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Volume 1
Issue 2

The DANSHAW INSIGHTS

Retrenchment in South Africa

LRA Section 189 and
189A

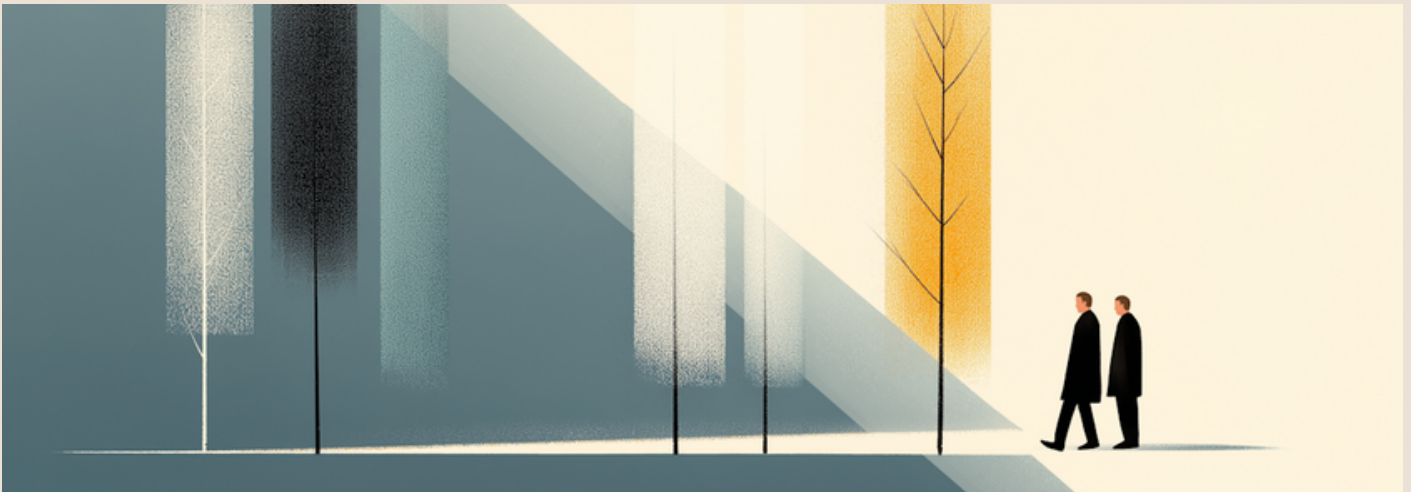
Consultation Process

Quiz

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The DANSHAW INSIGHTS



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LETTER *from the* EDITOR

Dear Colleagues,

Last week's Think Tank session (18 July 2025) on South African Labour Law, with a deep dive into **retrenchments**, was an enlightening experience for all of us.

Understanding the legal framework, processes, and best practices around retrenchments is not just about compliance - it is about fostering fairness and transparency in the workplace.

A special thank you to our **subject matter experts - Leon Theron, Tertius van Wyk & Bertus du Toit** - for guiding us through the intricacies of retrenchment law, from Section 189 and Section 189A of the Labour Relations Act to the procedural requirements that ensure both employers and employees are treated justly. Your insights have equipped us with valuable knowledge that strengthens our professional expertise.

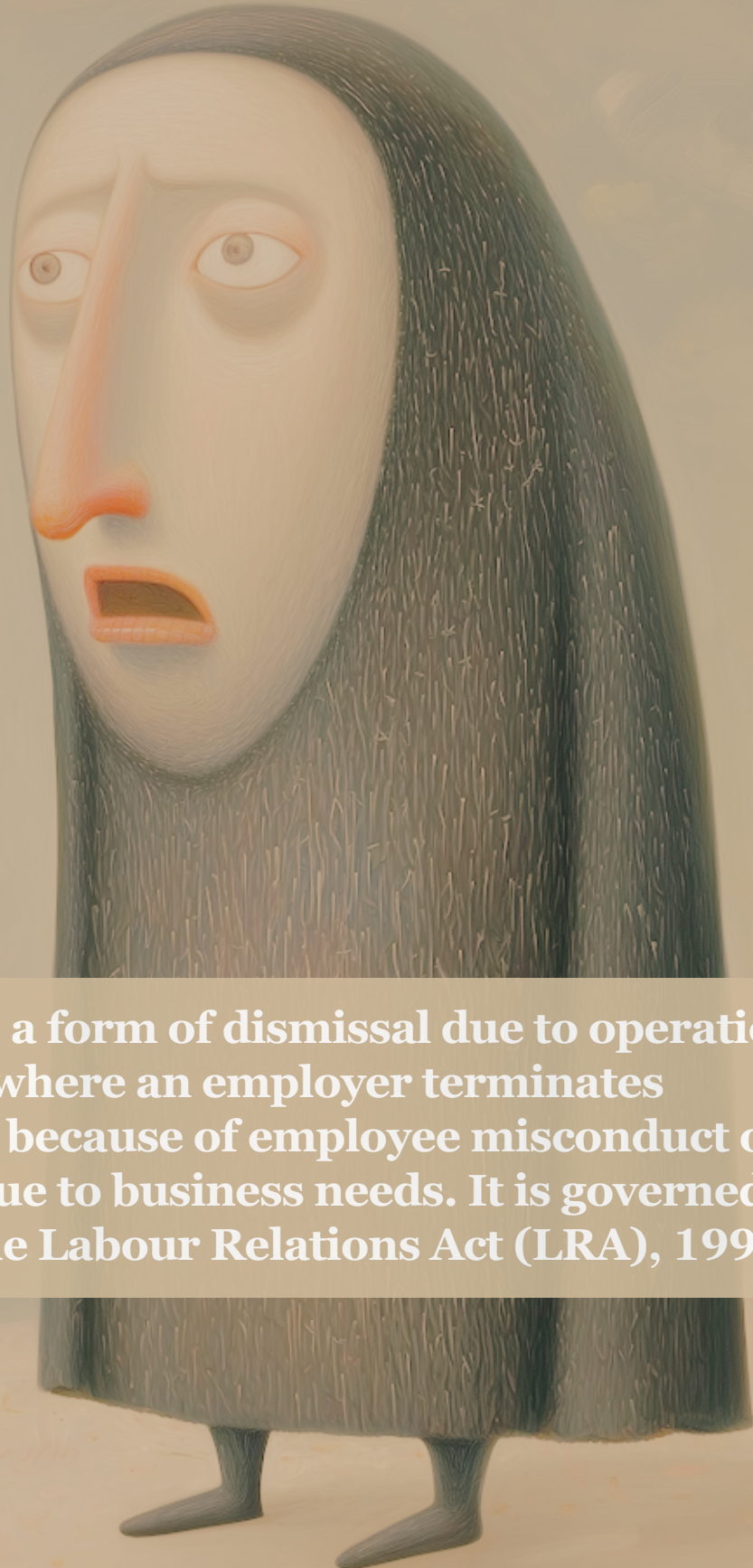
The **test results** you all completed demonstrate a strong engagement with the material - thanks for all the fun!

In this digital magazine, you'll find a **comprehensive recap of the retrenchment process, key legal considerations, and practical takeaways from the session**. My hope is that this serves as a useful resource, reinforcing what we have learnt and ensuring we approach such sensitive matters with both confidence and compassion.

As always, I welcome your feedback and suggestions for future Think Tank topics. Let's continue these conversations—they are vital to our growth as professionals and as a team.

Warm regards,
Michelle Mostert

WHAT IS RETRENCHMENT ?



Retrenchment is a form of dismissal due to operational requirements – where an employer terminates employment not because of employee misconduct or incapacity, but due to business needs. It is governed by Section 189 of the Labour Relations Act (LRA), 1995.

RETRENCHMENT PROCESS

The retrenchment process in South Africa is a highly regulated procedure under the Labour Relations Act 66 of 1995 (LRA), primarily governed by Sections 189 and 189A.

Triggering the Process: Operational Requirements

01

Retrenchment is permissible only when an employer faces operational requirements (such as economic, structural, or technological needs) that necessitate workplace reduction. This is NOT related to employee misconduct or poor performance. Employers must demonstrate a genuine and justifiable reason for retrenchment, as the Labour Court has ruled that procedural shortcuts (such as mutual separation agreements) CANNOT bypass Section 189 requirements.



Mandatory Consultation Process

02

Step 1: Initiation

- The process begins when the employer contemplates retrenchment and must consult with affected parties (such as employees, trade unions, or whatever other workplace forums).
- The goal is to facilitate discussion to avoid retrenchment or minimise its impact.

Step 2: Disclosure of Information

- The employer must issue a written notice under Section 189(3) disclosing:
 - **10 separate points**, to be discussed in detail below.

Step 3: Collaborative Problem-Solving

- Consultations must be meaningful and aimed at reaching consensus. Employers must explore alternatives (such as redeployment, reduced hours) before proceeding.



Selection Criteria

03

If retrenchment is unavoidable, employers must apply fair and objective criteria to select employees (such as length of service, skills, or operational needs). This ensures compliance with the LRA's fairness requirements.



Notice and Severance Pay

04

Notice Requirements:

- Employees must receive written notice of termination after consultations conclude.

Severance Pay:

- Retrenched employees are entitled to at least **one week's salary per completed year of service**, as stipulated by the Basic Conditions of Employment Act (BCEA).
- Additional compensation may apply if the employer's policy or a collective agreement provides more.



Finalisation and Procedural Fairness

05

- Retrenchment is procedurally valid only if all steps in Section 189 are followed. Courts have emphasised strict compliance, as retrenchment is a last resort.
- Failure to adhere to the process may render the retrenchment unfair, leading to potential reinstatement or compensation.



MANDATORY CONSULTATION PROCESS

Looking at detail at the Mandatory Consultation Process, it is important that the employer must issue a written notice under Section 189(3) disclosing:

a) The reasons for the proposed dismissal.

- The employer must provide valid operational reasons (such as economic, technological, or structural) justifying the retrenchment.
- *Example: financial losses due to reduced market demand.*

b) The alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives.

- The employer must disclose alternative measures explored to avoid retrenchment (such as redeployment, salary cuts, or reduced hours of work) and explain why each was rejected.
- *Example: the company considered remote work options but found them impractical due to the nature of the operations.*

c) The number of employees likely to be affected, and the job categories in which they are employed.

- The employer must specify the number of employees affected and categorise them by job type or department.
- *Example: 15 employees in administrative roles and 5 in production roles may be affected.*

d) The proposed method for selecting the employees to be dismissed.

- The employer must outline objective criteria for selecting employees (such as skills, seniority, or performance).
- *Examples: selection based on length of service and critical skills required post-retrenchment.*

e) The proposed severance pay for the dismissed employees.

- The employer must specify the severance pay offered (at least one week's salary per completed year of service under the BCEA).
- *Example: one week's salary per year of service at the company.*

MANDATORY CONSULTATION PROCESS

Continue...

f) The proposed method for calculating the severance pay.

- The employer must detail how severance pay will be calculated (such as based on years of service, the current salary, or including the benefits, if any).
- *Example: the severance pay is calculated as one week's salary multiplied by completed years of service, based on current basic salary excluding bonuses.*

g) The number of employees employed by the employer.

- The employer must disclose the total workforce size to provide context for the proposed retrenchment.
- *Example: the company currently employs 200 staff members across all departments and branches.*

h) The number of employees the employer has dismissed for reasons based on Operational Requirements in the preceding 12 months.

- The employer must report recent retrenchment history to demonstrate whether the current action is part of a pattern.
- *Example: no employees have been dismissed for operational requirement in the past year.*

i) The number of employees that the employer proposes to dismiss.

- The employer must specify the exact number of employees targeted for retrenchment.
- *Example: the company proposes to dismiss 17 employees.*

j) The time when, or the period during which, the dismissals are likely to take effect.

- The employer must state the proposed timeline for the retrenchment process.
- *Example: dismissals are expected to take effect within 60 days of consultation completion.*

KEY *Legal*

"INSTRUMENTS"

- **Section 189 (LRA):** Governs retrenchment for operational requirements.
 - **Section 189A (LRA):** Applies to large-scale retrenchments.
 - **Section 196-197 (LRA):** Addresses severance pay and transfer of contracts in restructuring.
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-

THINGS *to keep in* MIND

- Retrenchment is **NOT** a disciplinary process and must not be used to circumvent poor performance or misconduct procedures.
- Employers must avoid discriminatory selection criteria to prevent claims of unfair dismissal.

DIFFERENCE BETWEEN SMALL-SCALE & LARGE-SCALE RETRENCHMENTS



Under the Labour Relations Act (LRA), retrenchments are classified as either small-scale (Section 189) or large-scale (Section 189A), with distinct procedural and substantive requirements.

Employer Size

01

Small-Scale (Section 189):

<50 employees

Large-Scale (Section 189A):

≥50 employees

Retrenchment Threshold

02

Small-Scale (Section 189):

No threshold (only based on number of current employees)

Large-Scale (Section 189A):

Prescribed number (sliding scale based on the number of current employees).

Consultation Period

03

Small-Scale (Section 189):

No fixed timeline.

Large-Scale (Section 189A):

60 days

Facilitation

04

Small-Scale (Section 189):

Not required

Large-Scale (Section 189A):

May be required

Dispute Resolution

05

Small-Scale (Section 189):

CCMA / Labour Court

Large-Scale (Section 189A):

Labour Court (expedited under 189A (13))



A DEEPER DIVE INTO THE BASES OF COMPARISON:

1. Employer Size and Retrenchment Threshold

- Small-Scale Retrenchment (Section 189):
 - Applies to employers with fewer than 50 employees.
 - Retrenchment involves fewer than 10 employees in such workplaces.
 - Example: A company with 30 employees retrenching 5 employees.
- Large-Scale Retrenchment (Section 189A):
 - Applies to employers with 50 or more employees.
 - Triggers when the number of employees to be retrenched meets a prescribed threshold (a sliding scale based on the workforce size).
 - Example: A company with 200 employees retrenching 20 employees.

2. Procedural Requirements

- Small-Scale (Section 189):
 - Basic framework: Employers must consult with affected parties (employees/unions) to explore alternatives.
 - No mandatory facilitation or extended timelines.
- Large-Scale (Section 189A):
 - 60-day consultation period required.
 - Facilitation may be required if parties cannot reach consensus. A facilitator (e.g., the CCMA) oversees discussions.
 - Employers must submit a notice of intention to retrench and follow stricter disclosure rules.

3. Dispute Resolution Mechanisms

- Small-Scale:
 - Disputes about procedural fairness are typically resolved through the CCMA or Labour Court, but procedural compliance is less rigorously enforced.
- Large-Scale:
 - Employees may approach the Labour Court directly under Section 189A(13) to challenge the retrenchment process.
 - The Labour Court has jurisdiction to intervene expeditiously to correct procedural flaws.

4. Consequences of Non-Compliance

- For large-scale retrenchments, failure to adhere to Section 189A's requirements (e.g., with insufficient consultation) may render the retrenchment automatically unfair.
- Small-scale retrenchments are more likely to be scrutinised for substantive fairness (e.g., valid operational requirements) rather than procedural technicalities.

LIFO.



LAST IN FIRST OUT

LIFO (Last In First Out) is a selection criterion used during retrenchments where employees are selected for dismissal based on their length of service. Under LIFO:

- **The most recently hired employees are retrenched first.**
- **Employees with the longest service records are retained last.**

Reasoning Behind LIFO

1. Objective & Transparent:

- LIFO provides a clear, measurable standard (length of service) that is easily verifiable.
- Reduces perceptions of bias or unfair discrimination.

2. Rewarding Loyalty:

- Protects employees who have invested significant time in the company.
- Acknowledges institutional knowledge and long-term commitment.

3. Social Protection:

- Longer-serving employees are often older and may have fewer re-employment opportunities.
- Aligns with the constitutional principle of protecting vulnerable workers.

4. Operational Simplicity:

- Easy to implement administratively (vs. complex performance-based systems).

QUIZ

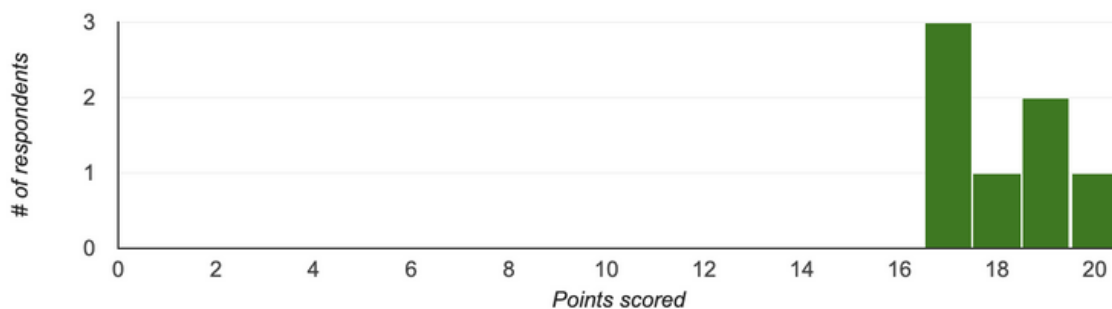
Insights

Average
18.14 / 20 points

Median
18 / 20 points

Range
17 - 20 points

Total points distribution



A heartfelt thank you to everyone who participated in our recent Think Tank and completed the retrenchment assessment. Your engagement and teamwork made this initiative a true success!

 **Test Results:** With an average score of 18/20, it's clear our team has a strong grasp of retrenchment processes - a testament to your commitment to learning.

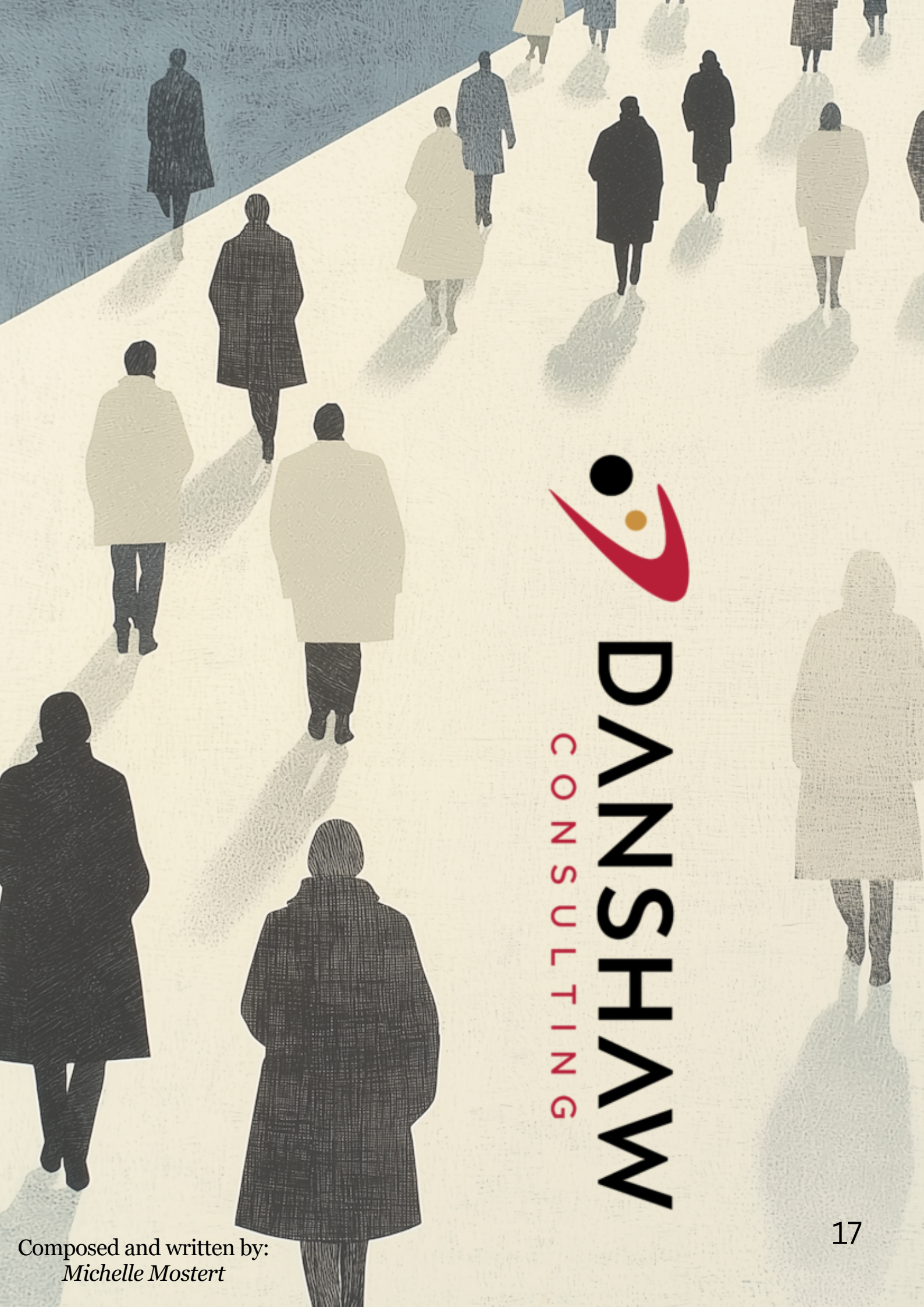
 **Great Collaboration:** The lively discussions and thoughtful questions during the session highlighted the power of shared knowledge.

UNTIL

NEXT

TIME

01
AUGUST
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