(16 July 1999 – to date)

LABOUR RELATIONS ACT 66 OF 1995

(Gazette No. 16861, Notice No. 1877, dated 13 December 1995 – Commencement date: 11 November 1996 – unless otherwise indicated)

NOTICE OF CODE OF GOOD PRACTICE ON DISMISSAL BASED ON OPERATIONAL REQUIREMENTS

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Notice is hereby given in terms of section 203(2) of the Labour Relations Act, 1995 (Act No. 66 of 1995), that the National Economic Development and Labour Council has issued under section 203(1) of that Act a code of good practice on dismissal based on operational requirements as set out in the Schedule.

SCHEDULE

CODE OF GOOD PRACTICE: DISMISSAL BASED ON OPERATIONAL REQUIREMENTS

(1) The Labour Relations Act, 1995 (Act No. 66 of 1995) ("the Act") defines a *dismissal* based on the *operational requirements* of an employer as one that is based on the economic, technological, structural or similar needs of the employer. It is difficult to define all the circumstances that might legitimately form the basis of a *dismissal* for this reason. As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology which affects 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. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise.

(2) *Dismissals* for *operational requirements* have been categorised as "no fault" *dismissals*. In other words, it is not the employee who is responsible for the termination of employment. Because retrenchment is a "no fault" *dismissal* and because of its human cost, *the Act* places particular obligations on an employer, most of which are directed toward ensuring that all possible alternatives to *dismissal* are explored and that the *employees* to be dismissed are treated fairly.

(3) The obligations placed on an employer are both procedural and substantive. The purpose of consultation is to enable the parties, in the form of a joint problem-solving exercise, to strive for

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Italicised words and phrases bear the same meaning as accorded to them by section 213 of the Labour Relations Act, 1995

consensus if that is possible. The matters on which consultation is necessary are listed in section 189(2). This section requires the parties to attempt to reach consensus on, amongst other things, appropriate measures to avoid *dismissals*. In order for this to be effective, the consultation process must commence as soon as a reduction of the *workforce*, through retrenchments or redundancies, is contemplated by the employer, so that possible alternatives can be explored. The employer should in all good faith keep an open mind throughout and seriously consider proposals put forward.

(4) *The Act* also provides for the disclosure by the employer of information on matters relevant to the consultation. Although the matters on which information for the purposes of consultation is required are specified in section 189(3), the list in that section is not a closed one. If considerations other than those that are listed are relevant to the proposed *dismissal* or the development of alternative proposals, they should be disclosed to the consulting party. In the event of a disagreement about what information is to be disclosed any party may refer the dispute to the CCMA in terms of section 16(6) of the Act.

(5) The period over which consultation should extend is not defined in the Act. The circumstances surrounding the consultation process are relevant to a determination of a reasonable period. Proper consultation will include:

(a) The opportunity to meet and report back to *employees*;

(b) the opportunity to meet with the employer; and

(c) the request, receipt and consideration of information.

(6) The more urgent the need by the business to respond to the factors giving rise to any contemplated termination of employment, the more truncated the consultation process might be. Urgency may not, however, be induced by the failure to commence the consultation process as soon as a reduction of the workforce was likely. On the other hand, the parties who are entitled to be consulted must meet, as soon, and as frequently, as may be reasonably practicable during the consultation process.

(7) If one or more *employees* are to be selected for *dismissal* from a number of *employees*, *the Act* requires that the criteria for their selection must be either agreed with the consulting parties or, if no criteria have been agreed, be fair and objective criteria.

(8) Criteria that infringe a fundamental right protected by *the Act* when they are applied, can never be fair. These include selection on the basis of union membership or activity, pregnancy, or some other unfair discriminatory ground. Criteria that are neutral on the face of it should be carefully examined to ensure

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that when they are applied, they do not have a discriminatory effect. For example, to select only part-time workers for retrenchment might discriminate against women, since women are predominantly employed in part-time work.

(9) Selection criteria that are generally accepted to be fair include length of service, skills and qualifications. Generally the test for fair and objective criteria will be satisfied by the use of the "last in, first out" (LIFO) principle. There may be instances where the LIFO principal or other criteria need to be adapted. The LIFO principle, for example, should not operate so as to undermine an agreed affirmative action program. Exceptions may also include the retention of employees based on criteria mentioned above which are fundamental to the successful operation of the business. These exceptions should, however, be treated with caution.

(10) *Employees* dismissed for reasons based on the employer's *operational requirements* are entitled to severance pay of at least one week's remuneration for each completed year of continuous service with the employer, unless the employer is exempted from the provisions of section 196. This minimum requirement does not relieve an employer from attempting to reach consensus on severance pay during the period of consultation. The right of the trade union, through collective bargaining, to seek an improvement on the statutory minimum severance pay is not limited or reduced in any way.

(11) If an *employee* either accepted or unreasonably refused to accept an offer of alternative employment, the employee's right to severance pay is forfeited. Reasonableness is determined by a consideration of the reasonableness of the offer of alternative employment and the reasonableness of the *employee's* refusal. In the first case, objective factors such as remuneration, status and job security are relevant. In the second case, the *employee's* personal circumstances play a greater role.

(12)

(1) *Employees* dismissed for reasons based on the employer's *operational requirements* should be given preference if the employer again hires *employees* with comparable qualifications, subject to:

(a) The employee, after having been asked by the employer, having expressed within a reasonable time from the date of *dismissal* a desire to be rehired.

(b) A time limit on preferential rehiring. The time limit must be reasonable and must be the subject of consultation.

(2) If the above conditions are met, the employer must take reasonable steps to inform the employee, including notification to the representative trade union, of the offer of re-employment.

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