



the dpsa

Department:
Public Service and Administration
REPUBLIC OF SOUTH AFRICA

Private Bag X916, PRETORIA, 0001. Tel: (012) 314 7911, Fax: (012) 323 2386 or (012) 324 5615
Private Bag X9148, Cape Town, 8000. Tel: (021) 467 5120, Fax: (021) 465 5484

Enquiries: H J van der Hoven
Telephone: (012) 314 7447
File No: 1/10/1

TO ALL HEADS OF DEPARTMENT

GUIDE ON TRANSFORMATION AND RESTRUCTURING: HUMAN RESOURCES

1. In view of the ongoing transformation and restructuring processes taking place in departments and the regular requests for guidance from the DPSA, the Minister for Public Service and Administration has approved guidelines on the matter.
2. Please find attached for your information the Guide on Transformation and Restructuring: Human Resources. The Guide is *inter alia* based on the relevant provisions of the *Labour Relations Act, 1995* as well as mechanisms that applied to the national restructuring exercise embarked on by the public service during 2002 and 2003 (PSCBC Resolution 7/2002).
3. We trust that the Guide will be of assistance to you in dealing with transformation and restructuring exercises.

DIRECTOR-GENERAL

DATE: 13/06/2006

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GUIDE ON TRANSFORMATION AND RESTRUCTURING:

HUMAN RESOURCES

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1. PURPOSE

To provide departments with guidelines on how to approach transformation and restructuring exercises as far as it relates to human resources.

2. INTRODUCTION

Focus on human resources

This guide does not intend to deal with the strategic reasons or basis for a department's decisions to embark on a transformation or restructuring exercise. Reasons will vary from department to department and from situation to situation. The focus is on the human resource element of such an exercise. In other words how to deal with staff affected by transformation and restructuring.

Restructuring and transformation of a department

PSCBC Resolution 7/2002 provided for a national transformation and restructuring exercise. This was a unique situation and if required in future, will be dealt with through a national collective agreement at PSCBC or sectoral level (whichever is applicable) or through a national ministerial directive. The focus of this guide is, however, on transformation and restructuring in an individual department although reference will be made to these processes as they affect parts of a department, multiple departments in a province and sectors.

Departments individual employers for operational requirement purposes

Where a transformation and restructuring process can potentially lead to the retrenchment of employees, the matter must be dealt with as operational requirements in terms of the *Labour Relations Act, 1995 (LRA)*. In this regard, it should be noted that section 189A(3) of the *LRA*, acknowledges **individual** public service departments as employers (i.e. the public service is not regarded as a single employer for this purpose).

Severance packages

It is equally important to note that the guide is premised on the fact that both an employee-initiated and employer-initiated severance package will be in existence.

Principles of transformation and restructuring

When embarking on a transformation and restructuring exercise, you should ensure that –

- all employees and their representatives are timeously informed of the exercise
- all employees affected by the process are treated fairly;
- all relevant legislation and collective agreements are adhered to;
- all avenues are explored to, as far as possible, ensure the continued employment of employees classified as "in excess";
- the representatives of the employees and/or the affected employees themselves are consulted;
- excess employees participate in redeployment/transfer processes;
- it results in the improvement of service delivery.

3. LEGISLATIVE FRAMEWORK

Applicable legislation to be studied

Before embarking on a transformation and restructuring process that will affect the employment of employees, it is essential that you make a proper study of all applicable pieces of legislation particularly the following:

- Labour Relations Act, 1995
- Basic Conditions of Employment Act, 1997
- Skills Development Act, 1998
- Employment Equity Act, 1998
- Public Service Act, 1994
- Government Employees Pension Law, 1996
- Promotion of Access to Information Act, 2000
- Promotion of Administrative Justice Act, 2000

Collective agreements and determinations

Apart from the relevant legislation, you should also take into account any relevant collective agreements or determinations by the Minister for the Public Service and Administration (MPSA). Applicable severance packages, be it employee- or employer-initiated packages, will be determined in this manner.

NOTE: Do not start your restructuring process until you have familiarised yourself with sections 189 and 189A of the LRA or section 197 in respect of the transfer of a function.

Determine whether your restructuring exercise will make you fall within the ambit of section 189A

4. PRE-REQUISITES FOR TRANSFORMATION AND RESTRUCTURING EXERCISE

Strategic plan

The Strategic Business Plan of a department is the departure point of any transformation and restructuring exercise. Such a plan must be developed by a department on an annual basis in terms of the Public Finance Management Act, 1999, the Treasury Regulations and the Public Service Regulations (PSR) and will, therefore, be available when a decision is taken to embark on a transformation and restructuring process.

Organisational structure

Based on these plans, a department will determine its organisational structure and the posts necessary to perform the relevant functions.

HR plan	<p>Linked to these plans, departments must develop a human resource plan which must be in compliance with the requirements of Part III D of Chapter 1 of the PSR and should include:</p> <ul style="list-style-type: none"> ▪ Number of employees required ▪ Skills/competencies required ▪ Employment capacities (permanent, temporary, etc.) required ▪ Training programmes
Consultation with labour	<p>Meaningful consultation with labour on these plans within the relevant departmental/provincial bargaining structures is essential. Involving the relevant trade unions in this process can eliminate/ reduce future objections to a restructuring decision.</p>
Implementation plan	<p>Before embarking on a transformation and restructuring process, you should have a clear picture of the steps that you are going to follow. An implementation plan indicating clear timeframes should therefore be developed.</p>
Ad hoc restructuring exercises	<p>It is acknowledged that restructuring decisions could for various reasons only surface during the course of a financial year. In other words a department might not at the time of developing its strategic and human resource plans be aware of a restructuring exercise that might be required. In this scenario strategic and human resource plans would obviously have to be re-determined. It is, however, important that such restructuring exercise not be conducted without a clear human resource plan.</p>

5. FORMS OF TRANSFORMATION AND RESTRUCTURING

Different forms of restructuring	<p>Restructuring exercises can take on different forms, namely:</p> <ul style="list-style-type: none"> ▪ Transformation and restructuring involving a whole department ▪ Transformation and restructuring involving a part of a department ▪ Transformation and restructuring involving multiple departments (e.g. all departments within a province) ▪ Transformation and restructuring involving a sector ▪ Transfer of a function to another department ▪ Transfer of a function to and from an external employer <p>The next section of the Guide will deal with the steps to be undertaken in each of the above-mentioned scenarios.</p>
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6. STEPS IN THE TRANSFORMATION AND RESTRUCTURING PROCESS

6.1 RESTRUCTURING OF WHOLE DEPARTMENT

Communication	Any restructuring exercise should be supported by an effective communication campaign that will keep employees and trade unions informed at all times.
Decision to restructure	When the decision is made to embark on a transformation and restructuring exercise, you will have a sense as to whether or not the exercise will result in certain employees being declared in excess of the department's establishment.
Full absorption – no/limited changes to post content	If all employees are to be appropriately placed (i.e. where there are no or limited changes to post content), the trade unions to the relevant bargaining structure should be informed as such and no further action will be required, save to inform each employee in writing of his/her placement.
Transfer to another workstation	If the placement involves the transfer of the employee to another workstation, the employee should be given the opportunity to motivate why he/she should not be transferred. You must consider the inputs received in this regard and take a final decision. If your decision is that the employee should be transferred, the employee should be given a formal instruction to assume duty at the new workstation. Refusal by the employee should be dealt with in terms of the disciplinary procedure (refusal to obey an official instruction). If an employee is dissatisfied with his/her placement, he/she should utilise the grievance procedure to address his/her dissatisfaction.
Full absorption, but change to post content	In cases where you will be absorbing all the employees, but substantial changes to the contents of the posts will result, a process of matching and placing (described below) should be used as a tool.
Partial absorption	If you are of the opinion that the transformation and restructuring process will lead to only the partial absorption of employees (e.g. as a result of a reduction in posts) resulting in a selection to be made between certain employees, you should embark on a matching and placing exercise.

Matching and placing

The first step in this exercise is to match an employee's profile (referred to under "Prerequisites") with the requirements of the post. If the employee's profile matches the post, the employee should be absorbed in the post.

No matching and placing against higher position

Matching and placing can only take place against a post on the same salary level as the one in which the employee finds him/herself. No matching and placing may take place against a higher position, as it will constitute a promotion, undermining the principle of open competition.

Regrading

If a post occupied by an employee is regraded to a higher salary level during the restructuring process, following the prescribed job evaluation exercise, the provisions of PSR Chapter 1, Part V.C.6 may be applied.

Matching and placing criteria

Where more than one employee's profile matches a particular post, you need to select one candidate amongst them. To be able to do so and to avoid legal challenges, you need to apply fair and objective criteria. The following are some criteria that are recognised as complying with this requirement:

- ▪ The service delivery imperatives of the department
- ▪ Affirmative action measures for designated groups
- ▪ Representivity
- ▪ Seniority – the LIFO principle (last in first out), provided it does not undermine affirmative action and representivity measures
- ▪ Conduct – as long as employee was aware of unacceptable conduct
- ▪ Efficiency – provided that it can be objectively tested and the employee was aware of the importance assigned to it by the employer
 - Skills - do
 - Capacity - do
 - Experience - do
 - Attitude to work - do
 - Productivity - do
 - Attendance - provided employees understood the importance as signed to it by the employer

Consultation with trade unions on criteria

Before applying any criteria in the matching and placing process, you should first consult with the registered trade unions (as opposed to recognised trade unions) of the employees that are likely to be negatively affected by the matching and placing process as required by section 189(3)(d) of the LRA. The notice to the unions to consult on this matter must be in writing.

Appointment of facilitator

If the number of employees that could possibly be affected in terms of possible dismissal, falls within the ranges referred to in section 189A(1)(a) and (b) of the LRA, you should consider applying to the CCMA for the appointment of a facilitator provided for in section 189A(3) of the LRA. This should be done before you enter into consultation with the trade unions concerned. The utilisation of a facilitator can also be forced by the trade unions if the majority of them request such facilitation.

Consultative forum

The consultation process could possibly be dealt with in an *ad hoc* consultative forum (e.g. restructuring forum) or in your bargaining structure.

NOTES: The issue of who should be consulted can be taken care of if there is an agreement in the bargaining structure as to who should be consulted in such circumstances.

The proposed structure and functioning of the restructuring forum is described in Part A of Annexure A.

Excess employees

Employees that cannot be absorbed during the matching and placing process will be excess to your establishment. To prevent any ambiguities, such employees should be informed in writing of their status. Employees declared in excess are not necessarily redundant, because alternatives have to be explored to accommodate them.

Departmental list of excess employees

You must develop a departmental list of the excess employees capturing the following information with regard to such employees:

- The name of the employee and other relevant personal details
- Rank/Occupational classification
- Qualification and experience
- Short courses/capacity building exercises
- Other relevant skills and competencies
- Post and responsibilities
- Preferences with regard to redeployment
- Training needs
- Latest performance assessment rating
- Race/gender
- Disability

Consultation with labour on
alternatives to dismissal

At this point you should again engage with the trade unions to your restructuring forum or bargaining structure (whichever is applicable) to consult on *inter alia* the alternatives to dismissal as well as other consultative matters referred to in section 189(3) of the LRA. The issue of the selection criteria (section 189(3)(d)) would have been dealt with at this stage. The issue of severance pay (section 189(3)(f)) cannot be dealt with at departmental level and will be guided by national collective agreements or ministerial directives. On the issue of possible future re-employment of employees who could possibly be dismissed (retrenched) (section 189(3)(h)) the Labour Relations Policy for the Public Service directs a window period of 18 months during which such re-employment should be considered.

Possible alternatives

Alternatives to dismissal that could be explored are the following:

- A round of closed internal advertising of posts that could allow an excess employee, given some short term training, to be properly absorbed in a post at the same salary level.
- Vacancies that will arise in the near future (not longer than six months) resulting from retirements, boarding, resignations and promotions that the employer is aware of.
- Requests to relevant departments to consider absorption of excess employees, especially departments that require expansion.
- Transferring excess employees together with their budgets for the MTEF period to another department.
- Continued employment of excess employees for a determined period based on the natural attrition rate of the department (i.e. likelihood of position opening up for absorption purposes).
- Allowing affected employees to opt for an employee-initiated severance package applicable to the public service (if in place).
- Eliminating or reducing temporary or casual labour.
- Eliminating or reducing overtime.
- Reallocation of tasks.
- Granting of unpaid leave for an agreed period.

Sufficient time to explore al-
ternatives

You should allow sufficient time for alternatives to be explored. Although some alternatives decided upon will dictate this period, it should preferably not be shorter than two months, but should also not exceed four months.

Retrenchment

If by the end of the above-mentioned period, employees declared in excess have not been absorbed or have not opted for a package of their own volition, they should exit the public service in terms of section 17(2)(b) or (c) of the *Public Service Act, 1994* (Act), provided an employer-initiated package to support such exit is in existence. If you are unsure as to whether or not a package exists, please consult with the DPSA.

NOTE: If an excess employee was offered alternative employment, but unreasonably refused it, he/she will not qualify for the severance pay portion of an employer-initiated package. Should a dispute arise as to whether or not an unreasonable refusal occurred, will require an objective determination by a court of law.

Notice

The notice period referred to in section 37 of the Basic Conditions of Employment Act (BCEA), must be adhered to unless you decide to pay the employee in lieu of notice as provided for in section 38 of the Act.

Strike action or Labour Court application

If section 189A of the LRA is applicable to your restructuring exercise, you may face **strike action** or a **Labour Court application** (the latter to test the substantive reasons for your decision to retrench) in reaction to your notice of termination of service of excess employees that could not be absorbed. If facilitation was requested, the trade unions may only give notice of a strike after 60 days have elapsed from the date on which you gave them notice to consult on the criteria for matching and placing. If no facilitation was requested, such notice of strike action may be given after a period of 30 days have lapsed from the date referred to above. The normal seven-day notice period for strike action in the public service will apply.

Absence of an employer-initiated package

In the absence of an employer-initiated severance package, excess employees will have to remain in the service of your department (additional to the establishment) until

- appropriately absorbed in your department or another department
- they resign
- they retire
- they opt for an employee-initiated severance package

6.2 RESTRUCTURING OF A PART OF A DEPARTMENT

Similar procedure to 6.1

- The same processes as described in paragraph 6.1 should be followed, read with the following changes:

Changes required to 6.1 procedure

- The strategic plan/human resource plan of the section or sections that are to be restructured, will guide the restructuring process.
- The matching and placing exercise will only be limited to the affected part of the department.
- Consultation need only be done with trade unions whose members that could be affected, serve in the part of the department concerned.
- An alternative that should be explored before a closed departmental advertisement is utilised, is a closed advertisement within the affected part of the department (provided relevant vacancies are available).

6.3 RESTRUCTURING OF MULTIPLE DEPARTMENTS IN A PROVINCE

Similar procedure to 6.1

- The same processes as described in paragraph 6.1 should be followed, but taking into account the following:

Changes required to 6.1 procedure

- If a number or all provincial departments restructure at the same time, the process could be dealt with as a single process if so agreed by the departments involved. **The Premier's office would need to co-ordinate such a process.**
- Apart from *ad hoc* restructuring forums for each department involved, a provincial co-ordinating restructuring forum should be established to assist with the co-ordination of the process (see Part B of Annexure A).
- A provincial agreement spelling out the process (based on the steps indicated in paragraph 6.1 above) would probably be the best route to follow in that it could eliminate the problem of having to consult all registered trade unions in the departments concerned.

6.4 RESTRUCTURING OF A SECTOR

Sectoral Agreement

If restructuring will affect a whole sector, it is advisable that a collective agreement on the matter be entered into in the sectoral bargaining council.

Paragraph 6.1 procedure to be followed

The processes described in paragraph 6.1 should form the basis of such an agreement with the following changes:

Changes required to paragraph 6.1 procedure

- The lead department in the sector should co-ordinate the process
- A closed sectoral advertisement should be preceded by a closed departmental advertisement (those departments involved) where the absorption of excess employees can first be explored before intra-sectoral absorption is considered.
- Where applicable, the lead department in the sector should establish a sectoral co-ordinating restructuring forum (see Part C of Annexure A) to assist with the co-ordination of the process.

7. DISPUTES

Employee aggrieved about placement or being declared in excess

An employee who is aggrieved about his or her placement or the fact that he/she has been declared in excess, may utilise the grievance procedure in an attempt to address his/her dissatisfaction. An employee cannot declare an unfair labour practice dispute on these matters and therefore refer a dispute to the relevant bargaining council.

Discrimination dispute

A discrimination claim by an employee would need to be submitted as a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) following which, if unresolved, could be referred to the Labour Court for judgment.

Administrative decision

In view of the fact that your decisions regarding the placement/declaring in excess of employees constitutes an administrative decision naturally allows for an application to the high court for a review of the decision.

Disputes on interpretation or application of collective agreements

If your transformation and restructuring process is contained in a collective agreement, a dispute could be declared on the interpretation and application of the agreement. Resolution of the dispute will be through conciliation and arbitration by the relevant bargaining council.

Dismissal disputes

Employees dismissed for operational requirements can declare unfair dismissal disputes requiring conciliation by the relevant bargaining council and arbitration by the Labour Court.

Section 189A dispute

In the case of a section 189A restructuring process the trade unions or employees involved may refer a dispute to the Labour Court on whether the reason for the intended dismissal of employees for operational reasons is fair.

8. TRANSFER OF A FUNCTION TO ANOTHER DEPARTMENT

Transfer of a function as part of restructuring

Restructuring can also take the form of a transfer of a function from a department (undergoing restructuring) to another.

Determination regarding transfer of a function

The provisions of section 3(3)(b) of the Act are applicable in such circumstances. This entails that the MPSA after consultation with the relevant executing authority(ies), or in the case of provinces, the Premier, makes a determination regarding the transfer of a function from one department to another. The exclusion in respect of provincial administrations or provincial departments (section 3(3)(b) of the Act as well as the Premier's power in this regard (see section 3A of the Act) must be noted.

Develop comprehensive proposal

To support the above-mentioned consultation process and to facilitate the MPSA/Premier's decision to make the required determination, it is important that your department develops a comprehensive proposal (business case) outlining the following:

- Function(s) to be transferred
- Rationale for the transfer of a function
- Number of posts and employees to be affected by the transfer
- Transfer process and time frames to be followed
- Implications for both the transferring and receiving department in terms of reorganisation, revised organogram, etc.
- Communication strategy

Communication with employees and trade unions

Employees to be affected by the transfer of a function should not be surprised or hear of the intended transfer to another department (the new employer) through the grapevine. To this end, the employees concerned and their trade unions should be informed at the earliest possible stage and be kept informed throughout the process. A proper communication strategy is therefore needed.

NOTE: The departmental bargaining structure could be utilised to convey the information on the transfer of the function to the trade unions concerned.

Adherence to PSR

The provisions of Part III, H of the PSR must be adhered to in all transfers of a function between departments.

Staff to follow function

As indicated in the above-mentioned regulations, all concomitant resources, including personnel, must transfer to the receiving department. In other words the principle of “staff to follow function” must be applied.

Employees fully involved in function

In the majority of cases it will be possible to identify (ring fence) the employees fully involved in the function. There is no question that such employees must transfer with the function in terms of the provisions of PSR Part III, H.

Employees partly involved in function

Cases may, however, arise where employees are only **partly** involved in the function to be transferred. In such cases a judgment call must be made whether or not the employees should be included in the group that is to follow the function to the other department. A guideline that could possibly be utilised in this regard is that if 50% or more of the employee’s working day is involved in the activities of the function, the employee must be included in the transfer of the function.

Consultation with trade unions

Before taking a final decision in this regard, you should consult with the trade unions in the departmental bargaining structure.

Support/corporate services staff attached to function to be transferred

The biggest problem lies with employees in support/corporate services functions who render services to employees in the function to be transferred. Where support/corporate services staff has been assigned to the specific function to be transferred, they must be included in the transfer of the function to the other department together with the line function employees concerned.

Support/corporate services staff linked to function to be transferred, not identifiable

Where the support/corporate services functions in a department are so structured that all staff involved in the functions render a service to all line functionaries in the department (i.e. support/corporate staff are not assigned to a specific line function) the following steps/options should be considered:

- The number and levels of support staff that should ideally also transfer to the other department must be determined.
- Employees at the required levels should be encouraged/requested to transfer to the other department.
- In the absence of employees (or the required number of employees) indicating their willingness to transfer to the other department, criteria should be explored, after consultation with the trade unions, to determine which employee should transfer to the other department.
- If this cannot be achieved, section 14(1) of the Act must be utilised to transfer the required number of employees to the other department “in the interest of the State”.

Section 14 of Act to apply

The transfer of staff in cases where a function is transferred to another department, must take place in terms of section 14 of the Act.

9. TRANSFER OF FUNCTION TO AND FROM EXTERNAL BODY OR INSTITUTION

Bases for transfer of a function to external body/ institution

The transfer of a function from a department to an external body/institution can occur through either -

- a determination by the MPSA or the relevant Premier in terms of section 3(3)(b) or 3(A) of the Act respectively
- an act of Parliament

Section 197 of the LRA to apply

Irrespective of how the transfer of a function is to be effected, section 197 of the LRA will govern the human resources aspects of such a transfer where the function is transferred as a going concern. You should therefore ensure that you adhere to the provisions of this section.

Strategic business plan to indicate need for transfer of function

The strategic business plan of your department will indicate when a transfer to an external body/institution is required as part of the departmental restructuring process.

Prepare business case

As is the case with a transfer of a function to another department, you should develop a business case outlining the following:

- Function(s) to be transferred
- Rationale for the transfer of a function
- Number of posts and employees to be affected by the transfer
- Transfer process and time frames to be followed
- Implications for the department in terms of reorganisation, revised organogram, etc.
- Communication strategy

Communicate with employees and trade unions

You should communicate the decision to transfer the function to the employees of your department and their trade unions at the earliest possible opportunity (e.g. once the MPSA/Premier has made the determination or after Cabinet approves that the Bill that deals with the transfer of the function be submitted to Parliament). The information referred in respect of the business case should be conveyed to the parties.

New employer to substitute
for department

In terms of section 197(2) of the LRA, the body/institution to whom the function is to be transferred, will substitute your department as the new employer for the staff engaged in the function. This means that these employees will automatically transfer to the new employer. There will be no election by the employees concerned as to whether to transfer to the new employer or to remain with your department. This is in line with the principle position that staff should follow function.

Liaise with new employer

You should as soon as possible after the decision has been taken to transfer the function to the body/institution concerned, liaise with the new employer to determine whether -

- it will honour the collective agreements of the public service applicable to the employees engaged in the function to be transferred (sections 197(3)(b) and (5) of the LRA); or
- there is a need to enter into an agreement with the appropriate persons or body referred to in section 189(1) of the LRA (see section 197(6) of the LRA in this regard).

NOTE: In the case of the public service, it will be the registered trade unions whose members are to be affected by the transfer of the function that will become the negotiating partners

New employer prepared to
honour collective agree-
ments

If the new employer is prepared to honour the collective agreements (in writing) applicable to the employees to be transferred, the transfer can proceed. The employees concerned and their trade unions should be informed accordingly.

New employer not prepared
to honour collective agree-
ments

If, however, the new employer is not prepared to honour the collective agreements, steps need to be taken to comply with section 197(6) of the LRA. In this regard you should -

- agree with the new employer to jointly negotiate with the unions representing the employees to be affected by the transfer regarding the conditions of service that will apply to them upon transfer.
- encourage the new employer to offer terms and conditions that will on the whole not be less favourable than those that apply to the employees concerned.
- jointly with the new employer draft an agreement that could be utilised for purposes of the negotiations with the trade unions.
- consult the proposals with the DPSA
- together with the new employer engage the trade unions with a view to reaching an agreement on the matter.

Deadlock breaking mecha-
nisms

If agreement cannot be reached with the trade unions in the negotiation process, all possible deadlock-breaking mechanisms (e.g. fact finding, facilitation, mediation, etc.) should be explored in an attempt to resolve the impasse. Voluntary, private arbitration could be considered as a last resort.

No agreement – apply
s.197(2) and 3(b) and 5(b)

Failure to reach agreement despite deadlock-breaking attempts will leave the new employer with no choice but to revert to the application of sections 197(2) and 5(b) of the LRA (i.e. to substitute your department as the employer, retaining all the rights and obligations between yourself and the employees concerned as contained in the relevant collective agreements). Once the transfer has been effected, the new employer will be able to take the necessary steps (be it through collective bargaining or otherwise) to bring the transferred employees' conditions of service in line with its own prevailing conditions of service.

Written agreement with new
employer

Apart from the above-mentioned agreement with the trade unions concerned or compliance with sections 197(2) and 5(b) as the case may be, you are required in terms of section 197(7) to conclude a written agreement with the new employer on the valuation of accrued benefits and payments as at the date of transfer in respect of the transferring employees. The following benefits/ payments should be covered:

- Accrued leave
- Service bonus
- Long service awards
- Severance pay
- Pension benefits
- Outstanding payments
- Post retirement medical assistance

Liability for payment

You should agree in writing with the new employer as to who will be liable for the payment of these amounts if and when a transferred employee becomes entitled to receive such payments. You could also agree to apportion the liability. You must ensure that the necessary budget provisions are made to cover your obligations in terms of the agreement.

Disclose agreement to em-
ployees

You must disclose the terms of this agreement to the employees to be transferred.

NOTE: Your department will, for a period of twelve months from the date of transfer of the staff concerned, remain liable (jointly and severally) with the new employer for any entitlements due to the employees in terms of section 197(7)(a) should any of them be dismissed by the new employer for operational reasons.

Identification of staff to follow
function

The same principles pertaining to the identification of staff that should follow the transfer of the functions discussion under paragraph 8 above, will also apply to section 197 transfers (i.e. line functionaries, employees who partly perform the function and support/corporate service staff).

Employees partly involved in function

In the case of employees who are partly involved in the function to be transferred, their inclusion in the transfer to the new employer (based on the guideline given under paragraph 8) will have to form part of the agreement referred to in section 197(6) of the LRA. If agreement cannot be reached on their position, they will have to remain with your department bringing section 189 into the equation if they cannot be absorbed within your department.

Support/corporate services staff

As far as support/corporate services staff is concerned, the option of secondment can be explored to assist the new employer (especially where the new employer is also a newly created institution) in dealing with the support/corporate services functions of the transferred employees. A closed advertisement by the new employer targeting only support/corporate services staff of the old employer can also be explored. The best option would, however, be (if achievable) to also include criteria for selecting staff from this group for transfer to the new employer in the section 197(6) agreement referred to above. If agreement cannot be reached on their position, they will have to remain with your department bringing section 189 into the equation if they cannot be absorbed within your department.

NOTE: In terms of section 187(1)(g) of the LRA the dismissal of an employee by reason of a transfer or a reason related to a transfer contemplated in section 197 or 197(a) will constitute and automatically unfair dismissal.

Disputes and claims

As the old employer you are likely to still have pending disputes and claims at the time of the transfer of the function to the new employer. These could fall within the following categories:

- Grievances lodged by affected employees that are not resolved as at the date of transfer
- Pending disability claims lodged by affected employees
- Pending claims for injuries on duty in terms of the Compensation for Occupation Injuries and Diseases Act (COIDA)
- Pending internal disciplinary cases
- Unresolved disputes referred to the relevant bargaining council
- Pending applications to the Labour Court

Record dispute/claims

You must identify and record all the disputes, grievances or claims in respect of every affected employee.

New employer responsible
for disputes/claims

Section 197(2)(a) of the LRA is clear that the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer. This will also be in respect of pending disputes, grievances and claims. Section 197(2)(c) determines that anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination is considered to have been done by or in relation to the new employer.

Agreement on dealing with
disputes/claims

The ideal would be for all disputes or claims to be finalised prior to the date of transfer of the function. If this is not possible, your department and the new employer should attempt to reach agreement with the trade unions concerned (in terms of section 197(6) of the LRA) on how these matters will be finalised. The following procedures could possibly be followed:

- Internal grievances and disciplinary processes to be finalised by your department with the assistance of the new employer, if applicable.
- Disputes lodged with bargaining councils to follow the relevant council's dispute resolution procedures.
- Pending Labour Court applications to be handled by your department with the assistance of the new employer, if applicable.
- Pending disability and COID claims to be taken over and managed by the new employer.

No agreement

If an agreement cannot be reached with the trade unions, the following should apply:

- Pending grievances and disciplinary processes must be dealt with by the new employer (with the assistance of your department) in terms of its procedures.
- Disputes lodged with a public service bargaining council will have to be re-routed to the CCMA or the relevant bargaining council under whose jurisdiction the new employer falls.
- Pending Labour Court applications must be handled by the new employer with the assistance of your department.
- Pending disability and COID claims must be taken over and managed by the new employer.

NOTE: Where the transfer of a function is from an external body to the department, the principles/processes indicated above will apply except that the department will become the "new employer" whilst the external body will be the "old employer". Consultation with the DPSA in these circumstances are of the utmost importance.

10. SOCIAL PLAN

Implement social plan	Your department must implement a social plan for all employees affected by the transformation and restructuring process (i.e. employees opting for an employee-initiated severance package or employees granted employer-initiated severance packages).
Purpose of social plan	<p>The purpose of the social plan must be to -</p> <ul style="list-style-type: none"> ▪ equip affected employees with life portable skills; ▪ facilitate the assessment of potential in order to help affected employees to identify their options and assist them in making choices between further skills training, small, micro and medium enterprise training or finding new employment.
Steps	<p>To achieve the above, you should -</p> <ul style="list-style-type: none"> ▪ ensure certification of prior learning to facilitate new employment through awarding of formal qualifications where appropriate. ▪ provide, among others, short term training on financial management, job seeking and entrepreneurial skills to facilitate the channeling of affected employees into new employment. ▪ provide time-off for employees to undergo training. ▪ provide group and individual counselling to assist affected employees in dealing with the emotional impact and adjusting to new conditions. ▪ facilitate links with local business service centres or other appropriate support institutions. ▪ advise affected employees on the available placement service agencies to facilitate new employment opportunities. ▪ Provide time-off for interviews
Link with DOL	You should link up with the local labour centre of the Department of Labour (DOL) to assist you on some of the above-mentioned areas.

11. RELEVANT CASE LAW/ARTICLES

(a) CWIU v Lennon Ltd [1994] 10 BLLR 1 (LAC)

The employer is entitled to decide whether proposed alternatives to avoid retrenchment are viable with the sole issue being whether it bona fide applied its mind to the proposals and not whether it was right or wrong in rejecting specific proposals.

The employer has a duty to consult not negotiate, therefore the Union's unjustified insistence on negotiation and its attitude to consultations may preclude it from arguing that the employer failed to consult properly.

- (b) **FAWU v Pietersburg Milling Co (a division of Tiger Milling & Feeds Ltd) [1995] 9 BLLR 20 (LAC)**

Courts generally adopt a non-interventionist approach toward recognition agreements. However, whilst statutory benefits may be waived by those who benefit (provided no public interests are involved), the terms of a recognition agreement, in acknowledging that the employer has the exclusive right to organise its affairs with full regard to its legal obligations, did not remove the employer's obligation to consult in terms of the Act.

- (c) **Reckitt & Colman (SA) (Pty) Ltd v Bales [1994] 8 BLLR 32 (LAC)**

An employee should be consulted regarding possible alternatives to dismissal including ascertaining whether he or she is prepared to accept a newly created, but down-graded position, and having regard to the employee's age, length of service, and experience, should if fair be considered for appointment.

There is no immutable rule that in applying the LIFO principle an employee should not be down-graded, or bumped, which entails the application of the LIFO principle between different categories of employees.

- (d) **Lanzerac Manor (Pty) Ltd v De Vries & others [1995] 12 BLLR 1 (AD)**

Affected employees selected on the basis of performance records must be given an opportunity to make representations and deal with unfavourable conclusions regarding their work performance before any final decision to retrench is taken.

- (e) **SA Mutual Life Assurance Society v Insurance and Banking Staff Association, Case No C312/89, LAC**

Vancoillie v Sanlam Insurance Limited, Case No DA1/2001 LAC

Wolfaardt and Another v Industrial Development Corporation of SA Limited (2002) 23 ILJ 1610 (LC)

Article by Prof A Rycroft "Corporate Restructuring and Applying for your Own Job", ILJ, Vol 23, April 2002

Article by Prof A Rycroft "The evolving (but confusing) law on business restructuring, ILJ, Vol 24, January 2003

Restructuring through a process of declaring all posts redundant and requiring staff to apply for the “new” positions must be handled with circumspection. Declaring all posts redundant but then recreating them again (albeit with changed or additional functions) could be perceived as a way of undermining or avoiding the law governing retrenchments, especially with regard to determining objective selection criteria.

The employer will be required to prove how the new posts differ from the ones declared redundant. Furthermore the employer will have to indicate why an employee who occupied a post that has been declared redundant would not (even if it required some targeted training) be fit for the recreated “new post”.

According to Prof Rycroft “[M]odifying a job or its responsibilities does not make that job redundant because jobs are normally constantly being redefined and adapted”.

12. FLOW DIAGRAMS

Flow diagrams

The following flow diagrams are attached for ease of reference:

- Annexure B : Normal restructuring exercise
- Annexure C : Restructuring through transfer of a function to another department
- Annexure D : Restructuring through transfer of a function to an external body/institution

ANNEXURE A

RESTRUCTURING FORUMS

A. DEPARTMENTAL RESTRUCTURING FORUM

- The forum should consist of representatives of the relevant department and at least one representative each from the trade unions that need to be consulted.
- The weight that a department will attach to the inputs of the various trade unions during the consultation process will be dictated by the number of members that they represent in the department.
- The relevant department must appoint a chairperson to chair the restructuring forum meetings.
- The department concerned must provide secretarial services to the forum.
- The chairperson must provide written reports to the forum
- The forum should meet at least every two weeks during the restructuring process, but may meet more often should it be necessary.
- Consultations on all matters relating to the transformation and restructuring process must take place in the forum unless there is a collective agreement in a chamber that governs the restructuring process in which case the chamber/council will fulfill the role of the forum.
- The restructuring forum must perform the following functions:
 - Monitor the co-ordination and implementation of the restructuring process in the department
 - Promote redeployment and make recommendations in this regard to the head of department
 - Monitor the establishment and updating of the department's excess list.
 - Monitor closed internal advertisements
 - Functions that are incidental to the forum's functioning

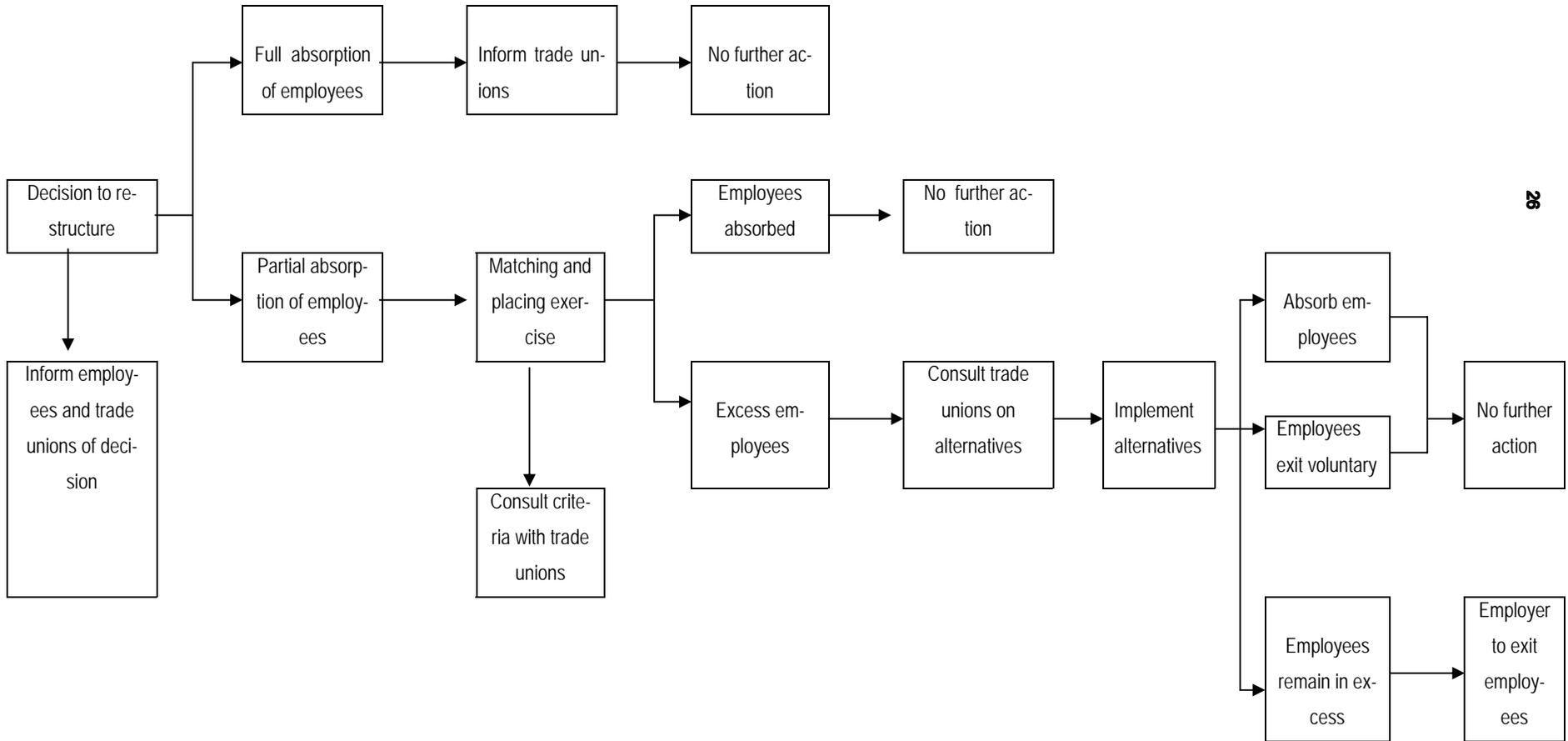
B. PROVINCIAL CO-ORDINATING RESTRUCTURING FORUM

- Premier's office to lead the establishment of the forum.
- The forum should consist of the chairpersons of the departmental restructuring forums of the provincial departments involved in the provincial co-ordinating process and 1 representative per trade union whose members are to be affected by the restructuring exercise.
- The weight that a province will attach to the inputs of the various trade unions during the consultation process will be dictated by the number of members that they represent in the affected departments collectively.
- Premier's office to appoint a chairperson.
- The premier's office to provide the secretarial services to the forum.
- The chairperson must provide written reports to the co-ordinating forum.
- The forum should meet at least once every month.
- Consultations on all matters relating to the transformation and restructuring process must take place in the forum unless there is a collective agreement in the relevant chamber of the sectoral bargaining council/co-ordinating chamber of the PSCBC that governs the restructuring process in which case the chamber/co-ordinating chamber will fulfill the role of the forum.
- The co-ordinating forum must perform the following functions:
 - Monitor the co-ordination and implementation of the restructuring process across departments concerned in the province.
 - Promote redeployment and make recommendations in this regard to the heads of department concerned and the Director-General of the province.
 - Monitor the establishment and updating of the departments' excess lists.
 - Monitor closed internal advertisements by departments
 - Functions that are incidental to the co-ordinating forum's functioning

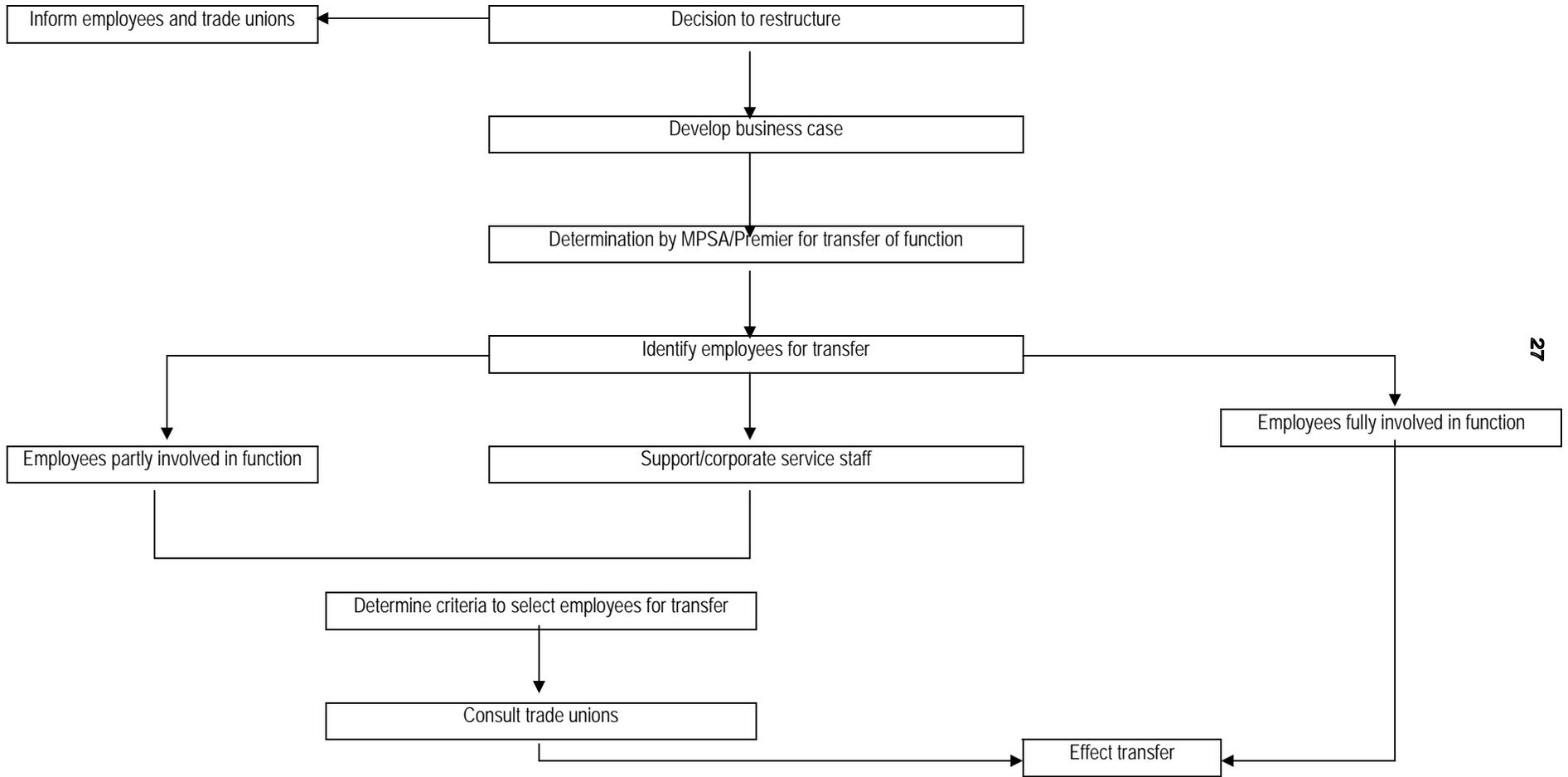
C. INTRA SECTORAL CO-ORDINATING RESTRUCTURING FORUM

- The forum should consist of representatives of the employer in the sector and at least one representative each from the trade unions that need to be consulted. The employer representatives should as far as possible include representatives from the various departments in the sector that will be affected by the restructuring process. Alternatively the chairpersons of the various departmental restructuring forums should represent the employer in the sectoral forum.
- The weight to be attached to the inputs of the various trade unions during the consultation process will be dictated by the number of members that they represent in the sector.
- The lead department in the sector must appoint a chairperson for the forum.
- The lead department in the sector must provide secretarial services to the forum.
- The chairperson of the forum must submit written reports to the heads of the departments in the sector and to the head of department of the lead department in the sector.
- Consultations on all matters relating to the transformation and restructuring process must take place in the forum unless there is a collective agreement in the relevant sectoral bargaining council that governs the restructuring process in which case the council will fulfill the role of the forum.
- The forum must provide the following functions:
 - Monitor the co-ordination and implementation of the restructuring process across departments concerned in the sector.
 - Promote redeployment and make recommendations in this regard to the heads of department concerned and the head of department of the lead department in the sector.
 - Monitor the establishment and updating of the excess lists of the departments concerned in the sector.
 - Functions that are incidental to the forum's functioning

NORMAL RESTRUTCTURING EXERCISE



RESTRUCTURING THROUGH TRANSFER OF A FUNCTION TO ANOTHER DEPARTMENT



RESTRUCTURING THROUGH TRANSFER OF A FUNCTION TO AN EXTERNAL BODY/INSTITUTION
(S 197 OF THE LRA)

