



- (1) Reportable: Yes
(2) Of interest to other Judges: Yes

Signature

Date

IN THE LABOUR COURT OF SOUTH AFRICA DURBAN

CASE NO: D715/2016

In the matter between:

**NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA (NUMSA)**

First Applicant

LINDELANI SHEZI & 37 OTHERS

**Second & Further
Applicants**

and

ASSMANG (PTY) LTD

Respondent

Final Closing Submissions: 6 April 2026

Judgment Delivered: 26 August 2026

**Summary: dismissal for operational reasons – selection criteria – bumping -
duty of union during consultations – duty of employer to apply a fair and
objective selection criterion, even in the absence of meaningful input from
employees**

JUDGMENT

WHITCHER J

Introduction and background

- [1] This matter concerns the retrenchment of 38 employees at the respondent's Cato Ridge Works. The employees are represented by NUMSA as first applicant. The dismissals took place in February 2016¹, pursuant to a large-scale restructuring under section 189A of the Labour Relations Act. The process was facilitated by the CCMA over a consultation period of some eight months.
- [2] It is now common cause that the retrenchments were motivated by operational requirements caused by the respondent's commercial and financial difficulties and the restructuring of its furnace operations. The financial and economic rationale was initially placed in issue in the applicants' statement of claim. However, by the time the testimony of the respondent's witness, Mr Karsten, had been led, the applicants no longer pursued their claim that the respondent lacked an operational need for a reduction in staff. The dispute narrowed to the fairness of the selection criteria and how those criteria were applied.
- [3] The respondent's pleaded case was that it applied "LIFO with the retention of critical and necessary skills and experience" as its selection criterion. In its Heads of Argument, it describes the criteria as "LIFO with retention of skills". The applicants, for their part, allege that the respondent imposed its own special selection criteria which were unfair. The unfairness, they say, lay in the fact that the respondent retained numerous employees with less service than the applicants, failed to consider or properly apply bumping, and continued to use contract workers after the retrenchments. According to the applicants, these factors rendered the dismissals substantively unfair.
- [4] The applicants accept that the Cato Ridge plant has since closed down. Consequently, if they were to prevail in their claim of substantive unfairness, they accept that reinstatement is not practicable and ask for compensation calculated in terms of a submitted schedule.

¹ The prosecution of this trial was repeatedly delayed mostly by the applicant, thus due to no fault of this Court.

- [5] The applicants do not posit a general problem with the application of selection criteria giving rise to a general entitlement to compensation. They identify some employees who, even on the respondent's own criteria, should not have been retrenched, as they were not the shorter-serving applicants in positions where reductions were necessary. There are, in addition, employees who had been promoted out of the furnaces and whose promotion resulted in their retrenchment. The applicants contend that these employees ought to have been vertically bumped back to the level 2 positions from which they had previously been promoted. Some among this group were fortunately re-employed within a 12-month period of retrenchment, and their entitlement to compensation is accordingly less than that of employees who were never re-employed. The applicants further identify several employees whom they say ought to have been accommodated at salary level 1, again distinguishing those who were re-employed within 12 months from those who were not. Lastly, the applicants identify three employees, a team captain, Xolani Gebashe, an electrician, Rishen Sukram and Makhatini, a second assistant in engineering, whose dismissal is said to be unfair for reasons special to each of them.
- [6] To avoid unnecessary repetition, the further detail relating to these employees is dealt with later in this judgment.
- [7] Before turning to the merits, I record that during the course of these protracted proceedings six of the individual applicants passed away. Applications were duly brought to substitute the deceased applicants' estates.
- [8] Certain documents were admitted into evidence and are central to this case. Exhibit C is the Retrenchment Selection Document, which the respondent relied upon in deciding which employees would be dismissed. The other important documents are described where they arise below.

The union's conduct during consultations

- [9] During the facilitated retrenchment consultations, the applicants took the position that no operational need existed to justify the retrenchments. Almost as if the union were negotiating rather than being consulted, it refused to engage on the other matters specified in section 189 of the Labour Relations Act, including selection criteria. The applicants disputed the respondent's severe

financial and operational pressures well into the trial. This is despite NUMSA's own financial advisors having been persuaded of the legitimacy of the operational requirement to reduce staff, once financial information was released.

- [10] While a trade union is entitled to dispute the facts an employer raises in retrenchment consultations, and, as here, to quibble about confidentiality restrictions placed on financial disclosures, having heard the evidence of Mr Karsten, (the substance of which had already been disclosed to NUMSA during retrenchment consultations), it is difficult to understand why the need to retrench continued to be disputed. Although the Court appreciates counsel's eventual concession, considerable trial time was wasted entertaining what may colloquially be described as a non-starter.
- [11] Had the union acknowledged the glaring fact that market conditions beyond its control had forced upon the respondent the need to reduce staff, consultations might have focused on other matters instead. Even if the applicants harboured suspicion about the existence of a genuine operational requirement, refusing to consult on all the other matters listed in section 189 of the LRA had an unfortunate effect. Union members were deprived of representation on the full range of issues relevant to a retrenchment.
- [12] A trade union may reserve its rights to dispute the primary need for dismissal while still vigorously engaging the employer on the other matters. Had the union engaged the respondent on its proposed selection criteria with the same attention it later mustered for the same subject at trial, the union's preferred criterion, LIFO with bumping, might well have been accepted once ideas and arguments were properly aired. This is precisely what section 189 of the Labour Relations Act envisages. It is an unfortunate use of scarce court resources to unpick, years later, an error in the knitting of a jersey that might have been pointed out at the time.
- [13] The respondent did not merely bemoan this state of affairs. It contends that the union's conduct deprived the applicants of the right to complain that better selection criteria might have been applied. The respondent led evidence that the consultation process was extensive, lasting approximately eight months,

with numerous meetings between the parties and CCMA commissioners, and additional bilateral meetings. According to Ms Mngoma, the respondent's HR manager, the respondent repeatedly sought to consult on selection criteria, but the union refused to engage on criteria until it was satisfied with the economic rationale, notwithstanding its access to forensic financial expertise and documentation.

- [14] The respondent accordingly contended that NUMSA's intransigence impeded the section 189A process and had a bearing on the subsequent selection decisions. It invoked sections 189A(13) and (18) to argue that consultation duties are reciprocal, that the union had the capacity to understand and engage with the respondent's operations (as shown by its own "Organised Labour Proposal"), and that any deficiencies in consultation over criteria should be viewed against the backdrop of the union's deliberate avoidance of the topic.
- [15] Applicants' counsel conceded that NUMSA refused to consult on selection criteria. He sought to explain this by reference to the respondent's initial failure to provide adequate financial information and the need to sign confidentiality agreements and pursue a referral to the CCMA before meaningful disclosure occurred. The applicants argued that meaningful engagement on the financial information only occurred on 15 January 2016, after which the economic rationale was no longer contested. They contend that, in any event, in law, the breakdown in negotiations and the reasons for it are irrelevant to substantive fairness. In the absence of agreed criteria, the employer must still apply criteria that are fair and objective, as required by section 189(7) of the LRA. The allocation of blame for the failure to reach consensus does not bear on the fairness of the dismissals.
- [16] I am bound to agree with the union's argument that its refusal to engage on selection criteria, and its failure to contest the criteria applied by the respondent during consultations, did not relieve the employer of its duty to apply criteria that were fair and objective. It ought to have occurred to the respondent, when it formulated the criteria it ultimately used (discussed below), that those criteria had the effect of selecting long-standing employees for dismissal.

notwithstanding that they were capable of performing, at a lower level, a job then being performed by employees with less service to the company overall.

[17] Our labour law places a premium on long service when it comes to selection for retrenchment. It is almost the default criterion, and an employer who wishes to depart from it must have solid reasons for doing so, and the basis of selection must, overall, still be fair and objective. One cannot apply LIFO to give effect to the value of privileging long service without considering the question of bumping. Bumping concerns whether more senior employees, in terms of total service to the respondent, should be moved into similar or lower positions held by employees with less service. Bumping is integral to the proper application of LIFO.

[18] Bumping is not, however, the *sine qua non* of fair and objective selection criteria. A long-serving hospital administrator cannot be bumped into a nursing position. Here, though, the respondent's own workforce profile reveals that a number of the applicants had previously worked in lower positions, the furnaces, for instance, which were saved from retrenchment. In that event, the employer ought at least to have considered LIFO with bumping as a possible selection criterion. It may be that LIFO with bumping could still have been avoided for countervailing reasons like operational complexity, dislocation, or the loss of critical skills, but bumping ought properly to have been discounted, one way or the other, with or without the union's engagement.

[19] This Court is bound to find as it does because this is the position taken by the Labour Appeal Court in *Fischer Tube Technik SA v Bayene and Another*.² There the Court held:

In South African Law, bumping forms an integral part of the application of LIFO. While there is no absolute obligation on an employer applying LIFO to bump, it is a matter that ought properly to be canvassed during the consultation process when LIFO is agreed. Indeed, it is not open to an employer to contend that employees cannot raise the issue of bumping only because they failed to do so during the consultation process.

²2024 45 ILJ 1804 (LAC) at para 14.

- [20] It should be recorded, in fairness to the respondent, that the Labour Appeal Court in *Fischer Tube Technik* ultimately upheld the employer's appeal on the facts before it. There, the employer had candidly canvassed vertical bumping with the affected employees, who declined a *bona fide* offer to be moved into lower-paid positions. The Court held that a fair offer of bumping, once made and refused, does not without more render a dismissal unfair. The position here is materially different. As appears below, the respondent never candidly canvassed, still less offered, bumping to the applicants in 2016. It cannot claim the benefit of the qualification that saved the employer in *Fischer Tube Technik*. The court does not accept the respondent's suggestion that a consideration of bumping only arises as part and parcel of the consultation process.
- [21] It follows, of course, that the union cannot now be heard to complain about the procedural fairness of the retrenchment process itself, for two independent reasons. First, and decisively, section 189A(18) of the LRA provides that this Court "may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements" in a dispute referred to it in terms of section 191(5)(b)(ii), as this one was. Any complaint about the fairness of the consultation process ought properly to have been raised by way of an urgent application under section 189A(13) during the retrenchment process itself, not resurrected as a ground of attack years later at trial. Second, and in any event, even if this were not a bar, the union's own refusal to engage on selection criteria during consultation would go a long way towards disentitling it from now complaining that the process was procedurally unfair. Neither of these considerations, however, dilutes the employer's separate and *substantive* duty, under section 189(7)(b) of the LRA, to apply a fair and objective selection criterion, even in the absence of meaningful input from employees. Whether the respondent discharged that substantive duty is considered later in this judgment, once I have dealt with a preliminary pleading point raised by the parties.

The applicants' pleaded case

[22] A second issue to be determined is whether the applicants' complaint that LIFO with bumping ought to have been applied as a selection criterion was properly pleaded.

[23] The applicants' complaint that the selection criteria used by the respondent were unfair, or not properly applied, was certainly not central to their pleaded case. Despite this, I am satisfied that the issue was nevertheless brought within the ambit of the cause of action. In their pleadings, the applicants averred that the fairness of the manner in which employees had been selected was in dispute, and that the proper application of LIFO required fair consideration of the principles of bumping.

[24] In the pre-trial minute, the Court was further required to decide whether the dismissals were substantively fair, including whether proper consideration had been given to alternatives short of dismissal and to the continued employment of contractors. The applicants emphasised that the precise methodology of selection lay within the special knowledge of the respondent, and that the respondent bore the onus of proving that the selection was fair and lawful.

[25] Further, as counsel for the applicants pointed out, the Labour Appeal Court in *Sibiya v SA Police Services*, a matter concerned with the amendment of a pleaded remedy rather than with un-pleaded issues generally, but in which the Court articulated a wider principle, held:

In substantiation of that principle, this Court further accepted in 'Trellicor' that while the object of pleadings is to define the issues and while parties are to be kept strictly to their pleadings where any departure would cause prejudice, or prevent full enquiry, the Court has a wide discretion within those limits, since 'pleadings are made for the Court, not the Court for the pleadings'. It is also accepted that our Courts have decided issues not specifically pleaded where the parties have widened the issues to include those not pleaded, and have even decided such issues where no amendment has been sought to regularise the position where there was no prejudice (ie which would ordinarily arise if those un-pleaded issues were not fully canvassed at the trial)."³

[26] I respectfully adopt that general principle for present purposes.

³ *Sibiya v SA Police Services* (2022) 43 ILJ 1805 (LAC) at para 31.

- [27] In this case, the respondent led evidence on how employees had been selected for dismissal. During this testimony, the respondent complained of being at a disadvantage without knowing the applicants' proposed comparators; that is, which employees the applicants contended ought to have been retrenched instead of the individual applicants. The Court ordered the applicants to provide further particulars identifying those employees. In compliance, the applicants produced Exhibit X, essentially a list of employees with fewer years of service than the applicants who, on the applicants' case, should have been retrenched instead.
- [28] In response, the respondent produced Exhibit Y and Ms Mngoma was led in further evidence-in-chief on its contents. Exhibit Y comprised a schedule, for each applicant and comparator listed in Exhibit X, of information including name, position when retrenched, date of engagement, last position, years of service, a skills differentiator, dates of re-employment and current status.
- [29] To the extent that it could be said that the applicants had not pleaded the respondent's failure to apply bumping as an element of substantive unfairness, the admission of, and evidence led on, Exhibits X and Y operated as an extension of the applicants' pleadings on selection fairness. The issue was thoroughly canvassed, and no prejudice was occasioned to either party.

Summary and evaluation of evidence

Operational rationale

- [30] The respondent's case on the commercial rationale for dismissal was advanced primarily through Bundle A and the evidence of Mr Karsten, which provided a detailed analysis of the financial position at the Cato Ridge facility, the need to reduce production capacity, and the impact on headcount. It is unnecessary to discuss the operational rationale in any detail, since, as noted, the applicants no longer pursue a challenge that the retrenchments were commercially unnecessary. The dispute turned on whether otherwise justifiable retrenchments were rendered unfair by defective selection criteria or their application, by a failure to consider alternatives, or by the continued employment of contractors.

Selection criteria and methodology

- [31] The respondent claimed that the selection criteria used were the date of an employee's commencement in a position in a department, together with that employee's position and skills. According to Ms Mngoma, and with reference to Exhibit Y, Heads of Department were involved and were said to know the personnel and skills requirements of their departments and which retrenchments would not affect the company's functioning from a skills perspective. The respondent described its criteria as "LIFO with retention of skills".
- [32] The applicants point to a number of concessions made by Ms Mngoma in her testimony which undermine the contention that the criteria applied were fair and objective. When taken through the Retrenchment Criteria Document, she acknowledged that where a position had been made redundant, employees in that position were retrenched as a matter of course and that where the number of employees in a position needed to be reduced, the employee with the fewest years of service in that position, regardless of total service to the company, was selected for retrenchment. Total service served only as a tie-break where years in position were equal. This methodology was confirmed in cross-examination and by the Court, and became the basis on which Exhibits X and Y were compiled.
- [33] As already stated, the applicants contend that it was unfair for the respondent to retain in its employ numerous employees with less service than those who were retrenched, in circumstances where the retrenched employees possessed the skills and experience to be vertically bumped into positions the company retained. This was the theme set out in Exhibit X which NUMSA produced and which was explored in evidence, alongside concessions made in respect of Exhibit Y and the details of skills and training the individual applicants possessed set out in Exhibits AA and BB. Taken cumulatively, this evidentiary material shows, on a balance of probabilities, that the applicants possessed the skills and experience necessary to perform the jobs of employees who were retained despite having fewer years of service with the respondent.

- [34] Ms Mngoma contended that bumping would have been impractical, and that its combination of LIFO and retention of skills was appropriate and fair in the circumstances. Ms Mngoma's evidence was that bumping would have caused a "mess" and would have been detrimental if applied without regard to skills.
- [35] The applicants argue that bumping was never actually considered at the time of the retrenchments, and that much of Ms Mngoma's testimony on the topic constitutes an *ex post facto* attempt to rationalise the dismissals. They submit that her evidence consists of vague generalities, unsubstantiated opinion, and claims unsupported by shop-floor knowledge. The applicants also point to Ms Mngoma's concession that the retrenched employees were multi-skilled and could have taken up alternative positions.
- [36] Counsel for the applicants further points out, not without merit, that Ms Mngoma's responsibilities were confined to HR, and that she could not explain the duties of entry-level employees in key departments even when asked by the respondent's own counsel. I accept that this lack of operational insight undermined her conclusions about the impracticality of bumping and the risk of losing essential skills, particularly where Bundles AA and BB reveal extensive training and multi-skilling amongst the applicants.
- [37] Exhibit D is a spreadsheet handed up by the respondent during Ms Mngoma's evidence. It sets out the employment details of the applicants who were retrenched because, tellingly, they were "last in the position", and compares their total years of service with other employees in the same position who were not retrenched. In my view, the evidence shows that this is not truly a debate between LIFO with retention of skills and LIFO with bumping at all. The evidence does not establish that the respondent actually applied LIFO with retention of skills. While Exhibit Y did reflect for each applicant and comparator, information about their position when retrenched, date of engagement, last position, years of service, a skills differentiator, dates of re-employment and current status, Exhibit Y was not in existence when the dismissals occurred. It certainly was not the blueprint the respondent actually used to determine who would stay and who would go.

- [38] Despite extensive correspondence, full proof of Exhibit Y's accuracy had not been provided by the time the matter resumed in October 2022, and its adequacy became a central issue in cross-examination. It became apparent that Exhibit Y did not reflect the full range of training and qualifications held by the applicants and comparators, that "skills" in Exhibit Y were not drawn from comprehensive training files, and that several employees with significant training, the production foreman, Mr Hlongwane, among them, were incorrectly recorded as having none.
- [39] Under cross-examination, Ms Mngoma further conceded that the best indication of training received by any applicant was contained in their training files, which were only made available late in the trial and are summarised in Bundles AA and BB. She accepted that Exhibit Y did not include licences to operate machinery, formal qualifications, or all training received, explaining the omissions by saying she had not been instructed what training to include and believed she would have the opportunity to "add more information" as the case continued.
- [40] In my view, these concessions demonstrate that Exhibit Y does not present a full or reliable reflection of skills or training, and that it cannot serve as an answer to Exhibit X, which showed that a number of the applicants were suited to vertical bumping.
- [41] The question then arises: what selection criteria were, in fact, adopted and applied in 2016, as opposed to those advanced *ex post facto*? The evidence shows that at the time the employer made its retrenchment decisions in 2016, the true selection criterion was LIFO per position, as in fact named in Exhibit D. Employees who had previously worked in a position, no matter for how long, were not considered for retention in it. To the extent that skills played any differentiating role, at best, employees presently in a position were deemed more skilled and useful to the employer than those who may have had greater overall service but now occupied another position. The "skill" possessed by employees who were retained was, in substance, already being in the job, being part of an existing team, and their retention occasioning the least "mess". The employer did not take a comprehensive and objective view of the skills

possessed by the applicants and their comparators beyond assuming that incumbency meant capacity.

[42] This selection criterion was, understandably, an attractive one for the respondent. Long-serving employees who had been promoted to other jobs would inevitably take time to readjust to jobs at a lower rank, even where they had previously performed those jobs, nor would operations resume as seamlessly under vertical bumping as they would under LIFO per position. Counsel for respondent accurately contends that bumping would have forced people from different departments into teams with which they were not necessarily familiar and leadership with which they were not familiar. It may even have caused some strife. However, in my view, the employer did too little to show, in credible evidence, that these operational considerations fairly outweighed a consideration *integral* to the fair application of LIFO; namely, whether bumping could be applied. Instead, the respondent sought to persuade this Court that LIFO plus skills were the objective factors distinguishing those who stayed from those who went, when incumbency was, in truth, the operative consideration. This is precisely the pattern of subjective, inadequately evidenced departure from LIFO that the Labour Appeal Court found fault with in *Umicore Catalyst South Africa (Pty) Ltd v NUMSA and Others*. In that case a “skills” or behavioural overlay was found to be subjective and uncorrelated to actual performance was further held not to rescue a departure from an otherwise fair and agreed criterion.⁴

[43] Selection criteria must be fair and objective. I have so far principally considered fairness, but objectivity also comes into play *in causa*. The respondent found itself on the horns of a dilemma: its real selection criterion, LIFO per position, was objectively easy to determine, but the criterion it pleaded, LIFO with retention of skills, could not be objectively justified on the evidence it produced, for the reasons set out above.

⁴ *Umicore Catalyst South Africa (Pty) Ltd v National Union of Metalworkers of South Africa and Others* (PA3/23) [2024] ZALAC 37; [2024] 11 BLLR 1138 (LAC); (2024) 45 ILJ 2545 (LAC) (29 August 2024).

[44] This is not quite the end of the matter. While an employer has a duty to apply fair and objective selection criteria, what happens if the application of an unfair and subjective criterion produces the same result as the criterion the dismissed employees and the union contend should have been applied? In other words, what happens if it can be shown that an employee selected for retrenchment on an unfair basis would nevertheless still have been retrenched had fair and objective criteria been applied? Section 189(7) of the LRA provides:

[45] The employer must select the employees to be dismissed *according to* selection criteria:

45.1.1 that have been agreed to by the consulting parties; or

45.1.2 if no criteria have been agreed, criteria that are fair and objective.

[46] Section 192(2) of the LRA provides that “if the existence of the dismissal is established, the employer must prove that the dismissal is fair.” I cannot see how the overall fairness of a dismissal for operational requirements can be delinked from the fairness of the selection criteria *according to* which employees were dismissed. If the criteria applied at the time lacked fairness and objectivity, the dismissal is accordingly substantively unfair.

[47] Besides the fact that the employer did not apply LIFO plus bumping, the applicants also allege that, in respect of nine employees, even the respondent’s own stated criterion, LIFO per position, was not accurately applied. In one case, that of Xolani Gebashe, the employee ironically appears to have been vertically bumped when there was no cause to do so. These instances, the applicants contend, also rendered the dismissals substantively unfair.

Findings

[48] The applicants’ complaint that the respondent’s continued use of contract labour after the retrenchments points to a failure to consider alternatives short of dismissal was raised in the pre-trial minute but it was not pursued with any energy in evidence or argument. The real purpose of the point seems to have been the belt to the brace of the primary argument the applicants advanced: that is, that they ought to have been bumped into positions within the company. If the court found against them on that claim, then their eligibility for contract

cleaning work as an alternative to dismissal might have come into play. Given what follows, that argument falls away.

[49] Exhibit X was not challenged on the basis that the applicants lacked longer overall service than the comparators. To the extent it is not already clear, it is this Court's finding that the respondent did not consider whether comparators with lesser service should have been "bumped" and, more importantly, did not have proper reasons at the time for discounting bumping. It follows that the respondent's selection of employees for dismissal was substantively unfair.

[50] The other selection anomalies described above, including the nine instances in which the respondent's own stated criterion of LIFO per position was inconsistently applied, and Mr Gebashe's anomalous vertical demotion, were not rebutted in evidence, and I accept them as established.

[51] The dismissals occurred in 2016. The applicants accept that the plant has since shut down and that reinstatement is no longer practical. They seek compensation instead. Section 194 of the LRA caps compensation for an unfair dismissal: an order must be just and equitable in all the circumstances, but may not exceed the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal. Our courts have identified a broad, non-exhaustive range of factors relevant to the exercise of this discretion, including the nature and degree of the unfairness, any conduct by either party that promotes or undermines any of the objects of the Act, for example, effective resolution of disputes, and the consequences to each of an award being made or withheld.⁵

[52] In deciding what compensation would be just and equitable, I repeat that my criticism of the union's conduct in refusing to discuss selection criteria did not bear on my finding that the dismissals were substantively unfair. That criticism does, however, return as a factor relevant to quantum. Our courts recognise that a party's own conduct during the process leading to the dispute, including conduct that undermines the objects of the Act, such as effective and timeous

⁵ See *Dr D.C. Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ 2677 (LAC); [2009] 11 BLLR 1027 (LAC), [at para 20]

engagement, may properly reduce (or, in an appropriate case, even eliminate) an award of compensation notwithstanding an underlying finding of unfairness.

[53] While the respondent ought to have considered bumping at the outset and, absent serious countervailing operational or fairness considerations, ought to have applied LIFO with bumping, the union's lack of engagement on this topic lessens, in my view, the degree of fault properly attributable to the respondent. Put differently, had the union engaged on selection and demanded LIFO plus bumping in 2016, and had the employer then stubbornly persisted with LIFO per position, the quantum of just and equitable compensation would, justly and equitably, have tended towards, if not reached, the statutory maximum. That is not this case. The respondent did not stubbornly persist with a wrong-headed criterion having rejected good arguments to the contrary, because it was never given the opportunity to hear those arguments. Section 189 consultations are meant to foster agreement and to avoid later disputes about the fairness of a dismissal. They are not bowling alleys, in which an employer sets up the pins only for the union to knock them down later in litigation.

[54] The court accepts counsel for the respondent's invitation to show some displeasure at the conduct of NUMSA in regard to its refusal to consult. Just as an employee who unnecessarily draws out or complicates a disciplinary hearing may recover less compensation than would otherwise be the case, even where the ultimate dismissal is found to be unfair, so too here is compensation affected by conduct during the retrenchment consultations. There is no reason to believe the respondent would have rejected LIFO with bumping out of hand. When called upon to justify the need for retrenchments, it in fact engaged at length and in good faith, and the Court has the distinct impression, rising to a probability, that it would have had an open mind on selection criteria too, especially if they knew the union demanded it.

[55] I set out below the categories of employees who were retrenched, together with the compensation this Court considers just and equitable in each case. I have adopted nine of the available twelve months as an appropriate baseline. I have not awarded the statutory maximum, because this is not a case of egregious, wilful, or contumelious conduct on the respondent's part of the kind that would

ordinarily attract it (as explained above). The respondent's failure, as found above, lay in a subjective and inadequately evidenced departure from a fair criterion, not a bad-faith disregard of its obligations. Within that baseline, the employees in category 1 below suffer no discount, because their claim does not depend on the vindication of the union's bumping argument at all. Even on the respondent's own chosen, if unfairly applied, methodology, they were the wrong candidates for retrenchment. Categories 2 and 3, by contrast, depend on vindicating the bumping argument, on which, as found above, the union's own intransigence in consultation is a relevant, if secondary, consideration. This accounts for the 10% discount common to both categories where the employee concerned was not re-employed. Category 3's discount is also 10%, applicable to those who were not re-employed and those subsequently re-employed.

Relief

[56] The ten employees identified from Exhibit "D"⁶ ought not to have been retrenched, as they were not the shorter-serving applicants in positions where reductions were necessary. They are accordingly awarded compensation in the sum of nine (9) months' salary at the salary level which pertained to them at the time of their dismissals.

[57] The six production employees who were promoted from the furnaces, which promotion resulted in their retrenchment (whose situation is described in paragraph 75 of the applicants' heads of argument, and who are identified from Exhibit X)⁷ ought to have been vertically bumped back to the level 2 positions

⁶ Mishack Mshengu (employee number 00035), Goodman Miya (employee number 03537), Sizwe Hlongwane, Hlengiwe Gasa (employee number 00655), Vusimuzi Magubane (employee number 03585), Nkosinathi Mhlaba (employee number 00529), Zwelitshe Makhatini, Malusi Miya (employee number 00525), Alexia Ngubane (employee number 00643); Bhekisisa Phetha.

⁷ Nosithembiso Gebashe was retrenched but was re-employed from 7 February 2017 as a second assistant, furnaces. Princess Nduli was retrenched but was re-employed from 7 February 2017 as a second assistant, furnaces. Ntombifuthi Tyani was retrenched but was re-employed from 10 August 2016 as a second assistant, furnaces. Nontsikelelo Tshongwe was retrenched but was re-employed from 26 October 2016 as a Sheq officer in training. Menzi Mbeje was retrenched but was re-employed from 7 February 2017 as a second assistant, furnaces. Buyisile Ndlovu was retrenched and was considered for re-employment in February 2017 but failed her medical examination at that point. Since there is no evidence that Ms Ndlovu would not have been able to be bumped into the lower position in 2016, I

from which they had previously been promoted. Of this group, the one applicant who was not subsequently re-employed is awarded nine (9) months' compensation at salary level 2, minus 10%.

[58] Those applicants who were subsequently re-employed within a 12-month period from the date of dismissal are awarded compensation for the period from dismissal until re-employment, calculated at salary level 2, minus 10%.

[59] Having regard to the Retrenchment Selection Document (Exhibit C), read together with Exhibit X, which identifies comparators with lesser service, six Engineering department employees⁸ and seven Materials department employees⁹ ought to have been accommodated at salary level 1 had LIFO with bumping been applied. They are awarded nine (9) months' compensation at that salary level, minus 10%, or, in the event that any of them was re-employed by the respondent within such 12-month period, compensation for the period from dismissal to re-employment, minus 10%.

[60] I turn now to three special cases. The respondent did not, in evidence, gainsay that Xolani Gebashe ought to have been retained as a team captain at salary level 4, but was instead re-employed in August 2016 at salary level 2. In other words, he was unfairly bumped downward when there was no cause to bump him at all. He is accordingly awarded compensation at the salary level 4 rate until the date of his re-employment, and thereafter the difference between

make nothing of her subsequent failure to meet a medical standard, and she is treated as not having been re-employed.

⁸ Engineering department: Nkosikhona Magcaba originally employed on 31 December 2006
Emmanuel Gwala originally employed on 20 October 2008. Pretty Buthelezi employed on 3
September 2007. Zanele Mabaso employed on 5 November 2006. Joyce Shange employed on
29 October 2007. Fikile Ndwandwe employed on 15 July 2010.

⁹ Materials Department: Lungasile Mncwabe start date 27 August 2008. Sizeka Nyoko start
date 6 November 2008. Renehoe Makufanwe commenced employment on 27 August 2008.
Mhlengi Khanyezi started work on 1 October 2010. Ngethembi Mtungwa started on 6
November 2008. Maxwell Dladla started on 3 September 2007. Lindelani Shezi started on 27
August 2008.

whatever salary he received and the level 4 salary, until he again reached that salary level, provided that this does not exceed 12 months in total.

[61] Rishen Sukram was not considered for bumping downward into a position in Stores, despite having significantly more service than comparator storemen who were not retrenched. The applicants contended that Mr Sukram might also have been accommodated as an electrician. It is not for this Court to award him compensation attached to the higher of the two positions into which he might have been bumped. He is awarded nine (9) months' compensation at the salary level of the Stores post into which he should have been bumped, minus 10%.

[62] The Retrenchment Criteria Document in relation to Mr Makhatini¹⁰ demonstrates he commenced work with the respondent as a general labourer in the production furnaces on 23 November 1993. He thus had approximately 23 years of unbroken service with the respondent when he was retrenched. He worked in various departments, but his last position was as second assistant in engineering to which he was transferred on 16 August 2010. He was retrenched because he had shorter service than other assistants in the position, despite his overall years of service and six years of experience as a second assistant. He is awarded nine (9) months' compensation at the salary level he occupied at the time of his retrenchment.

Costs

[63] Given the complex nature of this case¹¹, no cost order is made.

Order

[64] The dismissal of the applicants listed in the section marked 'relief' (above) was substantively unfair and each is awarded compensation as outlined therein.

Benita Whitcher

Judge of the Labour Court of South Africa

¹⁰ Page 547 of the record, Exhibit C.

¹¹ Basically, the union must start taking a more responsible position in retrenchment consultations.

Appearances:

For the Applicants:

P Schumann, instructed by Harkoo, Brijlal & Reddy

For the Respondent:

A Snider SC, instructed by Cliffe Dekker Hofmeyer
Inc

LABOUR COURT