Reportable

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO: C170/2000

In the matter between:

SOUTH AFRICAN TRANSPORT & ALLIED WORKERS UNION **Applicant**

and

OLD MUTUAL LIFE ASSURANCE COMPANY SOUTH AFRICA LIMITED **Respondent**

JUDGEMENT

MURPHY, AJ

1. The applicant, the South African Transport and Allied Workers Union ("the union"), acting on behalf of 124 of its members ("the individual applicants"), has referred a dispute to this court in terms of section 191(5)(b)(ii) of the Labour Relations Act alleging that the termination of the applicants' employment on operational requirement grounds on 29 October 1999 was unfair. Of the 124 individual applicants, 79 were retrenched and 45 elected to take early retirement as part of the restructuring process. All 124 challenge the fairness of the termination of their employment.

2. At the time the statement of case was filed the applicant was cited as the Transport and General Workers Union and nine other parties were cited in

addition to the respondent ("Old Mutual") as respondents. At the commencement of the trial on 21 June 2004, the parties by agreement sought leave to substitute the union (the original applicant's successor) as the applicant and to amend the statement of case by deleting averments and prayers to give effect to the fact that the applicant, having settled its dispute with the respondent's other than Old Mutual, has withdrawn its complaints against them. Such leave was duly granted and the amendments effected with the result that the only matter requiring adjudication is whether Old Mutual unfairly dismissed the individual applicants.

3. After the testimony of the first and only witness, Mr Wilkinson, an order was made by agreement between the parties that at this stage the proceedings would be limited to a determination of the prayer in paragraph 7(i) of the statement of case, namely, whether the dismissals of the individual applicants were unfair, and that the proceedings for the determination of the remaining relief would be stayed until this issue had been determined. Accordingly, on 24 June 2004 the trial was adjourned until 13 August 2004 for argument. After argument judgement was reserved.

4. As already mentioned, the respondent, on whom the onus rests to justify the dismissals called one witness, Mr Brian Wilkinson, its Shared Services Manager. After his evidence both parties closed their cases.

5. Old Mutual, it is well known, operates as one of South African largest financial services companies and is involved in the design, distribution and management of a variety of financial instruments, pension funds, life assurance policies, healthcare products and asset portfolios. In 1999, at the time of the retrenchments, Wilkinson was employed as the Facilities Manager of Old Mutual based at Mutual Park, the head office in Cape Town.

Wilkinson's responsibility was to manage the Facilities Management Division ("the FMD"), which was tasked primarily with overseeing the janitorial and building maintenance services of the complex in addition to providing associated services such as gardening, printing and stationery. In 1999, approximately 6 500 persons were employed at Mutual Park, either as Old Mutual employees or as the employees of contractors. Mutual Park consists of seven large office blocks. At the relevant time the FMD utilized the services of approximately 335 Old Mutual staff and 273 employees of contractors. More specifically, the facilities managed by the FMD included:

- Staff facilities (eg. Sports club, catering etc)
- Mutual Park Services (eg. Cleaning, building services, security etc)
- Office facilities (eg. Mail and transport, copying etc)
- Printing

6. The original office complex, built in 1954, was added to in 1989, 1991 and 1994. With the extensions, a decision was taken that all additional facilities management services in respect of the new buildings would be contracted in. Consequently, there was a shift in managerial strategy with regard to facilities. Instead of hiring new employees, the model employed in respect of new buildings was that senior and middle management would oversee contractors. At the same time a policy of natural attrition was applied in respect of Old Mutual staff, resulting in the FMD staff complement being made up aging employees with long service.

7. The events leading up to the retrenchments of late 1999 are best understood with reference to events commencing in early 1998 when an unsuccessful management buy-out strategy was mooted and ultimately rejected later that year.

8. In early February 1998 the facilities management team held a strategic planning workshop in Stellenbosch. The services of two professional consultants were retained and the team engaged in a so-called SWOT exercise in which the strengths and weaknesses of the unit were examined to determine whether there were any opportunities for growth or any threats that would encumber growth which needed to be considered within the context of the facilities management industry as a whole.

9. The exercise led to Wilkinson addressing a memorandum to Mr D W Walker, Old Mutual's Assistant General Manager and Chief Accountant, to whom Wilkinson routinely reported. The memorandum dated 7 February 1998 was aimed at securing executive management's approval for the adoption of a new strategy for the FMD. It explained that the FMD team saw a rapidly changing environment in terms of both the organizational and business developments taking place at Old Mutual, as well as within the external environment where a service facilities management community was emerging.

10. The envisaged strategy involved co-sourcing arrangements. Co-sourcing was to some extent already in place at the Old Mutual as a result of natural attrition in service staff areas. The proposed new strategy saw the first step in repositioning the unit as being the implementation of a "genuine co-sourcing strategy", implying that any in-house service delivery unit that was not of strategic importance to Old Mutual would be outsourced, unless the in-house unit had significant know-how, convenience or cost advantages over external suppliers, or where no external service provider community existed. This would then compel the development of a contract management competency for the control of contracted services.

11. Given the strategic direction Old Mutual was following, by concentrating on its core business, and the emergence of a "total facilities management service provider and intermediary community," the team felt it was no longer a question of whether facilities management should be outsourced, but rather a question of when. Thus, it was proposed that a process should be embarked upon to identify which units of the FMD would not be outsourced in the medium term future and then to restructure accordingly. Options for outsourcing units not retained in-house included:

    - Forming a joint venture with a current facilities management supplier.
    - Privatising the individual service delivery areas and entering into joint ventures with exiting suppliers.
    - Creating a vehicle which would allow staff to participate in equity ownership.

12. In seeking executive management's approval the team was at pains to emphasise that their aim was to develop a mechanism which was superior to "the traditional outsource/retrench/offer of employment with a new contractor route". The aim was not only to ensure that Old Mutual gained real commercial advantages, but also to ensure the unit was positioned for staff to enjoy as "soft a landing as possible in the event of a change in Old Mutual strategy towards facility management".

13. Executive management's response to this proposal was to encourage the team to continue formulating the strategy and eventually to present a formal business case. Ongoing discussions were held and some communication was directed at staff informing them that the process of repositioning was under consideration. In May 1998 a preliminary document and a Strategic Plan were

produced setting out the background and analyzing the strengths, weaknesses, opportunities and threats existing in relation to the FMD. The document described the three long range scenarios discussed at the strategic planning workshop as follows:

> "1. A business as usual case: This scenario envisages continuation of our current thrusts which are essentially to continue to refine the nature of our services and to focus heavily on cost management.
> 2. A gradual outsource case: This scenario envisages outsourcing of elements of our services in a methodical way as the external service provider community develops and is able to demonstrate cost and know-how advantages over the in-house service.
> 3. An empowerment or privatization case: This scenario envisages creation of a new services company and the outsourcing, with some form of contractual underpin or guarantee, of facilities services from Old Mutual to a new company. Existing staff would be transferred from Old Mutual to the new company and staff would own a meaningful share of the new company."

The document continued with an analysis of the pros and cons of each scenario and indicated that the management team as a whole favoured the privatization case, the third scenario, and re-emphasised that the strategy should ensure that no staff member would be worse of as a result of the plan and likewise that Old Mutual would be no worse off.

14. On 7 October 1998 Wilkinson addressed a letter to Mr B Botha of OMREB, an employee organisation, Mr N Mfundisi of the union, and Mr C Makosa, a full time shop steward, in which he included the document of May 1998 dealing with the background and analysis of the SWOT as well as the Strategic Plan, including a business case and details of a company to be formed to give effect to the privatization option in scenario three. It is clear from the letter that the purpose of supplying the documents to these persons was to allow them

to prepare for a meeting scheduled for 14 October 1998 during which they would be discussed.

15. The Strategic Plan had crystallised at that stage into a proposal to transfer all of the facilities management functions at Old Mutual to a new company that would be co-owned by management and staff which would then contract back to Old Mutual to provide the various services that the FMD was providing at that time. The contract with Old Mutual would give the company leverage to secure other facilities management contracts, in particular with associated companies such as Nedcor and Mutual and Federal. The team felt that were they not to pursue the privatisation strategy there was a strong possibility that retrenchments would happen at some time in the future and one of the other less attractive contracting out options would be considered more feasible. Therefore they hoped to pre-empt retrenchments by forming a new company using the existing staff of the FMD and then to transfer the staff across to the new company in terms of section 197 of the Labour Relations Act. For the sake of convenience I will refer to this proposal as “the TFM proposal”. The proposal was discussed at the highest level within Old Mutual in March 1998 at a meeting attended by Wilkinson, Walker and the Managing Director, Mr van Niekerk. Walker also discussed the proposal with Mr Mike Levett, the Chairman of the Board.

16. After the meeting involving Mr van Niekerk and Mr Walker, a project team was established to investigate methodologies. The team consisted of three senior managers who were released from their normal operational responsibilities. The project team concentrated on three main activities:

    - A detailed analysis of each operation within FMD in respect of the nature of the function and its relationship to Old Mutual.

- Communication sessions with department heads and section heads, exposing them to the environmental analysis and giving them opportunities to suggest future strategies.
- Analysis of structures that would allow for the transition from in-house to outsourced.

17. The Strategic Plan alludes to communication sessions in which the TFM proposal was discussed with staff. In his evidence Wilkinson confirmed that these workshops did indeed occur but failed to elaborate when. Certain conclusions emerged from the workshops. There was an acknowledgement of the threats posed by the external environment, fear as to future job security, a healthy "can do" attitude and some understanding that FMD could be a non-core support service within Old Mutual. The three possible approaches to give effect to the outsourcing exercise were:

    - A gradualist approach in which the existing in-house unit could be restructured commencing with cleaning, gardening, workshops etc. leading to the outsourcing of the contracts management.
    - An independent empowerment approach in which the unit would be restructured to differentiate between the management competencies which would stay with Old Mutual for control purposes and the formation of an empowerment vehicle to allow for the immediate outsourcing of the residual activities.
    - The joint venture or external take over approach which would be similar to the empowerment approach except with the additional idea of seeking a joint venture partner or an existing service provider in the place of an empowerment vehicle.

Ultimately, the management team of FMD opted for the creation of an empowerment vehicle and made a proposal regarding the mechanism for that. It set a time line of four months from 1 September 1998 until 1 January 1999 for the proposal to be given effect. A company (TFM (Pty) Ltd) was floated for that purpose, but in the light of subsequent events, it has remained dormant. Had TFM (Pty) Ltd become operational it would have contracted back to Old Mutual for a suggested contract period of five years, but in time would stand on its own two feet and compete in the open market place.

18. The TFM proposal met with some resistance from the employee representatives. The initial plan was to transfer the employees in terms of section 197 to TFM (Pty) Ltd without their consent. But because the team wished to alter certain aspects of the employees' contracts of employment, it became necessary to seek the employees' consent to the transfer. Accordingly, inducements in the form of share options were offered to them. The union, however, was set against the idea of a section 197 transfer and its attitude led to the rejection of the proposal at the end of the day. The employees were reluctant to change employers and to transfer to a new company without receiving severance packages.

19. Wilkinson conceded that the management team experienced difficulty explaining the concept of a transfer to a new company in terms of section 197 of the Act. A communiqué was distributed to the staff in the form of questions and answers in an attempt to clarify the proposal. Meetings were also held with staff on 22 and 23 October 1998. In the final instance, staff demanded the right to a voluntary severance package for employees who did not wish to be transferred. The position of the team in this regard was that the entire process was designed to prevent job losses. Nevertheless they recommended to senior management that the unions be invited to submit a proposal detailing the number of staff wishing to be voluntarily retrenched and that this should be considered under certain conditions.

20. In the ensuing negotiations Wilkinson addressed a letter to Mr Mfundisi of the union furnishing additional information regarding the proposal. In addition to various technical aspects, the letter, dated 4 November 1998, specifically addressed the question of why outsourcing was advantageous, despite FMD being in a position of strength. Wilkinson's written comments set out the basic rationale as follows:

> There is no question that the nature of the services performed by the facilities division are not a core business of Old Mutual. In line with the existing practices of Old Mutual, outsourcing of the division is inevitable.

The fact that the division has a relatively good track record and that it is in a position of relative strength has allowed us to table the establishment of a specialist company in which we have demonstrated its capability. Clearly, had our division been an underperforming unit or if we were in a position of weakness, the outsourcing would have followed the same route as that of the printing works – i.e. retrenchment and outsourcing of this function to a third party contractor. This process inevitably results in unhappiness and job losses.

It is submitted that our position of strength is in fact the only reason why retrenchments and job losses are avoidable. We are in an even more privileged position in that we are being given the opportunity to grow our business, which would not be possible had we remained part of Old Mutual. This business growth will hopefully allow for the creation of new jobs and enhance career and earnings for all of our staff.

21. In the same letter Wilkinson conveyed to the union that the management team were not in favour of voluntary severance packages and that they were seeking to avoid this by means of the section 197 transfer.

22. On 11 November 1998 the union declared a dispute in terms of clause 7.5 of the then existing recognition agreement. The dispute lead to unprocedural strike action, some unpleasantness and a failed attempt to bring in mediation.

23. The TFM proposal met its demise shortly thereafter at a dispute meeting on 25 November 1998, basically because Old Mutual was perceived as not being

able to guarantee job security. Mfundisi confirmed that the members preferred not to go to TFM (Pty) Ltd at all. The minutes contain the following entry:

> Mr Mfundisi indicated that the proposal as it currently stood needed to be withdrawn and management had to find out what the problems were before proposing outsourcing. He indicated that management had not canvassed the feeling of the members and that the proposal should be withdrawn and consultations entered into. He indicated that he did not know who TGWU were fighting or embarrassing as they did not know who had made the decision.

Mr Mfundisi indicated that he thought that the union could rather have run the company as opposed to the current proposal. He indicated that management should give him approval to go to the members and inform them that the proposal had been withdrawn. He indicated that it could be a good idea but that the method had been wrong. He indicated that he did not want to jeopardise the relationship. He again requested that the proposal be withdrawn and indicated that discussions could be opened as to what was on the table.

24. Further in the minutes, after the management team had caucused, Mr Wilkinson tabled the following statement at the meeting:

> Old Mutual has decided that in view of a clear majority of the Facilities Division who do not wish to be part of a new company and would, therefore, not be committed to its success, the proposal to form Total Facilities Management and to transfer facilities staff to that company in terms of section 197 of the Labour Relations Act be withdrawn at this stage.

Old Mutual wishes to record that the proposal was intended as a survival strategy and as a mechanism to prevent job losses given the clear trend towards outsourcing and retrenchment in our facilities service industry. It is unfortunate that this opportunity has been missed, largely, in our opinion, as a result of the union's unwillingness to engage in mechanisms to clarify the transfer issues and to ignore management's offer to delay the process if required so that these discussions could take place.

That was then the end of the TFM proposal.

25. Under cross-examination Wilkinson made certain concessions about the nature and intention of the TFM proposal. Importantly he acknowledged that it

had never been part of the plan to substitute existing labour with cheaper labour, as there had been no intention to effect a dramatic cost saving. There would have been no immediate cost saving to the respondent who would have underpinned the new company to enable it to meet its salary bill. This fact was stated up front in the business case prepared in mid 1998 where it was said:

> In reality there would effectively be no immediate cost savings to Old Mutual. The reason for this is that all that will initially happen is that the existing labour costs are transferred to a new entity and that Old Mutual is underpinning the new company in order to allow it to meet its salary bill. Cost savings through outsourcing can only be achieved if the amount of labour is reduced, which we submit is not possible, or if they were substituted by cheaper labour, which is not the objective. It is submitted that medium and long term savings can be achieved through productivity increases and through the uses of existing infrastructure to take on new business both external and also internal to the Old Mutual group.

26. Another feature of the TFM proposal, also reflected in the business case, was that there would be a saving of retrenchment costs estimated at R8 million. Moreover, Old Mutual took the view that the TFM proposal (by avoiding the traditional retrench and outsource practice) would have accorded better with the higher standard of employer ethics to which it aspired.

27. Wilkinson acknowledged that the starting point of the TFM proposal had been the belief that outsourcing of aspects of facilities management was inevitable and that this involved a decision about what was core and non-core business. He did nonetheless qualify this statement by claiming that the proposal amounted to the beginnings of a strategy or a mechanism for outsourcing and that any recommendations in that regard needed to be seen as part of a process. Even so, he was compelled to accept that because the focus of the TFM proposal had been on the means of outsourcing it of necessity must

have been preceded by an in-principle decision, involving the managing director, on what amounted to core business. Hence, he was also constrained to concede that if the section 197 transfer was not proceeded with, retrenchment was obviously one of the options and thus that the possibility of retrenchments would have been contemplated at this time. In short, he accepted that the TFM proposal was indeed perceived as an alternative to the affected employees being retrenched. He was able to offer no comment on the proposition that Old Mutual failed to consult on whether the changes were necessary or desirable. Management was concerned primarily with finding a mechanism for what had been designated as non-core services. Wilkinson believed that because the TFM proposal involved a section 197 transfer there was no need to engage in the same level of consultation as required in a retrenchment exercise. He further emphasized that the union had never raised any arguments about management's determination of core and non-core facilities services at the time the TFM proposal was made.

28. Wilkinson emphatically denied that the TFM proposal was offered on a take it or leave it basis. As he saw it, it was management's proposal, and while logistics had been put in place to give effect to it, including setting up the company and deploying a certain Mr Holmes to oversee the process, he contended that the proposal was not a *fait accompli.* He claimed it was always the respondent's intention to discuss the matter with the union and that there had been staff meetings in which the proposal and its contents had been communicated. Nevertheless he accepted that most of the employees had long service and were essentially being asked to give up their security of tenure in order to transfer to an unknown and untested business entity. He further acknowledged that the union only rejected the proposal once Old Mutual had indicated that it was not prepared to give a ten year guarantee. In

view of that, the TFM proposal could not be said to have been rejected outright and in the circumstances the rejection of the proposal by the union was understandable.

29. Part of the motivation for the privatisation option set out in the business case was that TFM (Pty) Ltd would an empowerment vehicle seen as “very new South African in flavour” by “allowing for a substantial staff shareholding and thereby creating the opportunity for true wealth creation”. Thorough scrutiny of the proposal during cross-examination revealed the empowerment categorisation to be mere puff and rhetoric. The portion of the business case dealing with the funding of the company proposed that the FDM’s assets valued at about R1.5 million would be purchased for R250,000 payable in cash. The discount was justified in the interests of advancing an empowerment vehicle. The capitalisation arrangement of the company shows however that the level of empowerment of black employees would have been minimal. The company was initially to be capitalised at R500,000. Share capital would have been raised by way of a private placing among the current management team of R400,000 with an additional R100,000 placed in a staff share trust account. Staff would be given options to purchase these shares in later years. The staff share trust would effectively control 20% of the company for the first three years of its existence. It was proposed that Mr D Walker, the Assistant General Manager of Old Mutual, be appointed as the trustee of the shares and that he be appointed as director and chairman of the company. On closer analysis it appeared that the 18 people who made up the management team and department heads of FMD would have controlled 80% of the company. The eight members of the management team were all White. Some of the ten department heads were Coloured, the exact number not being clear. There were no African department heads. This meant the management team of TFM would be mainly, if not exclusively, White and the

shares of the Black employees would have been controlled by a trust with control vested in one White man, namely Mr Walker. In the circumstances, the criticism that the vehicle could hardly be described as a Black empowerment vehicle is plainly valid. It was put to Wilkinson that the proposal in such terms was seen as offensive to Black people for failing to involve Black people, either in the preparation of the proposal or in the management of the company. Wilkinson conceded as much, but added that there had been a discussion with the union with a view to inviting it on to the board in a management capacity. Nevertheless he accepted that it would have been better for the ostensible beneficiaries of the scheme to have been involved in the process of formulating it.

30. In the light of these defects in the formulation and negotiation of the proposal, regrettable as it may be, it is not altogether surprising that the proposal led to industrial strife and in the end was rejected. The fault in this regard, in fairness, does not lie entirely at the door of the management team. There appears to have been little follow through or response from the union to the invitation to participate in TFM (Pty) Ltd although the details in this respect are somewhat vague. In the final analysis the proposal never really got off the ground and as such remained a proposal. One assumes that much was left for possible discussion or negotiation, which never materialised. As Wilkinson put it, “it was simply a proposal that seemed to make sense at the time”. Moreover, the union did not at any time prior to its rejection convey to Wilkinson that it found the proposal offensive for racial reasons.

31. For a period of seven months after the union’s rejection of the TFM proposal the issue of outsourcing lay dormant. At a meeting on 9 July 1999 Wilkinson presented a business case for the restructuring of the FMD, which in spite of previous misgivings opted for the traditional retrench and outsourcing route.

32. In the intervening period, Old Mutual had been engaged in the process of demutualization and enlisting on the South African and UK Stock Exchanges. As a preamble to the listing Old Mutual PLC had initiated what has come to be known as Project 500, which consisted of an undertaking to its investors and the investment community to permanently reduce its annual costs by R500 million. This required all divisions of Old Mutual to embark on a process of self-examination to see where they could cut costs. Since Project 500 only arrived on the table in October-November 1998 it was not an apparent consideration in the TFM proposal.

33. The proposal put to senior management at the meeting of 9 July 1999 had a similar rationale to the TFM proposal in that it too started from the proposition that the facilities division was not core business for Old Mutual and that there were external imperatives for change. The proposal recommended instead of a privatisation and transfer in terms of section 197, a conventional retrenchment process following the shut down of operations and the outsourcing of the work to private contractors. Wilkinson identified the imperatives for change as being, trends within the industry, the fact that FMD was already outsourcing most of the services, that most of the services could be regarded as non-core and that it would be able to save in the order of R6 million out of a total expenditure budget of R32 million. It would also allow greater flexibility in terms of inbound costs avoiding the disadvantage of an in-house operation where costs are in the main fixed costs.

34. Taking account of these considerations the Business Case referred back to the executive decision in early 1998 to follow a strategy of outsourcing and confirmed that the proposal was an alternative to the failed proposal of 1998. The Business Case sets out four options as follows:

"Option 1 – the formation of a new facilities outsourcing company

This option proposes the formation of an independent management and staff owned and funded company which would contract to Old Mutual for the provision of facility services. It allowed for the transfer of staff in terms of section 197 of the Labour Relations Act at no detriment and provided them with a financial interest in the company via a share incentive and options scheme. While executive management approved this option the proposal was found to be unacceptable by the Transport and General Workers Union and was withdrawn. It should however be noted that the proposal was supported by OMREB and non-unionised staff.

Option 2 – outsource to a facilities management company

There are a number of facilities management companies in South Africa offering facility management services. Old Mutual would contract to a single contracts management company which in turn sub-contracts for the provision of facilities services. Existing staff will be retrenched and the option exists to either require that the appointed contractor guarantee them employment or alternatively the option for an interview. Employment would be on the terms and conditions of the contractor.

Option 3 – outsource to multiple service providers

There is an established service provider community specialising in many individual aspects of the provision of facilities services eg catering, cleaning, indoor and outdoor gardening. The option exists to contract individually for the various services to be outsourced. Existing staff will be dealt with on the same basis as option 2 above.

Option 4 – create a joint venture company

In the building management and office space design arrears there is a marketable value both in terms of the expertise of the staff and the potential contract with Old Mutual. Rather than dispose of these without compensation the option to seek joint venture or like partners has been considered. Depending on the needs of the joint venture, existing staff would be transferred in terms of section 197 of the Labour Relations Act or be retrenched."

35. On the basis that the union had rejected the first option, the Business Case

recommended the implementation of a combination of the options listed, with some of the facilities services being retained in-house and others being outsourced. Thus it was proposed to retain mail, transport, events and heritage management, procurement, finance, security control, office space design, administration of sports club and training centre administration in-house for the immediate future. The balance of functions would then be outsourced on a multiple contract basis as opposed to appointing a single facilities management contract. It was further proposed that a small nucleus of staff would be required to manage the outsource contracts. The rationale for this was that some of the functions intended to be retained in-house fell in the strategic or organisational importance categories, while it would be useful to retain others, like office space design, while not of strategic importance, for a period of eighteen months during which it was envisaged that the complex at Mutual Park would be "restacked". It was felt necessary to retain the finance department in-house to ensure effective financial controls.

36. The reluctance to outsource to a single contractor was explained on the basis that such an arrangement could put Old Mutual at risk. The joint venture option was rejected on the grounds that the formation of a joint venture company between Old Mutual and an outside entity would add little value to the profitability of Old Mutual and would remain as non-core business. The TFM option was rejected as not viable because of the experience of 1998 and the resultant reluctance of the FMD management team to invest in it.

37. The Business Case then sets out the implications of the decision, pointing out that staff in the units intended to be retained in-house would not be affected and that changes would be limited to changes in the management structure of the division, that the number of staff in the division would reduce significantly from 300 to an estimated 100, that overhead expenses would be contained,

and that many services previously provided by Old Mutual staff would henceforth be provided by contractors. It recorded further that the contemplated retrenchments would have an impact on the recognition agreement with the union.

38. The employees affected were identified to be all the employees in the building services, cleaning, catering, indoor gardens, outdoor gardens, office installation group (including furniture storage), bulk and decentralised copying, stationery, space management/consulting, and assistant divisional management (excluding events and heritage management). Affected employees faced either the opportunity to apply for positions in the restructured contract management core that would remain, redeployment to other departments or divisions of Old Mutual, or retrenchment and the opportunity of an interview (possibly employment) with the contractor appointed in their service delivery area. Furthermore, the possibility of early retirement would be made available to employees who met the applicable pre-conditions, specified in the Business Case as those employees older then 55 or employees older than 50 with more than 20 years service.

39. Management proposed a consultation process with employees and their representatives commencing in July 1999 with a targeted implementation date of 1 October 1999. In the interim, negotiations began with various service providers for the purpose of obtaining prices, formulating contract terms and agreeing service levels. The Business Case clearly stated that no undertakings would be given to suppliers until such time as the consultation process had been completed. Additionally job descriptions and evaluations for the remaining management positions and the positions in the contract management group would be finalised. However, again the point was made that the process of selection for these positions would be determined in

consultation with the labour representatives.

40. The Business Case was presented to executive management and was approved by Mr Walker on 9 July 1999. Thereafter it was distributed to the labour representatives and effectively served as the written disclosure notice required in terms of section 189(3) of the Labour Relations Act. The section requires the employer to disclose in writing to the other consulting parties the reasons for the proposed retrenchments, the alternatives that the employer considered before proposing the dismissals, the reasons for rejecting the alternatives, the number of employees likely to be affected and the job categories in which they are employed, the proposed method for selecting which employees to be dismissed, the timing of the dismissals, the severance pay proposed, any assistance the employer proposes to offer the employees and the possibility of future re-employment of the employees who are dismissed. The Business Case canvasses these topics, perhaps with the exception of severance pay and the full extent of possible future re-employment. However, as will be seen, these topics were subject to negotiation at a later point.

41. The consultative process commenced on 21 July 1999 with a formal meeting involving the employee representatives and the management team. The process endured until the end of October when the retrenchments were eventually implemented. During that time there were twelve meetings between management and employee representatives. Substantial correspondence and documentation passed between the parties. As discussed more fully later, for the most part the parties tended to focus on the issues related to implementation of the retrenchments and the severance package. Prior to these proceedings surprisingly little attention seems to have been given to uncovering and explaining the rationale for the proposed

retrenchments. The minutes and correspondence deal little with the decision to regard certain units as core and others as non-core. Nor do alternatives to outsourcing, alternative means of outsourcing, or alternative means of saving costs, which over time became an important consideration in the decision to retrench, appear to have been the subject of much scrutiny or thorough discussion.

42. At the first formal meeting with the union on 21 July 1999, management presented its proposal, in the form of the Business Case, including a question and answer document elaborating on the information required to be disclosed by section 189(3). At the meeting Wilkinson referred to the earlier consultations in 1998 and gave notice that the purpose of the meeting was to reopen the consultation process in regard to the alternative options. The meeting concentrated on the exchange of information and included some discussion about voluntary retrenchment, the severance package and the nature of the envisaged joint problem solving exercise. The question and answer document attached to the Business Case made it clear that the TFM proposal was off the table because the members of management who had been the initiators of it no longer supported the concept as a consequence of the industrial action which had resulted from it. Management proposed a time frame which contemplated the retrenchments taking place by 1 October 1999. Mfundisi addressed the meeting and advised that he was not in a position to make comments at that stage, but felt that the time frame was unlikely to be adhered to.

43. The meeting with the union was followed almost immediately by a staff meeting at which all employees of the FMD were gathered. Staff was informed of what had transpired at the union meeting and was given a brief outline of the proposal and notice of the intention to embark on a formal

process of consultation. It was emphasised that the contemplated exercise was not a downsizing exercise but an outsourcing and that voluntary retrenchment and early retirement options would be available to anyone affected.

44. It was put to Wilkinson in cross-examination that it didn't make sense to follow the traditional retrench and outsource model because FMD had an excellent track record and the TFM proposal had not been premised on any need to save costs. In response Wilkinson made two points. Firstly, the TFM proposal, he argued, had been an attempt to pre-empt retrenchments by a process of privatisation coming from a position of strength. Secondly, times had changed and with the process of demutualization Old Mutual was obliged to engage in a cost cutting exercise, the so called Project 500 experience, and that this had happened immediately after the withdrawal of the TFM proposal. There had been a commitment that a certain level of expenses would be reduced and the whole company was required to contribute to that expense reduction. This involved a commitment to the investment community that Old Mutual would become more focused in terms of running its affairs and it was thus obliged to address the expensive nature of some of the services it provided on an in-house basis. And although the retrenchment involved an initial cost of R8 million in severance costs there would be an anticipated saving over a period of time estimated then to be R6 million out of a R32 million budget. These precise figures were not disclosed in the Business Case presented to the union, which instead limited itself to a general remark that the outsourcing would result in financial savings. This issue appears not to have been interrogated during the consultation process. There was some suggestion that the actual saving was unlikely to be significant and that the other objectives of outsourcing may have been of greater importance. The primary objective being the attainment of greater

flexibility in relation to future in-bound costs.

45. On 27 July 1999 management furnished the employee representatives with further details regarding the proposed restructuring of the FMD, including specific suggestions about which contractors would take over non-core functions.

46. At the next meeting of 28 July 1999, the union expressed concern that Wilkinson was not in attendance and that management had appointed a recently employed employee, Mr Holmes, to conduct the consultation process on its behalf. Holmes had originally been employed to deal with the TFM proposal, but when it was removed from the table had been appointed as procurement manager of FMD. Wilkinson testified that the reason he had withdrawn from the process was because it was felt that he (Wilkinson) had become a potential obstacle to reaching agreement. The breakdown in the discussions around the TFM proposal had been attended by considerable tension and it was feared that his presence would be counterproductive. The union saw the matter somewhat differently, they were concerned that Holmes was a new employee with little or no knowledge of the FMD and, as was borne out by later experience, was often not in a position to respond to any of the proposals from the union and had to refer to Wilkinson whenever anything of significance arose. It was put to Wilkinson that his non-involvement in the process and the choice of Holmes as the person responsible for conducting the consultations was a further indicator that the consultations had a predetermined outcome. He was steadfast in his reply that Old Mutual's thinking was founded on the relatively intense nature of the events leading up to the withdrawal of the TFM proposal and that he could have been a hindrance to an effective consultation process. As he put it, "it was probably the right management thing to do to try and keep myself away from the

negotiations or consultation. The minute that it became clear that I needed to be involved I was involved…".

47. The union's disquiet about Wilkinson's absence was exacerbated by its contention, also made at the meeting of 28 July 1999, that management was not negotiating in good faith because it had agreed during wage negotiations to negotiate a separate bargaining unit for the FMD. Wilkinson admitted that management had known during the June 1999 wage negotiations that outsourcing was going ahead, with the consequences that the bargaining unit would largely disappear. Management however did not tell the union this because it feared that had the union been so informed, successful wage negotiations would have been made impossible. This the union perceived as bad faith on the part of management. As Wilkinson saw it, the company would have been in an impossible situation if it had attempted to conduct a wage negotiation at the same time as the retrenchment exercise. For that reason they felt justified in deferring the discussion about the bargaining unit and denied that Old Mutual was acting in bad faith. On the same day Holmes accordingly addressed a written response to the union concerning the issues that had been raised. In relation to Wilkinson's non-involvement, it took the view that management would not prescribe to the union about whom it chose to represent the union and felt that it was entitled to similar treatment. It denied that it was negotiating in bad faith, arguing that the wage to negotiations and restructuring were separate issues in that it would have been inappropriate to deal with the two issues simultaneously.

48. To my mind, in so far as anything turns on it, I hesitate to draw an inference of bad faith bargaining from such a tactical position. Likewise, Old Mutual's stance regarding Wilkinson's participation, though perhaps of doubtful wisdom, was legitimate in the light of the hostility which had previously arisen

towards him.

49. Regarding the need to outsource the functions that FMD was running so effectively, Holmes stated in the letter:

> The reason for the proposed restructuring of the division is that it is non-core to Old Mutual's focus as a provider of financial services. In the proposal presented to TGWU in October last year…it was clearly stated that facilities was a non-core function, that it would be outsourced and the only debate was when this should happen.

This reason, non-core, remains the motivation for restructuring and management considers that it is now appropriate to re-enter into consultation on the proposal.

50. In the meeting of 4 August 1999, the union raised a question about the definition of core and non-core business. It noted that it did not agree with the argument that the highlighted areas were not non-core and complained that it had not seen a policy statement from the Old Mutual board on what was core or non-core. The minutes of the meeting do not reflect that management directly addressed the issue. Holmes however is minuted as having said that the decision to outsource was approved by executive management in November 1998, and that while the TFM proposal had floundered, the decision to outsource had never been withdrawn. From this one might reasonably infer that the classification of core and non-core underlying the TFM proposal rationale remained operative. Wilkinson confirmed this in his testimony although he had not been present at the meeting in question.

51. When asked to give a working definition of Old Mutual's core business, Wilkinson described Old Mutual as a financial services organisation with three main components: a long term life assurance component, a banking unit via its investment in Nedcor, and a short term insurance arm via its investment in Mutual and Federal. In addition, Old Mutual is involved in the design,

marketing and administration of various long term savings and risk vehicles, life assurance policies, healthcare, pension fund management and asset management. In relation to the ancillary services and facilities needed to perform the core business, Wilkinson argued, along the lines put forward in the TFM proposal, that functions which were prima facie not core to the provision of financial services could be considered core if they were of strategic importance, or if organisational convenience or a cost benefit justified retaining it in-house.

52. Beyond asking for a policy statement from the board on what it considered core and non-core functions, from this point onwards in the consultation process, the union made no further demands, requests or proposals in relation to the categorisation of core and non-core business. Nor did it attempt to interrogate or dispute the underlying criteria which informed the chosen classification. Nevertheless, it was put to Wilkinson during cross-examination that what was said by the union at the meeting of 4 August 1999 amounted to a challenge and a demand that management explain to the union what their definition of core and non-core was, and that the purpose of doing this was to alter Old Mutual's perceptions about the issue for the obvious reason that the categorisation of certain functions as non-core posed a threat to job security.

53. Wilkinson conceded that the union had not been consulted regarding the *a priori* decision about what was core and what was not; or whether a non-core function should be retained in-house on the grounds of strategic importance, convenience, or cost. However, in response to the claim that the union had been excluded Wilkinson stated:

> There were many things that were decided before, that during the process of consultation in fact changed. The union never raised any arguments to say "we would like to put to you the following" that these functions are in fact strategic or these

functions do in fact have a cost benefit, whatever.

Management felt it had done what it was supposed to do in this regard. The union, for reasons not explained, did not take the matter beyond complaining again in the meeting of 13 August 1999 that it had not received a policy statement from the board. No further challenge was made and no alternative proposals were put on the table. As no union official testified on behalf of the applicants one can only speculate as to the reasons. The meetings which followed focused almost exclusively on questions of implementation and the severance package.

54. In the meeting of 4 August 1999 management clarified that the Business Case was based on section 189 of the Labour Relations Act but that a section 197-transfer option could follow depending on the consultation process. Wilkinson emphasised in his testimony more than once that management had been open to another section 197 option, although, given the experience of 1998, a management buyout was unlikely. Throughout the process the union never came up with another section 197 option, despite intimating that it was considering doing so.

55. Immediately after the meeting of 4 August 1999 Holmes addressed a letter to the union setting out the proposed severance package as follows:

- Half a months salary for each completed year of service up to a maximum of 12 months salary.
- Payment of the 1998/99 annual bonus and the pro-rata bonus for the period 1 July 1999 to date of severance.
- Pay in lieu of accumulated annual leave.
- Pay in lieu of long leave where the long leave cycle has been completed and the leave has not yet been taken.
- Two months notice, which subject to negotiation, the staff member will not be required to work.

56. The letter of 4 August 1999 also proposed an early retirement option which would permit members of the Old Mutual Staff Retirement Fund or the Old Mutual Pension Fund over the age of 55, or alternatively who had 20 years service and who were older than 50, to proceed on early retirement. This was later extended to staff who were members of the union's provident fund and extended further to allow early retirement for persons whose age and years of service combined to equal 70.

57. In the period between 4 August and 30 August 1999 the union was provided with detailed proposals from external service providers bidding to render facilities services to Old Mutual.

58. At the meeting of 13 August 1999 Wilkinson mentioned that Old Mutual wished to ensure that the communication process was open and wanted to discuss alternatives to the Business Case with the union once they had consulted with their members. The offer was made to the union to engage more frequently with their members if required. Wilkinson further stated that it was necessary finalise consultation on the Business Case before considering options to reduce the impact of the restructuring. Nevertheless, at this meeting Old Mutual conceded to the bumping of temporary staff within the mail handling area to allow for permanent members to obtain these jobs.

59. At the next meeting, on 30 August 1999, Mfundisi stated that the union had not received a mandate from its members. Holmes is recorded as responding that management were concerned that there was nothing on the table from the union in terms of suggestions or proposals regarding the Business Case. Mfundisi undertook to fax through proposals to Holmes once he had received input from the members at their meeting.

60. Management then tabled a financial analysis of the Business Case. The financial analysis was a detailed working of the extent of the savings expected to be achieved in each department slated for outsourcing. It chronicles the commercial rationale for the restructuring of the FMD with reference to possible savings.

61. Despite Holmes sending a written reminder to Mfundisi on 31 August 1999, no alternative proposals were faxed to him. In his testimony Wilkinson confirmed that the alternative proposals promised by the union at the meeting of 13 August 1999 never materialised. On the question of whether the decision to outsource remained open to debate he remarked:

> Clearly whilst in some instances we took decisions, those decisions were subsequently reversed because of representation and TFM was an example of a decision being reversed M'lord. So it is difficult to understand now but the decision could well have been overturned M'lord, if there had been something put on the table that was convincing enough to make us do something else….the decision could have been reversed, the timing could have been changed, many things could have happened M'lord.

62. At the meeting of 6 September 1999 the union did say that it did not want to "dismiss the section 197 option". For reasons not explained, the union did not follow up on this and, as already intimated, never tabled a proposal either on another section 197 scheme or any other form of new business. During cross-examination counsel for the union put it to Wilkinson that such a proposal would have been unlikely to fly, if it was not of financial benefit to the members of management who had been the originators of the original TFM proposal. Wilkinson responded by making two points. First of all, the original management buyout scheme had involved the members of management investing their own money in the company and given the resistance to it they

were understandably reluctant to proceed down that road again. Secondly, if something had been put on the table he reiterated that it would have been discussed and considered in good faith.

63. It was then contended that Old Mutual had fallen short in its failure to be pro-active by not suggesting alternative privatisation means and black empowerment options, or by assisting the employees to form groups to tender for one of the multiple service provider contracts that were on offer. Wilkinson claimed that management had brought up the latter idea a number of times. The only employees that showed any interest were those who formed a company to take on responsibility for the external grounds maintenance. Old Mutual assisted them by retaining the services of Ernst and Young's Small Business Consulting Division to lend a hand in developing a business plan.

64. Wilkinson's testimony is borne out by a letter he addressed to Mfundisi on 9 September 1999. In it he wrote:

> It has become very clear from the meeting that, should the proposal to outsource certain departments proceed, the dominant concern will be that the affected staff have an employment opportunity with a new contractor. A further material factor is the indication that in some cases a small business creation opportunity exists and that staff may wish to group together to form such enterprise.

Old Mutual has already indicated in principle support of both these issues.

In order to realistically evaluate both the employment opportunity and the small business proposal it is necessary that Old Mutual request proposals from the open market. Please be assured that the decision to issue these "Requests for Proposals" to the open market in no way binds Old Mutual to accept any proposal nor should it be construed that Old Mutual is no longer willing to consult with you as to the basic business case to outsource and alternatives to the proposal. It is effectively simply a gathering of factual information which may have a material impact on the issues listed above. Extracts of the relevant sections of the request for proposal (RFP) document are attached for you information. A full copy of any of the RFPs will be made available on request.

The business case also makes provision for the retention of a contracts management infrastructure. So as to allow staff to understand whether, if the proposal to outsource proceeds, they will be retained as part of this group or not, it is necessary to advertise these position and to commence a selection process. David Holmes will consult with your group on Old Mutual's selection proposal. Whilst we envisage that applicants will be notified of their success or not, the actual appointment will not be implemented until such time as all consultations are completed and the proposal to outsource is implemented. Clearly, if an alternative to outsourcing is accepted, the appointments would not proceed.

65. The meetings that followed involved extensive, comprehensive negotiations about the severance package, improving the voluntary retirement option, selection of employees for employment in the various vacancies arising out of the restructuring of the FMD, amending the Business Case to re-categorise certain limited functions as core, and the guarantee of employment by the contracted service providers. The union tried particularly hard to improve the severance package by negotiating for additional compensation for the loss of the subsidised mortgage bond facility. The employer stood firm on this issue refusing to make an additional award, arguing that the two months notice payment compensated sufficiently for this. Similarly it refused to pay on a pro-rata basis long leave which accrued under the existing policy only on completion of the long leave cycle (10 years). It took the view that the severance pay was generous enough, being more than double the statutory minimum. The package was further supplemented by two months notice pay. Significant concessions were made however. Besides agreeing to write off staff loans, the option of voluntary retirement was extended in order to create bumping opportunities and was made available to persons younger than 50 who had long service. Moreover, Old Mutual guaranteed a minimum wage of R1800 per month (as opposed to the original suggestion of R1600 per month) by the contracted service providers. The minutes disclose that the approach to filling vacancies was handled co-operatively, and proceeded smoothly.

66. On 6 October 1999 Wilkinson addressed a letter to Mfundisi summing up the

situation as of that date. The letter reads:

> On 21 July 1999 we announced our proposal to restructure the division to staff and union representatives. Subsequent to this, a number of consultation meetings have been held with union representatives and correspondence has been exchanged.

The consultation process has not identified any viable alternatives to the Business Case. While you might argue that consensus on the Business Case has not been reached, there is, in our opinion, tacit acceptance of the proposal. It has therefore been decided to proceed with the restructuring of the division. As you are aware, request for proposal documents have been issued and it is envisaged that the awarding of contracts will be finalised during October 1999.

A number of alternatives to minimise the number and the effect of the dismissals have been agreed. Appointments to the retained positions in the new structure have been finalised and applications for vacant positions in the mail room are currently being considered. In addition, certain potential vacancies as a result of the offer of voluntary severance to unaffected staff will be advertised shortly.
We are confident that through the steps mentioned above and possible employment with service providers, offers of employment will be secured for the majority of affected staff. It is intended that the position of all staff will be clarified by 31 October 1999.

The question of severance pay for dismissed employees has already been raised at consultation meetings. We will continue to consult in an endeavour to reach consensus on this matter.

67. Wilkinson explained what he meant by “tacit acceptance”, saying, while it had become obvious that the union did not agree with what Old Mutual was doing, the direction taken during the consultations confirmed that outsourcing was going to happen in any case. Seeing that the parties were already consulting over things like voluntary severance arrangements and severance packages, Old Mutual took this to indicate that there was certainly acceptance that the retrenchments were going to happen, even though no unequivocal agreement had been reached.

68. Wilkinson’s understanding of the situation was perhaps a tad optimistic. Two weeks later on 20 October 1999 Mfundisi wrote a letter to Old Mutual stating:

> It is now clear from the response that we got from yourselves that we will not be reaching an agreement on issues tabled by both parties in the restructuring meeting.

We have always maintained from the beginning that any restructuring should not lead to job losses or change in conditions of employment. Your business case was not clear as to why your company wanted to outsource certain functions in the facility division.

It is also clear that conditions of your current staff will change when one looks at the companies that have been awarded the tender.

69. The letter goes on to deal with issues regarding subsidising bonds, spouses' insurance cover, long leave and other issues of implementation, and lastly declared a dispute.

70. Despite the union's position, the meetings of October 1999 dealt almost exclusively with implementation issues. At the meeting of 18 October 1999 Wilkinson presented a summary of the contracts to be awarded to nine different service providers who would have responsibility for the outsourced functions of cleaning, tea, fields, indoor potted plants, churn and furniture management, stationery and copying and technical services. Old Mutual's decision to award contracts was clearly influenced by the ability of contractor to offer employment to the staff. This key consideration weighed heavily in the decision making process and had the result that every affected employee who wanted to be employed was given the opportunity of employment. Wilkinson acknowledged, however, that the salary might have been different in certain instances although the minimum was set at above the market norm of R1800 per month. To facilitate the employment process Old Mutual set up dates for interviews with the service providers and communicated this to staff. The interviews took place on Friday 22 October and Monday 25 October 1999.

71. At the first dispute meeting on 25 October 1999, following the union's declaration of a dispute on 20 October 1999, Holmes made the point that the issues which had been raised in the dispute letter had been previously debated at earlier meetings and indicated that management did not propose

entering in further discussions on these topics. In spite of this stance, there was indeed movement on the issues subsequently. In the second dispute meeting on 26 October 1999 the employer made the concession of shifting the minimum wage from R1600 to R1800, it waived the balances on personal staff loans and changed the so called 70 rule allowing persons under the age of 50 to retire provided their age and years of service totalled 70.

72. This was the last meeting between the parties before the retrenchments were implemented. It was followed by a letter from Holmes to the union on 27 October 1999 in which among other things he said:

> A copy of the business case approved by Mr van Niekerk, Managing Director, has already been supplied to you. The decision to proceed does not require the approval of the Old Mutual board.

At our meeting of 4 August 1999, we emphasised that our Business Case did not propose a section 197 transfer … The alternative of a section 197 option had previously been rejected by yourselves in terms of the TFM proposal. You indicated at our meeting on 6 September 1999 that you wished to keep the option of a section 197 transfer open. The matter has not been raised again in subsequent meetings.

73. The retrenchments were implemented on 31 October 1999. 160 staff members either took early retirement or were involuntarily retrenched. Of the union's membership, 45 took early retirement and 79 were retrenched. 35 of the union's members were placed with contractors at the same salary, 48 at a reduced salary and 41 elected not to seek employment with the contractors. The average retrenchment package amounted to 8 months salary with R2.8 million paid as severance pay to union members.

74. As stated at the outset, the applicant union has brought this application on behalf of the 79 of its members who were retrenched and the 45 who opted for early retirement. At the end of Wilkinson's cross-examination, counsel for the union sought to stipulate that agreement had been reached with the

respondent's legal representatives that they did not intend to argue that those applicants who chose early retirement were not dismissed within the meaning of section 186 of the Labour Relations Act. I informed counsel that such was a question on which the court needed to be persuaded, since it goes to the court's jurisdiction in terms of section 191 and 193, read with section 186 of the Act. In as much as the issue concerns the court's jurisdiction and therefore the *locus standi* of some of the applicants to bring the proceedings, this court is not bound by the undertaking or agreement reached between the parties.

75. Section 191(5)(b) bestows upon an employee the right to refer a dispute to the Labour Court for adjudication where the alleged reason for dismissal is based on the employer's operational requirements. Such reference is required to be preceded by conciliation either by the CCMA or a bargaining council with jurisdiction in terms of section 191(1)(a). The Labour Court's jurisdiction to determine dispute about dismissals is dependant on the dispute involving a dismissal as defined. Section 186 of the LRA defines a dismissal to mean that –

> (a) an employer has terminated a contract with or without notice;
> (b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms or did not renew it;
> (c) an employer refused to allow and employee to resume work after she took maternity leave in terms of any law, collective agreement or contract of employment;
> (d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to reemploy another;
> (e) an employee terminated a contract of employment with or

without notice because the employer made continued employment intolerable for the employee;

(f) an employee terminated a contract with or without a notice because the new employer, after a transfer in terms of section 197 or section 197(A), provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided for by the old employer.

76. With the exception of paragraphs (e) and (f), the definition recognizes a dismissal to be conduct at the instance of the employer. Paragraphs (e) and (f) are situations of constructive dismissal where the employee resigns, either because the employer made continued employment intolerable or because a new employer after a transfer did not comply with the requirement that conditions of employment remain substantially the same. Any other conduct at the instance of an employee, such as resignation, does not constitute a dismissal. The issue for determination here is whether an employee exercising the right to accept early retirement as part of a retrenchment exercise can be said to have been dismissed.

77. The exercise of an election to retire may occur at the instance of an employee, and frequently does. More often the case, retirement occurs as a consequence of an automatic termination of the employment relationship when the employee reaches a certain age that has been agreed upon in advance or is the accepted norm in the particular employment context. Opting for early retirement is different. At first glance it does not seem to fall within any of the categories of conduct contemplated by the definition of dismissal in section 186.

78. Mr Kahanovitz, counsel for the applicants, sought to persuade me that the

early retirement option in this instance should be viewed as a form of severance benefit available to retrenchees, and that the contract of employment was terminated at the instance of the employer as part of the retrenchment exercise and thus fell within paragraph (a) of the definition. I am unable to agree with this proposition. During the process the employer offered an election to certain of the employees facing retrenchment who qualified for early retirement in terms of the rules of the retirement funds as amended to give effect to the 70 rule. Either they could opt for retrenchment and receive a retrenchment package or they could take early retirement and receive a pension fund benefit and have the continued benefit of post retirement medical aid. By electing early retirement such employees relieved the employer of the burden of dismissing them. Unlike normal retirement, which may amount to the termination of employment through the effluxion of time, early retirement is akin to resignation and normally involves the communication of an intention to terminate employment by the employee. In the circumstances, the exercise of such an election cannot be a dismissal. It follows that the 45 individual applicants who were granted early retirement have not been dismissed. They accordingly lack standing to bring suit to this court for unfair dismissal. In the result, their application for relief for unfair dismissal must be refused on that ground. All the same, it remains necessary to consider the merits of the application in respect of the remaining 79 individual applicants who were indeed dismissed.

79. The individual applicants enjoy protection against unfair dismissal and the employer is required to prove that the reason for dismissal was a fair reason based on the employer's operational requirements and that the dismissal was effected in accordance with fair procedure, taking into account the relevant Code of Good Practice. Because retrenchment is a no fault dismissal, and because of its human cost, the Act imposes an obligation on employers to

ensure that all possible alternatives to dismissal are explored. The employer should in all good faith keep an open mind throughout the consultation process and seriously consider proposals put forward. Section 189(3) of the Labour Relations Act is central to the process in that is defines the consultation agenda and obliges the disclosure of relevant information. At the time of the applicants' dismissal section 189(3) merely obliged the employer to disclose information. In its present form the section requires the employer to invite consultation on the topics identified in section 189(2), namely measures to avoid or minimise dismissals, the timing, mitigation of adverse effects of the dismissals, selection criteria and severance pay. The amendment requiring an invitation to consult clarifies the employer's obligations in the process and states explicitly what previously was in any event implied.

80. The starting point is to enquire whether the employer has proven a fair reason for the applicants' dismissal. It is trite to say that employers are entitled to reduce staff for a variety of reasons, including pursuing what they may consider to be a better cost structure. That said, this court remains duty bound to exercise an appropriate level of supervision and review in relation to employer's decisions regarding the need for retrenchment.

81. The debate about finding the appropriate level of scrutiny is well known, and has endured for the best part of two decades. Different judges have formulated the test differently at different times, introducing subtle variations and nuances. Initially, the courts were reluctant to interfere with the employer's prerogative to take legitimate business decisions about their labour needs. As Grogan (*Dismissal* 223) points out, as long as they were satisfied that the dismissals were linked to genuine economic considerations, the courts generally adopted the view that it was not their task to correct

legitimate business decisions which might have been in some respects unwise. See *Morester Bande (Pty) Ltd v National Union of Metal Workers of South Africa* (1990) 11 ILJ 687 (LAC). Furthermore, the courts have held that a desire to increase profits and business efficiency constitutes a fair reason to retrench. This approach, described by some as an abstentionist approach, was thrown into question by the Labour Appeal Court in the landmark decision of *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC) which suggested that fairness in the context of the law of unfair dismissal went further than testing the *bona fides* and the commercial justification of a decision to retrench and that the question was rather concerned with whether the termination of employment is the only reasonable option in the circumstances.

82. The approach in *Atlantis Diesel Engines* has been nuanced further in subsequent decisions. In *SACTWU & Others v Discreto* (1998) 19 ILJ 1451 (LAC) the court stated the appropriate test as follows:

> The function of a court scrutinising the consultation process is not to second guess the commercial or business efficacy of the employer's ultimate decision….but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham…The manner in which the court adjudges the latter issue is to enquire whether the legal requirements for a proper consultation process had been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process. It is important to note that when determining the rationality of the employer's ultimate decision on retrenchment, it is not the court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational, commercial or operational decision, properly taking into account what emerged during the consultation process.

83. In *BMD Knitting Mills (Pty) Ltd v SA Clothing and Textile Workers Union*

(2001) 22 ILJ 2264 (LAC), the Labour Appeal Court suggested that a higher standard of substantive review was required. It observed:-

> I have some doubt as to whether this deferential approach which is sourced in the principles of administrative review is equally applicable to a decision by an employer to dismiss employees particularly in the light of the section of the Act, namely, "the reason for dismissal is a fair reason". The word "fair" introduces a comparator, that is a reason which must be fair to both parties affected by the decision. The starting point is whether there is a commercial rationale for the decision. But rather than take such a decision at face value, a court is entitled to examine whether a particular decision is also fair to the affected party, namely the employees to be retrenched. To this extent the court is entitled to enquire whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the contents of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness, is the mandated test.

84. With the amendments to the legislation in 2002, the legislature has given a clearer indication of the standard to be applied. Section 189A(19)(b), applicable to employers retrenching a significant number of employees, imports into the test for adjudging the fairness of a retrenchment the requirement that the dismissal must be "operationally justifiable on rational grounds". Grogan argues that the use of the phrase "justifiable on rational grounds" implies that the approach envisaged is akin to that adopted by the Labour Court in reviewing arbitration awards by the CCMA. Still, the question remains whether the employer is obliged to satisfy the court that dismissal was the only option under the circumstances or that retrenchment can only be used as a means of last resort. The balance of authority suggests not.

85. The test formulated by the legislature in the 2002 amendments harkens back

to the principle of proportionality or the rational basis test applied in constitutional and administrative adjudication in other jurisdictions. As such, the test involves a measure of deference to the managerial prerogative about whether the decision to retrench is a legitimate exercise of managerial authority for the purpose of attaining a commercially acceptable objective. Such deference does not amount to an abdication, and as stated in *BMD Knitting Mills (Pty) Ltd,* the court is entitled to look at the content of the reasons given to ensure that they are neither arbitrary nor capricious and are indeed aimed at a commercially acceptable objective. The second leg of the enquiry is directed at the investigation of the proportionality or rationality of the process by which the commercial objectives are to be achieved. Thus, there should be a rational connection between the employer's scheme and its commercial objective, and through the consideration of alternatives an attempt should be made to find the alternative which least harms the rights of the employees in order to be fair to them. The alternative eventually applied need not be the best means, or the least drastic alternative. Rather it should fall within the range of reasonable options available in the circumstances allowing for the employer's margin of appreciation to the employer in the exercise of its managerial prerogative. The formulation of the test in this way adds nothing new. It simply synthesises what has already been said in *Discreto* and *BMD Knitting Mills*. The two decisions are not entirely at odds with one another. They are simply elucidations of the governing principle that the decision to dismiss must be operationally justifiable on rational grounds, which permits some flexibility in the standard of judicial scrutiny, depending on the context.

86. In the present matter the employer's rationale for its decision to retrench developed over time from a strategic workshop in early 1998, and even before, being finally formulated in the Business Case prepared in early July

1999. It was presented to the union in its initial manifestation during the negotiations of the TFM proposal and finally on 21 July 1999 when it was formally tabled as the outsourcing/retrenchment strategy.

87. Both the Strategic Plan of February 1998 and the Business Case of July 1999 identified the need to restructure the FMD in anticipation of internal changes within Old Mutual and in the face of a changing environment and practice within the facilities management industry. Inextricably linked to the need to restructure, was the decision that the facilities management function was non-core to Old Mutual's business and that non-core functions should only be retained if there was as a strategic, cost saving or organisational convenience advantage in doing so. Management's original proposal to privatise and outsource to a management buy-out company floundered in the face of union opposition. The TFM proposal had no cost saving advantages other than perhaps potential greater flexibility in relation to inbound costs, but would have attracted positive social sentiment. The harsher traditional outsource and retrench route which was finally implemented, involving outsourcing to multi service providers and retrenchment, had the additional advantage of saving about R6 million in annual costs (arguably a minimal amount in the context of Old Mutual's operations) and thereby contributed to Project 500.

88. The union's attack on the underlying rationale for the retrenchments throughout the process was surprisingly muted and indirect. The dispute letter of 20 October 1999 certainly makes it clear that the union did not see the need for outsourcing. Yet throughout, and despite repeated invitations to do so, it never interrogated the rationale for outsourcing, nor requested details of the anticipated financial savings. Nor did it make any proposals whatsoever for an alternative strategy. By and large its approach suggested that it had accepted the need to outsource and chose instead to secure the best

severance package for its members. In the result, there is no evidence that the decision to outsource was not for a legitimate, commercially justifiable objective, or that it was arbitrary or capricious in any way.

89. Rather than directly attacking the commercial objective of the decision, the union focused its attack on the allegation that the decision to outsource and the underlying categorisation of core and non-core functions was presented as a *fait accompli,* claiming that it had been denied the opportunity to consult and influence that decision. It was argued that by March 1998 the company had decided what was core and what was non-core and to outsource non-core, and that the union was not consulted at that critical time.

90. It is true that Wilkinson in his testimony conceded that no consultations had been held with the union before management decided what was core business and to outsource non-core functions. Indisputably this decision was taken in principle prior to the formulation of the TFM proposal. Moreover, when the retrenchment consultation process began in July 1998 management stated clearly that it was of the view that facilities was non-core and that outsourcing was inevitable. Thus, in the memorandum addressed to Mfundisi dated 28 July 1999 it is stated:-

> In October last year…it was clearly stated that facilities was a non-core function, that it should be outsourced and the only debate was when this should happen.

91. Mr Muller, who appeared on behalf of Old Mutual, submitted that the arguments so put approached the particular facts of the case formulaically. He contended that there was no sudden epiphany by the company in early 1998 that the FMD performed non-core functions. It was, he argued, implicit in the decisions which had been implemented since the late 1980s. Had the union, at the time of receiving the Strategic Plan or the Business Case,

considered management's view on the matter to be contentious, it was, he argued, on the table for debate. He stressed Wilkinson's testimony that there had been many things decided in principle before being tabled, but which during the process of consultation in fact had changed. The union had never raised any arguments to say that the functions selected for outsourcing were in fact strategic or had a cost or organisational benefit. The union basically failed to engage on these issues during the consultation process. I am inclined to agree.

92. The fact that management had an *a priori* view did not mean that the management team had closed its mind to alternatives. There were just no other proposals forthcoming from the union. In his memorandum to the union on 28 July 1999, Holmes referred only to the TMF proposal as being no longer a viable option. His position cannot be interpreted to suggest that management had closed its mind to a debate about non-core functions and the need to outsource them. While it is correct that the union raised the question of a pre-determined decision on the question of what was core and non-core and requested a policy statement from the board in that regard, (at the meetings of 4 August 1999 and 14 August 1999), it did not press the point and proceeded in a manner which suggested that it had come to terms with management's decision, while having some reservations

93. Similar conclusions can be reached about the presentation of the TFM proposal. The fact that TFM (Pty) Ltd was registered as a company before the union was informed of the plan, and that Holmes was hired to manage the proposed contract with TFM (Pty) Ltd, and that Wilkinson had advised executive management that the transfer programme was underway within two weeks of the TFM proposal having been tabled, do not justify the conclusion that the TFM proposal was presented as a *fait accompli*. As borne out by

subsequent events, the fact that the logistics had been put in place for a privatisation and outsourcing did not mean that it had become a foregone conclusion. In any event, it is debatable whether the same standard of consultation was required in relation to the envisaged section 197 transfer.

94. The respondent additionally justified its approach with reference to the comments made by Conradie JA in *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) ILJ 129 (LAC) where in relation to timing the announcement of the possibility of retrenchments, the learned judge observed:

> News of impending lay offs are profoundly disturbing to employees. It is bad strategy to give cause for any destabilising news until such time as management is reasonably sure that retrenchment is the way to go. In the interests of productive efficiency and labour peace, there is a natural inclination not to put out bad news until it is absolutely necessary. That is the employer's dilemma. A prudent manager will not put out such news unless he or she is sure that it is the right thing to do, sure, in other words that….. the proposed dismissals are operationally necessary. From a productive point of view the employer wants to be certain of his decision before facing the disruption which it is bound to cause, from an industrial relations point of view: he dare not be certain before he invites consultation (and thereby makes his intentions known).

95. In other words, the fact that the management team was strategic in its timing of the announcement of the TFM proposal does not of itself mean that it presented the proposal as a *fait accompli*. Likewise, the fact that the members of the management team were likely to be the most significant beneficiaries of this scheme did not altogether taint it as an unacceptable option. The evidence shows that the promoters of the TFM proposal were amenable to discussing the details of the proposal and understood that they needed to reach consensus in order to take the project forward. Wilkinson is minuted as saying in the meeting of 14 October 1998 that the intention was to

seek consensus to move to TFM – working with all the bodies. In his letter to Mfundisi dated 7 October 1998 he also stated that he was desperately anxious to build a fully inclusive process and wanted the union's input.

96. Mr Kahanovitz made much of the somewhat transparent attempt to sell the TFM proposal as an empowerment vehicle. By presenting it in this way, it may have been that Old Mutual agreed to sell the TFM assets at a substantial discount to market value and to pay a premium for delivery of its services by locking itself into a long term contract. Wilkinson was forced to concede that putting together a proposal to empower black people without involving them in its preparation was possibly offensive to black people, especially if the ostensible beneficiaries of the scheme were not involved in the process of formulating the plan and following it through. By the same token, Wilkinson also testified that the union at no stage conveyed to management that it found the TFM proposal offensive for racial reasons. Nor is it clear that it was rejected for that reason. The evidence suggests rather that it was rejected because the employees were legitimately concerned about losing their security of employment by agreeing to such a transfer arrangement.

97. The rejection of the TFM proposal in fairly implacable terms, for whatever reason, made it an unlikely alternative in the retrenchment negotiations of 1999, or at least certainly in the form in which it had been proposed. The Business Case of July 1999 proposed four options as possibilities under the heading "alternatives considered". Management's recommendation was to implement a combination of the options listed, involving a partial outsourcing to multi-service providers. As has been mentioned, attempts to elicit proposals from the union for an alternative proposal proved fruitless. The evidence is fairly persuasive that the possible consideration of an empowerment vehicle involving a section 197 transfer was never entirely

removed from the table during the 1999 round of discussions. All that was off the table was the TFM proposal, which had floundered against union resistance and some unprocedural industrial action causing the management team to be reluctant to participate in a management buy out. A management buy out was not the only kind of section 197 arrangement that could have been contemplated or implemented.

98. Insofar as section 189 imposes a duty on the employer to take steps on its own initiative to propose alternatives, to my mind, the respondent did so by first attempting the TFM proposal and subsequently setting out four options in the Business Case. The one eventually implemented fell within the range of reasonable options in the circumstances. With the benefit of hindsight, one or other of the proposed alternatives might have better served the parties. The fault, in my view, lies in the failure to thoroughly interrogate the proposal put forward with a view to coming up with a better alternative. By not doing so the union lost its opportunity to influence the exercise of the employer's managerial prerogative. As Landman J said in *SACWU v Afrox Limited* [1998] 2 BLLR 171 (LC):

> A failure to utilise this opportunity closes this avenue. Criticism after the event is no substitute for co-operation when it is called for during the consultation process.

99. It is implicit in section 189(3)(b) that it is open to the employer to consider and reject alternatives to dismissal prior to consultation. To the extent that the other consulting party fails to interrogate or propose alternatives to the dismissals or to participate in the consultation exercise meaningfully, the employer is entitled to take the necessary decisions, provided it does so fairly and in accordance with the further requirements of the Act. In the premises, I am unable to find that the employer's reason for the dismissal was unfair by virtue of it failing to give proper consideration to alternatives.

100.Mr Kahanovitz has made the related point that had the union been told during 1998 that the rejection of TFM proposal was likely to lead to retrenchments then it was likely that they would have opted for the TFM proposal. Management's failure to make that disclosure, or attaching that significance to the alternative, resulted, so the argument went, in the alternative which had the greatest prospect of saving jobs being off the table during the retrenchment negotiations. I am inclined to agree with Mr Muller that such an interpretation overstates the point. It should have been clear to any reader of the 1998 Strategic Plan that management at least held the view that it was inevitable that the FMD functions would ultimately be outsourced and that the prospects of job losses, in the event of an alternative not being found, was a distinct possibility.

101.It was also contended on behalf of the union that the dismissals were substantively unfair because the respondent had made no proposals at all in respect of fair and objective selection criteria and that there had been no discussion or consultation in that regard. Section 189(2)(b) provides that the consulting parties should attempt to reach consensus on the method for selecting employees to be dismissed. Section 189(7) requires that the employer must select the employees to be dismissed according to selection criteria that have been agreed to by the consulting parties or, failing agreement, in accordance with criteria that are fair and objective. It was submitted that one could infer from the evidence that the employees in the affected departments of FMD were automatically selected and that such a criterion was neither fair nor objective. One understands the point to mean that the respondent had a duty to consider LIFO and bumping.

102.The rationale behind the selection of the employees for retrenchment was to

target employees for dismissal in the departments which had been outsourced. In other words, all employees in any department that was being outsourced were likely to lose their jobs. The Business Case (and the question and answer document that accompanied it) identified the departments which would be affected by the proposed restructuring. They explained why certain departments would be excluded from the restructuring process. This blanket approach was implicit to the proposal and at no stage did the union propose any alternative criteria, though it was able to effect some bumping in respect of the mailroom and in other areas. The blanket approach is partly justified by the fact that employment was available to all employees being dismissed with the new contractors who would undertake the services previously performed by the department. There was thus an inherent logic in the blanket approach, even if it did not have the best possible results for employees with the longest service. In the context in which the selection occurred, it is difficult to make a finding that the applied selection methodology of itself rendered the dismissals substantively unfair.

103. The applicant has also alleged that the manner in which Old Mutual went about the outsourcing exercise gives rise reasonably to an inference that it acted without *bona fides*. The claim is that an inference of bad faith can be drawn from the fact that it took nine months after the withdrawal of the TFM proposal to commence the retrenchment consultations and that no evidence was heard from the respondent's "actual decision makers" on why they would not have been prepared to entertain a modified TFM proposal nine months later. The submission is without merit. The delay was explained as being a result of the demutualization process, and the evidence is clear that Old Mutual was ready to entertain a modified TFM proposal. The onus, given past events, was on the union to put that proposal forward. It singularly failed to do that. For what it is worth, one may tentatively venture that the outsourcing of

the jobs of some of the longest serving employees of Old Mutual, all of whom were at relatively advanced age, for a minimal saving of R6 million per year, falls somewhat short of the standard of social responsibility one might expect from a company like Old Mutual, that alone does not mean that it acted *mala fides*.

104. In the light of the aforegoing, I am unable to conclude that the dismissal of the individual applicants who did not take early retirement was substantively unfair.

105. The applicant has also raised allegations of procedural unfairness. The most important of these is that the respondent failed to consult when retrenchments were first contemplated. While this allegation goes to procedural fairness, it is of such a nature that if true could lead to a result of substantive unfairness.

106. The aim of the problem-solving and consultation process is generally to attempt to avoid dismissals or at least to bring about a reduction in the number of dismissals and to mitigate the effects. Both section 189(1) of the LRA and the Code of Good Practice stress the need for consultations and the joint, problem solving exercise to commence as soon as a reduction of the work force is contemplated by the employer. The longer the employer waits to engage with the union about the problem the less the prospect of the parties being able to find alternative solutions to dismissal. The applicant alleges that although the respondent contemplated retrenchments as a consequence of the decision to outsource, it made a conscious decision not to consult with the union. The reason advanced for this by the respondent was that while a section 197 transfer was being proposed, no retrenchments were contemplated and therefore consultations were not required, even though the TFM proposal was an alternative to retrenchments because in the event of

the proposal not succeeding retrenchments were an inevitability. Moreover, once the respondent withdrew the TFM proposal, it was at a point where, on its own version, outsourcing would lead to retrenchments in the near future. On this basis it was submitted that there was a duty on the respondent to commence consultations about retrenchments either in March 1998 or at the latest in November 1998.

107. To my mind, the argument suffers a degree of artificiality. Both in logic and in law the duty to consult arises once the possibility of retrenchment is reasonably foreseeable. The test of reasonable foreseeability implies that not every future prospect of retrenchment imposes a duty of consultation. There should be some imminence and the prospect of retrenchments ought not to be too remote. Sight should not be lost of the fact that the aim of the TFM proposal was to avoid retrenchments. It was a process that was initiated at a lower tier of management and the union became involved not long after the proposal had been formulated. However, what was put into position was not a process that would necessarily result in retrenchments. Middle management read the future as posing a threat to future employment because outsourcing was increasingly likely and it wanted to obtain the best advantage for themselves and similarly for their employees. When Wilkinson obtained the permission of van Niekerk to proceed, he did not understand that he had an authority to implement a process that would lead to dismissal. As he put it in his evidence:

> I walked out of the meeting with the understanding that we had, in principle the approval to pursue a process that would lead to a mechanism being put in place. We didn't in fact discuss – didn't go into huge detail on specifics of which unit is in and which unit is out. So it was a process.

108. What was contemplated was a process aimed at developing a mechanism

which was superior to the traditional model of "outsource/retrench/offer of employment with a new contractor". The question and answer document distributed in mid-1998 specifically stated that employees would not be retrenched as this was a process which was designed to prevent retrenchments and job losses. Accordingly, it cannot be said that retrenchments were contemplated in March 1998. They were a possibility, but there were many intervening factors which had they been successfully negotiated and implemented could have rendered that possibility an unlikelihood. To the extent that management might have contemplated retrenchments after the failure of the TFM proposal in November 1998, justification existed for the delay in consultation because of the demutualization process. The decision to shelve the matter until later, if there indeed was one, cannot be stigmatised as unfair procedure, rather it was more likely a strategic decision to avoid "any destabilising news until such time as management is reasonably sure that retrenchment is the way to go". As Conradie J said in *Kotze* there is a natural and legitimate inclination not to put out the bad news until it is absolutely necessary. In this case it only became absolutely necessary after the demutualization process and the decision to outsource in the hope of contributing to Project 500.

109. Accordingly the theory that argues that the decision to outsource in 1998 contemplated retrenchments, about which the union was consulted too late, resulting in the retrenchments being presented with a *fait accompli,* is not sustained by the evidence. The retrenchments only became imminent after the demutualization process and were in focused contemplation at that point in time. The duty to consult thus arose within that time frame. Hence, there was no procedural or substantive fairness on this count.

110.On the other requirements of procedural fairness, I am in agreement with Mr

Muller that there were no serious irregularities. Thus the Business Case and the question and answer document distributed in July 1999 amounted to substantial compliance with the provisions of section 189(3). The Business Case sets out the reasons for the retrenchments, the alternatives considered the reasons for rejecting them, the number of employees likely to be affected and the method of selecting them. The timing of the dismissals was specifically dealt with and the questions of severance pay were proposed initially in the letter to the union of 4 August 1999 and were subsequently discussed and varied in correspondence and consultation meetings. Some fifteen meetings were held between management and the trade union in the period July 1999 to November 1999. The evidence reveals that there were discussions and an attempt to reach consensus on the appropriate measures for avoiding and minimising the number of dismissals, the timing and mitigating the adverse effects. The discussion on severance pay was extensive and, as already explained, the method for selecting employees dismissed had its own internal logic. Attempts to minimise the number of dismissals were successful to some extent in that the respondent agreed to dismiss temporary staff in the mail area to allow affected staff a redeployment opportunity (bumping). The number of these posts was extended from five to ten. The voluntary severance arrangement was also extended to non-affected staff and dismissals were avoided through early retirement with its more beneficial consequences. Moreover, in order the mitigate the adverse defects of the dismissals the new service providers were prevailed upon to offer employment to all affected staff and to pay wages higher than the market wage. Staff loans were written off and ultimately 35 of the applicants were transferred on the same salary as that which they had earned at Old Mutual. These were the results of a fair process.

111. Finally, the applicant has raised the procedural point that clause 7.3 of the

recognition agreement obliged the parties to negotiate a retrenchment procedure before commencing consultations. Under the heading "*retrenchment procedure*" it provides as follows:

> The parties agree that a retrenchment procedure will be negotiated in accordance with the procedure outlined in clause 7.4 where necessary.

112. It is alleged that the employer made no attempt whatsoever to negotiate the terms of a retrenchment procedure. Wilkinson testified that at the time when the collective agreement was entered into, Old Mutual did not retrench employees. That explained why the parties did not regard it as necessary to conclude a procedural agreement at the time. Was it necessary before starting the 1999 retrenchment process? Mr Muller submitted that there were three answers to this complaint of procedural unfairness. Firstly, the complaint was never pleaded as part of the applicant's case. Therefore on that ground along it cannot be relied as a ground for complaining that the dismissals were procedurally unfair. Secondly, clause 7.3 is open to the interpretation that the parties would negotiate its retrenchment procedure when they considered it necessary to do so. There is no unilateral duty on the employer to introduce the agreement. As the parties did not consider it necessary they did not negotiate a procedure. Thirdly, as a fact, neither party at the time considered it necessary to negotiate a retrenchment procedure even though the union was well aware of the recognition agreement and made reference to it during the process, nevertheless it at no stage insisted that a retrenchment procedure first be negotiated before the discussions continue. To the extent that it might be argued on a proper interpretation that such was required, both parties appear to have waived their rights under the provision and should be estopped from raising it at this late stage. I agree with Mr Muller and there is no basis for a finding of procedural unfairness on

this score.

113. For these reasons, I am persuaded that there was no procedural unfairness.

114. The respondent has asked to be awarded its costs. In this instance I am inclined to exercise my discretion not to make an award of costs. The matter was complex involving a large number of employees and entailed a radical restructuring which naturally inclined the employees to seek adjudication of the fairness of the dismissals. Moreover, although the union has lost its bargaining rights, it still maintains a presence at the respondent and presumably enjoys organisational rights. A costs award might jeopardise and otherwise relatively harmonious industrial relationship.

115. Given that I am persuaded that the dismissals were fair, it is unnecessary to determine the other issues of relief. Accordingly, I make the following orders:

115.1. The dismissal of the 79 members of the applicant on 31 October 1999 is hereby declared to have been substantively and procedurally fair.

115.2. The application of all the applicants in terms of section 191(5)(b) is dismissed.

115.3. There is no order as to costs.

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MURPHY AJ

DATE OF HEARING:	21-23 June 2004; 13 August 2004
DATE OF JUDGEMENT:	**07 February 2005**
APPLICANT'S REPRESENTATIVE:	Adv C Kahanovitz instructed by Bernard Vukic Potash & Getz attorneys.
RESPONDENT'S REPRESENTATIVES:	Adv J Muller SC Instructed by Findlay and Tait attorneys