LAW AT WORK

Demands vs operational requirements

The law prohibits an employer dismissing employees in order to compel a demand. But does this apply where the employer claims dismissal based on operational requirements? The **Labour Bulletin** reports on the latest in the saga of Numsa v Fry's Metals, which deals with this issue.

Fry's Metals attempted to introduce a change in shift patterns. The company wanted to introduce these changes which would also require a change in employment conditions relating not only to a change in the shift system but also the withdrawal of a transport allowance. Negotiation began in 2000 and the employer argued that the changes would ensure an increase in productivity leading to continued viability and enhanced job security. These negotiations however, failed.

It should be noted that this issue was originally first raised in the context of collective bargaining. The employer then stated in September 2000 that it was an operational requirement and that workers who did not accept the change would be retrenched. Further meetings were held but to no avail and letters of dismissal were issued on 18 October, 2000. The union interdicted these dismissals on the basis that by acting in this way the company would breach the provisions of section 187(1)(c) of the Labour Relations Act (LRA), which makes a dismissal automatically unfair if the reason for the dismissal is to compel acceptance of a demand.

The union further argued that the dispute concerned a matter of mutual interest and should follow the relevant dispute procedure. Fry's Metals argued that the disputed retrenchments were a 'step to compel a demand' and that the changes proposed to the shift system were an operational requirement.

The Labour Court agreed with Numsa's argument that the intended dismissals were sought to compel employees to agree to changes contrary to section 187 (1)(c). The Labour Appeal Court however, overturned the Labour Court's decision. It held that section 187(1)(c) only prevented dismissals that were not final and whose purpose was to compel acceptance of a demand, in a manner equivalent to the lock-out dismissals that were specifically provided for in the old LRA.

Anton Roskom, a practising attorney and director of Cheadle Thompson Haysom Inc., argued in a paper presented at Cosatu's conference to celebrate ten years of democracy that section 187(1)(c) is there to protect the integrity of collective bargaining and employers are forbidden to threaten or actually dismiss workers in order to compel acceptance of a demand. It is difficult to negotiate about matters with the threat of dismissals hanging above one's head. The case therefore raises the question of whether the approach of the LAC to the interpretation of section 187(1)(c) was correct. It likewise raises the important issue of when it is possible for an employer to migrate matters from the domain of collective bargaining to the domain of adjudication on operational requirements.

It seems that it is now common practice for some employers to try to get their way by first trying to bargain, and if that doesn't work, to define their demand as an operational requirement and migrate the issue from the arena of collective bargaining, where negotiations take place, to the arena of consultations about retrenchments. The Fry's Metals case tries to put the brakes on this strategy, which clearly undermines collective bargaining.

There is no easy solution. The difficulty facing employers is that if section 187(1)(c) is interpreted absolutely, then every time an employer proposes an alternative in retrenchment consultations, it may be accused of threatening dismissal in order to compel a demand.

Simplistic solutions such as 'retrenchments must be negotiated' (i.e. there must be agreement with the union before they may be affected) take the matter nowhere. Trade unions do not want

the right to decide about retrenchments and it is doubtful that employers and government would ever agree to extend that power to trade unions who could then effectively hold the business to ransom. The argument that employers may only use the lock-out (as opposed to unilateral action) as a mechanism to induce agreement will not be successful. No employer worth its salt would ever agree to such a proposition.

At the same time it is important to protect the sanctity of collective bargaining, which is under threat. If all that is required to undermine collective bargaining is to define the employer's demand as an operational requirement, then there will be no effective entitlement to collective bargaining. Strategies must be developed to prevent the migration of collective bargaining issues to the rights domain. This challenge must be confronted at all levels. It is an important precedent to set in the courts and this issue must be wrestled with constantly.

There is also the need for a sophisticated union approach involving the exercise of power. This would mean campaigning for collective agreements with employers about some of the subjects that are reserved for collective bargaining. Trade unions could also adopt an approach that re-migrates the issue back to the collective bargaining table.

The union appealed against the LAC's decision to the Supreme Court of Appeal (SCA). The appeal was against the LAC's reversal of the interdict dismissing the workers for their failure to accede to Fry's Metals' demands regarding the implementation of a two shift system and the withdrawal of a transport subsidy in the context of proposed changes to employment conditions. The SCA handed down its decision in April 2005. The SCA held that even though it can hear appeals against decisions in the Labour Court, under special circumstances, Numsa had failed to establish special circumstances in this case.

The ruling means that the law remains unchanged from the LAC decision. This means that only if an employer threatens dismissal to compel workers to agree to its demands or dismisses them conditionally on the understanding they can return to work if they accept the demands, will that threat or conditional dismissal be in contravention of section 187(1)(c). If the employer argues that the dismissals are final for operational reasons then the section will not apply and workers can only challenge the dismissals as unfair retrenchment even if the reason for the dismissal is they did not agree to the employers' operationally related demands tabled in the court of negotiations.

The SCA decision has important implications for whether it has jurisdiction to hear appeals from the LAC. If the SCA has jurisdiction to hear appeals from the LAC, must leave to appeal be obtained first or is there an automatic right of appeal? These issues will be covered in an analysis of the judgement in the next edition. LB