Unlocking labour laws

Can employers change your terms of employment?

The South African Constitution gives every citizen the right to choose their trade, occupation or profession freely. However, the practice of a trade, occupation or profession may be regulated by law.

According to the Labour Relations Act (LRA) (1995) everyone has the right to fair labour practices and every worker the right to form and join a trade union, and to participate in its activities and programmes and to strike.

On the other hand, every employer has the right to form and join an employers' organisation, and to participate in the activities and programmes of that organisation.

Additionally, every trade union and employers' organisation has the right to determine its own administration, programmes and activities, organise, form and join a federation.

Every trade union, employers' organisation and employer has the right to engage in collective bargaining which is regulated by national legislation. Where laws may limit a right, this must be compliance with section 36(1).

National legislation may recognise union security arrangements contained in collective agreements.

Under what conditions are employers allowed to lawfully change your employment contract?

Employment contracts are governed by the LRA and are also determined by how some labour cases have been dealt with in the past. The parol evidence rule used in common law to govern contacts means that a written contract cannot be interpreted using evidence from past agreements or terms. This means the contract can only be changed or is variable by consent.

Variation by consent refers to a situation where there is an agreement from employer and employee in changing the contract. The consent is either given by a union on behalf of its members or is sometimes included in the contract. In some circumstances the changes are anticipated and included in the contract. Other contracts can also have a fair variation clause.

For example, if an employer locks out workers and dismisses them for not agreeing to changes in their contracts it is considered by the law to be automatically unfair. According to section 187(c) of the LRA: 'A dismissal is automatically unfair... if the reason for the dismissal is to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee...' Mutual interest refers to salaries, benefits, working hours, shift arrangements, retirement age, supervisory relationship and workplace.

When a dismissal is automatically unfair the dispute is directly referred to the Labour Court and the employees can get compensation of up to 24 months' salary.

In *Chemical Worker's Industrial Union v Algorax*, also in 2003, the Labour Appeal Court ruled that dismissals fell within section 187(c) and were automatically unfair and that the purpose of the dismissal was found to compel employees to accede to employer's demands. In this case the employer had proposed changes to the shift system and operational requirements. The employers made attempts to engage and negotiate with workers. However, workers were given notice that they may accept changes or be fired and were given an option to change their minds after dismissal and return to work.

However, section 189 and 189A allows for fair dismissals. In *Fry's Metals v Numsa* there was a proposed change to a shift system in which workers were told that if they did not accept they may be retrenched. A section 189A consultation process was initiated and workers were given an opportunity to reconsider the amendments and therefore avoid dismissal.

When the matter went to the Labour Appeal Court in 2003 it ruled unanimously that the dismissals were fair as they did not fall under section 187(1)(c) and the Supreme Court of Appeal upheld the judgment in 2005 arguing that dismissals in terms of section 187(1)(c) have to be 'designed to induce agreement' to employer's demands.

CONCLUSION

Terms of your employment contract can be changed under one section of the law – section 189 and 189A but under section 187(1)(c) dismissals are treated as automatically unfair. According to Sbu Gule the questions to ask on variation of contracts are: 'Was the dismissal effected to compel the employees to agree to the employer's demands, such that the dismissal would be withdrawn and the employees retained; or is the dismissal final so that the employer may replace employees permanently with other employees who are prepared to work under the terms and conditions required by the employer.' LB

This article is based on a presentation by Sbu Gule, the chairperson of Norton Rose Fulbright South Africa, at the 26th Annual Labour Law Conference in July 2013.

What is labour's perspective on education?

Every democratic society faces the challenge of educating succeeding generations of young people for responsible citizenship. The challenge that we face at the 20th year of freedom is to create an education and training system that will ensure that the human resources and potential in our society is developed to the full, writes **Malose Kutumela**.

It is the challenge posed by the vision of the Freedom Charter: 'To open the doors of learning and culture to all'. All individuals should have access to lifelong education and training irrespective of race, class, gender, creed or age.

The journey we have embarked on is long and hard. The educational problems of our country run deep and there are no easy or quick-fix solutions. There is a serious lack of democratic control within the education and training system. Students and teachers have been excluded from decision-making.

For a policy to have a chance of success, sufficient people must be persuaded that it is right, necessary and implementable. Almost any education and training policy will come to grief in practice if it does not win the support of two essential constituencies: those who are expected to benefit from it, and those who are expected to implement it. The maximum participation of teachers and trainers in the design and testing of new curricula will be crucial.

This implies that the groundwork of education and training policy must be very carefully prepared, if the policy is to find broad public acceptance and win the wholehearted support of education and training managers and practitioners. The process of policy-making in education and training must therefore be as open and participatory as possible. Policy-makers need to practise the art of consultation, listening, reasoning, and persuasion, as well as offering vision and leadership.

The separation of education and training has contributed significantly to the situation where most of our people are under-educated, under-skilled, and under-prepared for full participation in social, economic and civic life. Most of the unemployed lack the basic education on which to build on, and many of those in work are locked into low-skilled and low-paying jobs. A vast proportion of students leaving the school system, either before or after completing the final year, do so largely unprepared for the rest of their lives.

There is a lack of skilled and trained labour and the adverse effects of this on productivity and the international competitiveness of the economy.