UNILATERAL CHANGES TO TERMS AND CONDITIONS OF EMPLOYMENT

BACKGROUND

Terms and conditions of employment of an employee refer to things such as the type of work for which the employee is employed, the place of work, working hours, salary or wages, leave entitlement, etc. The terms and conditions of employment need to be given to the employee in writing, either in a contract of employment or in the form of written particulars of employment. These may also be included in a collective agreement concluded between one or more registered trade unions and the employer (or a registered employers' organisation).

WHEN DO UNILATERAL CHANGES TO TERMS AND CONDITIONS OF EMPLOYMENT OCCUR

Under the common law, an employer may not unilaterally change the terms and conditions of employment of an employee. Instead, a process of consultation should take place between the affected parties to reach an agreement on the proposed changes. The prohibition on variation includes a lowering of the status of the employee and the provision of terms and conditions of work that are substantially less favourable to the employee than those enjoyed by him or her previously.

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 (substantial changes).

The National Minimum Wage Act (NMWA) states that it is an unfair labour practice for an employer to unilaterally alter wages, hours of work, or other conditions of employment in connection with the implementation of the national minimum wage.

HOW CAN CHANGES BE FAIRLY MADE?

Where a collective agreement exists, an employer will be required to engage the trade union(s) concerned before changing terms and conditions of employment that form part of that collective agreement. The employer is thus required to adhere to the provisions of the collective agreement (*see Collective Agreements info sheet*) unless these are less favourable than the provisions of the law (including sectoral determinations).

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

- Ordinary working time, ordinary hours of work, and hours of work regulated by the Minister of Employment and Labour;
- Night work;
- Entitlement to Maternity leave;
- Entitlement to parental leave;
- Entitlement to commissioning parental leave;
- Entitlement to adoption leave;
- Reduce entitlement to sick leave;
- Annual leave (cannot be less than 2 weeks)
- Child labour; and
- Payment of the national minimum wage (NMWA).

Where an employer can justify the need to change terms and conditions of employment based on operational requirements, and no agreement is reached with the affected parties after a process of consultation, the employer may exercise its right to engage in consultations towards possible retrenchments. For example, if a variation to the terms and conditions of employment is required to prevent business closure.

REMEDIES

An employee or registered trade union may refer a case of unilateral change to the terms and conditions of employment to the CCMA or a bargaining council for conciliation in terms of section 64(4) of the LRA. The conciliation application form can be downloaded from the CCMA Website (https://www.ccma.org.za/advicecategories/ccma-referral-forms/). The referring party may require the employer not to implement unilaterally the change to terms and conditions of employment for a period of 30 days in order for the CCMA or bargaining council; or if the employer has already implemented the changes, require the employer to resort back to the terms and conditions that applied before the change. The employer then has 48 hours from receipt of the referral to comply with the latter (failure to comply could lead to industrial action – see discussion below).

Should the matter remain unresolved after the conciliation process, the referring parties may approach the Labour Court for appropriate relief under 77(3) of the BCEA.

Alternatively, where the referring party is a trade union or is a group of two or more employees, notice may be given to the employer of the intention to embark on industrial action.

Please note that in terms of section 69 of the LRA, a registered trade union may only authorise a picket by its members and others in support of the strike if picketing rules are in place.

While not recommended as a first resort due to the risks involved, the affected employee may also opt to resign and declare a constructive dismissal where the employer has made changes that substantially affect his or her terms and conditions of employment. The employee will have to provide evidence that the employer made the working relationship so intolerable that resignation was the only solution.

An unfair labour practice dispute may be referred to the CCMA or council within 90 days of the act or omission where the unilateral change to terms and conditions of service leads to an unfair labour practice.

RELEVANT LEGISLATION

- Labour Relations Act 66 of 1995
- Basic Conditions of Employment Act 75 of 1997
- National Minimum Wage Act 9 of 2018.