The more urgent the need by the business to respond to the factors giving rise to any contemplated termination of employment, the more truncated the consultation process might be. Urgency may not, however, be induced by the failure to commence the consultation process as soon as a reduction of the workforce was likely.

On the other hand, the parties who are entitled to be consulted must meet, as soon, and as frequently, as may be reasonably practicable during the consultation process.

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

Criteria that infringe a fundamental right protected by the Act when they are applied can never be fair. These include selection on the basis of union membership or activity, pregnancy, or some other unfair discriminatory ground. Criteria that are neutral on the face of it should be carefully examined to ensure that when they are applied, they do not have a discriminatory effect. For example, to select only part-time workers for retrenchment might discriminate against women, since women are predominantly employed in part-time work.

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

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

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

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

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

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

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