

UNILATERAL CHANGES



BACKGROUND

Terms and conditions of employment of employees are normally stipulated in their contracts of employment, which can either be verbal or be in writing.

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 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.

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.

A variation will not necessarily amount to demotion, however, 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.

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 of *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 (*see Collective Agreements info sheet*) which governs terms and conditions of employment will also amount to a unilateral variation.

HOW CAN CHANGES 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 the matter 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.

In terms of the BCEA 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.

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 or wait until the

variation is introduced and refuse to work because of the employer's breach, and sue for damages (Civil 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. 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 had 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.

RELEVANT LEGISLATION

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