The aforementioned information regarding the leave was required by the union to assist it in the consultation process. The court held the relevant information which should have been provided was not provided; hence there was a breach of the workplace determination (clause 47.2.3).[249] The court subsequently ordered Qantas to pay $41,250 in penalties for breaching its consultation obligations and for failing to provide information required for effective consultation.[250]

When evaluating the consultation requirements in SA with that of Australia, the following differences mentioned below are relevant:

In Australia, the obligation to consult and to redeploy in terms of s 389 is a key part of the definition of a genuine redundancy under the FWA.[251] The obligation to consult in regard to the selection process of the employees to be dismissed (for the purpose of procedural fairness) is, however, not part of the redundancy process in Australia.[252] According to Stern, this was a deliberate decision on the part of the Rudd Government rather than an oversight and is evident in the Explanatory Memorandum to the Fair Work Bill 2008.[253] Stern further indicates that "there is nothing meaningful in establishing a balanced 'flexibility' to employers and ' fairness' to employees that continues the former Work Choices Act of absolving employees from the need to conduct a fair selection process".[254] In comparison to Australia, both SA and the UK require that the parties consult about the selection criteria and that the parties agree to the criteria.[255] Sectio er provides that if the selection criteria have not been agreed upon, then the criteria tha l be selected.

In addition, the employer and the other required to engage in a 'meaningful joint consensus-seeking process' and attempt implies that they must do more to reach consensus than in a normal consultation p erms of s 389(1)(2) of the FWA, the position in Australia is that the employer is tc ncy. The consultation criteria regarding a 'meaningful joint consensus-seeking process 'in SA is thus more extensive in respect of dismissals based on operational requirements than in Australia in that both the consultation parties are required to engage meaningfully in the consultation process to reach consensus. As a result hereof, it will be more challenging for employers to dismiss employees in SA than in Australia.

Furthermore, as indicated in chapter one, in Australia consultation only takes place where the employer has made a 'definite decision' to introduce major changes which include operational requirement redundancies.[258] In SA consultation takes place when the employer 'contemplates' dismissing employers based on operational

[249] *Australian Licenced Aircraft Association v Qantas Airways Limited* (No.2) [2013] FCCA at para 157
[250] *Australian Licenced Aircraft Association v Qantas Airways Limited* (No.2) [2013] FCCA at para 18-9
[251] Stern E, From 'Valid Reason' to 'Genuine Redundancy' Redundancy Selection: A Question of (Im)balance *UNSW Law Journal* (2012) 99
[252] Stern E, From 'Valid Reason' to 'Genuine Redundancy' Redundancy Selection: A Question of (Im)balance *UNSW Law Journal* (2012) 99
[253] Stern E, From 'Valid Reason' to 'Genuine Redundancy' Redundancy Selection: A Question of (Im)balance *UNSW Law Journal* (2012) 99
[254] Stern E, From 'Valid Reason' to 'Genuine Redundancy' Redundancy Selection: A Question of (Im)balance *UNSW Law Journal* (2012) 101
[255] Sections 189(2), 189(3)(d), 189(7)(a) of the LRA & s 188(4) of TULRCA
[256] Section 189(2) of the LRA 66 of 1995
[257] Basson et al (2005) 240; Section 189(2) of the LRA 66 of 1995
[258] Section 1(a) of regulation 2.09 of the FWR & s 389(1) of the FWA

requirements. The words 'definite decision' is less compatible than the word 'contemplates' in that the obligation to consult must be fixed, whereas in the case of the word 'contemplates' consultation takes place when it is envisaged as a possibility.

A 'definite decision' to introduce a change consisting of a termination of employment does not require an employer to provide an opportunity for the employee to change (or avoid) the definite decision it has made.[259] Instead, it requires the employer only to discuss certain prescribed matters such as those relating to the introduction and likely effects of the change itself.[260] In addition, a definite decision to introduce a change consisting of a termination of employment before consultation was to commence would in a sense amount to a "fait accompli" as the consultation is approached with a fixed outcome in mind.[261] In comparison, the situation in SA is different in that the consultation includes means of avoiding or minimising dismissals.[262]

In light of the aforementioned, it is submitted that the consultation requirements relating to operational requirement dismissals in SA are more extensive than that of the UK and Australia in that it not only provides for a joint consensus seeking consultation but are more geared towards a process of a fair dismissal for the employee.

4.5 CONCLUSION

A comparative analysis of the obligation to consult, relating to operational requirement dismissals, in SA with that of Australia and the UK, reveals that the consultation requirements in SA are more extensive than in Australia and the UK.

Under SA law, it is necessary for the consulting parties to engage in a 'meaningful joint consensus-seeking process' and attempt to reach consensus, which implies that the consulting parties must do more to reach consensus than in a normal consultation process in the case of the UK and Australia which merely provides that the employer must attempt to reach consensus and to consult about the redundancy respectively.

Furthermore, in SA the obligation to consult when 'dismissals are contemplated' envisages an earlier state in time than 'proposing to dismiss' and a 'definite decision to dismiss' as in the case of the UK and Australian respectively. This is in line with Article 13(1)(b) of the Convention, which requires that an employer contemplating termination for reasons of an economic, technical, structural or similar nature for consultations to be held with the worker's representatives as early as possible.

Compared to SA, Australian and UK law on consultation requirements appears to be less compatible for the following reasons: In the UK consultation is only required where the employer is proposing to dismiss as redundant 20 or more employees, whereas in SA consultation is required where one or more employees are contemplated for

[259] *Ventyx Pty Ltd v Mr Paul Murray* [2014] FWCFB 2143 at para 45
[260] *Ventyx Pty Ltd v Mr Paul Murray* [2014] FWCFB 2143 at para 45
[261] *Ventyx Pty Ltd v Mr Paul Murray* [2014] FWCFB 2143 at para 47
[262] Section 189(2) (i)-(ii)of the LRA 66 of 1995

dismissal. Furthermore, in Australia there is no obligation to consult on the selection criteria for dismissals of employees as in the case of SA.

As a result of the aforementioned, it is submitted that it will be more challenging for employers in SA to prove that a dismissal is potentially fair than in the case of Australia and the UK.

CHAPTER FIVE

5.1 INTRODUCTION

Once dismissal has been established by the employee, in terms of s 192(1) of the LRA, the employer must prove that the dismissal is fair.[263] In *County Fair Foods (Pty) Ltd v OCGAWU & another*,[264] the court ruled as follows:

"If the employer relies on operational requirements to show the existence of a fair reason to dismiss, he must show that the dismissal of the employee could not be avoided. That is why both the employer and the employee or his representatives are required by s 189 of the Act to explore the possibilities of avoiding the employee's dismissal." This ruling was further reinforced by the decision in *Algorax*,[265] where the court held that it should intervene where it is clear that certain measures could have been taken to avoid or minimise job losses or where it is clear that the dismissals were not resorted to as a measure of last resort.

According to Grogan, the dividing line between dismissals effected for permissible reasons and automatically unfair dismissals may sometimes blur.[266] In the case of an automatically unfair dismissal the employer will have to prove that the reason for the dismissal did not fall within the scope of s 187(1)(c).[267] Grogan indicates that an employer can never raise an acceptable defence in the case of a s 187(1)(c) dismissal other than those set in the Act.[268]

5.2 DISMISSALS BASED ON THE EMPLOYER'S OPERATIONAL REQUIREMENTS AND S 187 (1)(C) OF THE LRA

In *Fry's Metals*,[269] the court rejected the view that matters of mutual interest must be resolved by a bargaining process where dismissals are contemplated due to operational requirements.[270] The court concluded that there is a difference between a dismissal which is defined in s 186(1) and a dismissal which is contemplated by s 187(1)(c).[271] According to the court, the difference relates to whether the dismissal is effected in order to compel the employees to agree to the employer's demand which would result in the dismissal being withdrawn or whether

[263] Section 192(2) of the LRA;
[264] [2003] 7 BLLR 647 (LAC) at 656 F
[265] (2003) 24 ILJ 1917 (LAC) at para 70
[266] Grogan J (2014) 209
[267] Grogan J (2014) 209
[268] Grogan J (2014) 208
[269] *(2005)* 26 ILJ 689 (SCA) at 707 G
[270] *NUMSA & others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) at 707 G-I
[271] *NUMSA & others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) at 708 A-B

it is effected finally so that the employer may replace the employees permanently with employees who are prepared to work under the terms and conditions of the employer.[272] The court reasoned that, in the case of a s 187(1)(c) dismissal, the dismissal is conditional and even reversible if the employee accepts the employer's demand.[273] It further reasoned that as such a s 187(1)(c) dismissal is not a final dismissal [as in the case of the meaning of a dismissal under s186(1)].[274] Similarly, in *Algorax*[275] the court endorsed the interpretation adopted in the *Fry's Metals* (Labour Appeal Court) case that s 187(1)(c) relates to a dismissal that is not final but conditional in nature.

The point to consider above is what the intention of the legislator in relation to the content of s 187(1)(c) was, and whether the legislator intended for a dismissal under s 187(1)(c) to constitute a conditional dismissal subject to withdrawal once the employer's demand was complied with.

Grogan points out that the 'ironical result of the aforementioned judgements was that the employer perpetrated an automatically unfair dismissal by offering to reinstate or re-employ workers who refuse to accept a demand, but did not do so by simply dismissing workers for the same reason'.[276] In addition, he indicated that that it 'seems somewhat strange that the legislature should have categorised conditional dismissals in the context of collective bargaining as automatically unfair, but excluded final dismissals occurring in the same context **....** The final dismissal is the fulfilment of the threat that provides the compulsion inherent in the conditional dismissal'.[277]

According to Cohen, 'this anomaly could have been avoided if the Labour Appeal Court had adopted a purposive interpretation' in accordance with s 3 of the LRA, which provides that the provisions of the Act are to be interpreted to give effect to its primary objects; in compliance with the constitution and in compliance with the public international law of the Republic.[278] Furthermore, Cohen indicates that no conflict between s 187(1)(c) and s 189 need arise, provided that the employer is able to prove on the facts that the purpose of the proposed changes and the resultant dismissals is motivated by operational requirements and not an ulterior motive.[279]

Section 187(1)(c) of the LRA 66 of 1995 has now been amended by the Labour Relations Amendment Act 6 of 2014 to render it automatically unfair if the reason for the dismissal is a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer. A literal interpretation of the aforementioned amendment means that a dismissal will be automatically unfair if the employees refuse to accept a proposed amendment to the terms and conditions of their employment. Employers are therefore restricted to change the terms of conditions of employment without the consent of the employees. The dismissal is automatically unfair,

[272] *NUMSA & others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) at 708 C-D
[273] *NUMSA & others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) at 708 F-G
[274] *NUMSA & others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) at 708 F-G
[275] (2003) 24 *ILJ* 1917 (LAC at para 36-7
[276] Grogan J (2014) 216
[277] Grogan J 'Chicken or Egg - Dismissals to Enforce Demands' Employment Law April 2003 vol 19(2) at 11
[278] Cohen T 'Dismissals to Enforce Changes to Terms and Conditions of Employment Automatically Unfair or Operationally Justifiable?' 25 *Indus. L.J.* Juta 1883 (2004) 1892
[279] Cohen T 'Dismissals to Enforce Changes to Terms and Conditions of Employment Automatically Unfair or Operationally Justifiable?' 25 *Indus. L.J.* Juta 1883 (2004) 1896

simply, because the employer has made a demand which the employees have refused to accept irrespective whether the dismissal or threat of dismissal was intended to induce the employees to comply with the demand.[280]

According to Grogan, the amendment was aimed at correcting the unexpected manner in which the courts interpreted the initial version of s 187(1)(c).[281] This perhaps raises the question whether or not the Fry's Metals Supreme Court of Appeal decision has undermined the effect of the bargaining process where an interest dispute arises.

Furthermore, the LRA sets out several primary objects to promote collective bargaining: In terms of s 1(c) of the LRA, the primary object is to provide a framework within which the employees and the employers can collectively bargain to determine terms and conditions of employment and other matters of mutual interest. Furthermore, s 1(d) of the LRA provides for the promotion of orderly collective bargaining as well as collective bargaining at sectoral level.

However, should the bargaining process be followed and the parties fail to reach consensus, a delay in implementing the proposed changes to the terms and conditions of employment of the business could result in the business not operating effectively or even a collapse of the business. A lock-out will therefore not assist under the circumstances.

Van Niekerk and others (Van Niekerk) argues the amendment has the effect of precluding employers from using dismissal as an economic weapon.[282] According to Van Niekerk, the employer cannot simply in the course of a dispute resort to a dismissal, only because the employees refuse to accede to his demands.[283]

Van Niekerk further states that the employer is not precluded from dismissing his employees for a reason related to its operational requirements if the true intention is to replace the employees with those who are willing to work according to the new changes.[284] The real reason for the dismissal is therefore not the employees' refusal to accept the employers' demand but is motivated by the economic need of the employer.[285] Furthermore, Van Niekerk alleges that the line between a s 187(1)(c) dismissal and an operational requirement dismissal will always be a fine one and it's up to the courts to determine where it should be drawn.[286]

5.3 CONCLUSION

In light of the aforementioned, it is submitted that the possible solutions to interpreting s 187(1)(c) of the Labour Relations Amendment Act are as follows:

[280] Grogan J (2014) 214
[281] Grogan J (2014) 214
[282] Van Niekerk et al (2015) 258
[283] Van Niekerk et al (2015) 258
[284] Van Niekerk et al (2015) 258
[285] Van Niekerk et al (2015) 258
[286] Van Niekerk et al (2015) 258

It is suggested that where the employer wishes to introduce a change in respect of any matter of mutual interest in the workplace and the employees refuse to accede to his demands, that the parties try and reconcile the matter through collective bargaining in the case of a dispute. The employer will then have recourse to consider a lock-out where collective bargaining had failed. It would not be fair to simply dismiss the employees because they refuse to accede to his demands. This is in line with s 1(c) of the LRA, which primary object is to provide a framework within which employees and employers can collectively bargain to determine terms and conditions of employment and other matters of mutual interest.

Where there is an immediate danger that the business will collapse if changes to terms and conditions of employment are not implemented, following a failed bargaining process, the employer will be justified in retrenching its employees based on the operational requirements of the business. The proviso is that the employer is able to prove on the facts that the purpose of the proposed changes and the resultant dismissals is motivated by operational requirements and not an ulterior motive.[287] The employer is therefore dismissing the employees, not because they refused to accept a demand, but because of the economic needs of the employer.[288]

In circumstances where the changes to the terms and conditions of employment involve an economic dispute in that the business is making a profit and the employer want to increase its profit margin it is submitted that the economic dispute is resolved through collective bargaining, failing which could follow the route of strikes and even lock-outs.

It is further submitted that s 187(1)(c) does not prevent employers from dismissing employees who refuse to accept a demand if the effect of that dismissal is to save other workers from retrenchment.[289]

Lastly, it would appear to be a safer approach for the employer, who wishes to change the terms and conditions of his employees in circumstances where the viability of the business is threatened, to treat the matter as a retrenchment exercise from the start and replace the workers permanently with those who are prepared to work under the terms and conditions to meet the employer's requirements.[290]

TOTAL WORD COUNT = 16693 WORDS

[287] Cohen T 'Dismissals to Enforce Changes to Terms and Conditions of Employment Automatically Unfair or Operationally Justifiable?' 25 *Indus. L.J.* Juta 1883 (2004) 1896
[288] Van Niekerk et al (2015) 258
[289] Grogan J (2014) 217
[290] *NUMSA v Fry's Metals* (2005) 26 ILJ 689 (SCA) at 708 D

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