiations or at another time) at least a minimum level of severance benefits. If the benefits negotiated are 'minimum benefits', unions will be able to press for additional benefits during any particular retrenchment.

What should a trade union do if the employer refuses to negotiate over severance pay?

As severance pay is now a subject for collective bargaining, it falls under the general 'duty to bargain' and logically a refusal to bargain on severance pay is an unfair labour practice. However, in

Cele the court refused to declare as an unfair practice the employers' refusal to consult or negotiate on severance pay, because the company had a policy of not paying severance benefits. This must be wrong: if there is no right to severance pay, it can only be determined by collective bargaining and the refusal to bargain is a breach of the duty to bargain.

What if the employer agrees to negotiate but then adopts the attitude in negotiations that it will not pay severance benefits? Here the labour appeal court is divided. In *Cele* the court said it would not intervene and award severance benefits. In the *Young* case the court left open the possibility that there might be circumstances in which the employer's refusal to pay severance pay was so unfair that it could be an unfair labour practice.

Procedural unfairness

Some members of the industrial court have adopted an approach known as the 'no difference' principle in considering the procedural fairness of a retrenchment. The effect of this approach is that an employer's failure to consult with a trade union or with employees over a retrenchment is only an unfair labour practice if the employees can prove to the court that proper consultation would have changed the outcome of the retrenchment (for instance, that it could have saved some of the jobs). This is generally impossible to do as the union will have to show that the retrenchment was unfair without having received information about it during consultations. As a result, the failure by employers to consult is often not punished by the court.

In a very recent labour appeal court judgment, *Ellerines v Du Randt* the labour appeal court adopted a different approach. The court held that the failure to consult was an independent unfair labour practice regardless of whether it had an impact on the outcome of the retrenchment. In that case the employee was awarded two months wages as compensation for the employer's failure to consult over the retrenchment. Hopefully this judgment will mean the end of the no 'difference rule'.

The obligation to consult

When does the employer's obligation to consult with a trade union over a retrenchment arise? The initial approach of the industrial court was that the employer must consult over the *need* to retrench. However, in some recent decisions, the court has said that a retrenchment should be divided into two phases: the decision over the need to retrench and the implementation of that decision. They have said that the employer need only consult on the second phase of retrenchment - the implementation of the decision - but need not consult over the 'in principle' decision to retrench. The effect of this approach is to exclude the union from participating in the most important consideration: whether or not to retrench. Although, there is one labour appeal court case *BCAWU v Murray & Roberts* which appears to endorse this view, it is hoped that the more perceptive trend in recent cases such as *Ellerines v Durandt* could lead to a revision of this attitude.

Conclusion

As you will see, the law on retrenchment is in a state of flux. But, by and large, it is an area in which there is little joy from the courts for workers and unions. Once an employer has consulted, there is little prospect of the workers getting assistance from the court. The primary response to retrenchment therefore must be organisational. Severance benefits will have to be negotiated. If the right to severance pay is to be secured for all employees, this will require a successful campaign for new legislation. ☆

Further Readings:

Labour appeal court cases (Industrial Law Journal)
Young v Lifegro (1992) 3 *ILJ* 256 (LAC)
Ellerines v Du Randt (1992) 13 *ILJ* 611 (LAC)
Cele v Bester Homes (still to be published)
BCAWU v Murray & Roberts (1992) 13 *ILJ* 112 (LAC)