UNILATERAL CHANGES IN TERMS AND CONDITION OF EMPLOYMENT

When do unilateral changes to terms and conditions of employment occur?

Under the common law, an employer is not permitted unilaterally to change the terms and conditions of an employment contract with an employee, and if it does so without agreement, the employee would have the right to either abandon the contract or to sue for damages in terms of the contract. This means that an employer should not just change the terms and conditions without getting the employees buy-in.

The prohibition on variation includes a lowering of the status of the employee and a change in the nature of the work he or she is required to perform for the organisation.

A variation will not necessarily however amount to demotion, if it amounts merely to the re-designation of a job, even if the new designation indicates a lower status and even if the employee is called on to do work of a lesser importance than he previously performed, provided that the employee retains the same wage and comparable seniority. If you are not sure whether there has been a demotion, we suggest that you contact one of the Labour Protect attorneys for assistance and advice.

A change in the method of performing work may amount to a unilateral variation, but only if it changes the essential nature of the job. Therefore a unilateral change by an employer is unlawful only if it amounts to a change in terms and conditions of employment. An employer is free to change benefits, such as loan schemes, special leave privileges or discretionary bonuses to which employees are not contractually entitled.

Disregard by an employer of a binding collective agreement which governs terms and conditions of employment will also amount to a unilateral variation.

How changes can be fairly introduced:

It would appear that the courts will in certain circumstances sanction unilateral change to contracts of employment by employers if they can cite sound commercial reasons for doing so, and if the employer has negotiated in “good faith” (proper consultation) with the employees concerned.

In instances where a deadlock is reached the employee can go on strike after following proper procedures. We do not suggest that you withdraw your labour until you have considered the matter thoroughly with a qualified labour attorney or lawyer.

In terms of the Basic Conditions of Employment Act, a collective agreement concluded in a bargaining council may alter, replace or exclude basic conditions that are consistent with the purpose of the Act, with exclusion of those governing -

- ordinary working time;
- night work;
- maternity leave;
- sick leave; and
- child labour.

Remedies:

Disputes regarding unilateral changes to terms and conditions of employment are disputes of interest and therefore cannot be arbitrated by the CCMA. This means such disputes should not be referred to the Commission for Conciliation, Mediation and Arbitration.

What can employees do in the face of a threatened unilateral variation of the employment contract? Under common law, they can either seek an interdict against the employer in the ordinary courts... a very costly and complicated course of action... or wait until the variation is introduced and refuse to work because of the employer’s breach, and sue for damages in the civil courts (Magistrates/ High Court). This action could be an inadequate consolation as the employer could respond by exercising its contractual right to dismiss on notice. Under the Act, the CCMA has the power to arbitrate on the substantive fairness of such a dismissal.

The other option for an individual employee is to directly refer the matter to the Labour Court for adjudication and consideration. If the change(s) affects a number of employees, they can go on strike after proper procedures have been followed.

Does this mean that because of the provisions of s64(4) an employee is deprived of any remedy other than strike action if the employer unilaterally changes the contract of employment? The Labour Court has held that at least in the case of a variation that takes the form of non-payment or under-payment of remuneration, the employees retain their common-law right to seek enforcement of the contract in the High Court. Discuss the matter with your lawyer to see what course of action is advisable.

Use the internal grievance procedure to address the unilateral changes in the terms and conditions of employment with management. Although this may not always be successful, such grievance may form part of subsequent questioning and investigation of whether the employer is practicing discrimination or attempting to encourage you to resign (constructive dismissal). Outside professional advice should be taken as soon as the dispute arises or once the grievance procedure has been exhausted.

Relevant Legislation: Labour Relations Act s64(4), Schedule 7, Basic Conditions of Employment Act, s77(3), Chapter 7

This document is based on literature available from the CCMA