Varying terms and conditions of employment

Anton Roskam and Henry Ngcobo discuss the ways employers may change or try to compel workers to change their terms and conditions of employment and the possible ways in which workers may respond if they do not agree to the changes.

If an employer wants to change terms and conditions of employment then it must try to get the workers, or the trade union representing the workers, to agree to the change. The employer's problem arises when workers refuse to agree What can the employer do and what options are open to the workers? This is a complex area of labour law and seems to confuse both employers and trade unionists.

In law, an employer has no right to unilaterally change terms and conditions of employment. The workers must agree either:

- explicitly, by for example, concluding a collective agreement; or
- implicitly through their conduct.

If an employer wants to bring about a change it can approach the issue in two ways

- it can argue that the workers' consent to the change is not needed because the change does not vary their terms and conditions of employment;
- it must seek the workers' consent if the change clearly varies terms and conditions of employment.

If workers refuse to accept the changes proposed by the employer, the employer must try to force workers to agree to the change by using methods recognised by collective bargaining (for example, lockout).

Unilateral changes

Sometimes employers exercise their power and unilaterally change employees' terms and conditions of employment. They try to persuade the workers to agree to the changes through implementing the changes unilaterally. In general, the employer does not have this right. However, labour law practitioners often confuse the employers' exercise of power by way of unilateral implementation with their 'right' to vary the terms and conditions of the employment contract.

Employers often argue that they are able to make changes because of their 'managerial prerogative', which is their power and right to run the business in the

way they want to run it. They argue that they are not changing terms and conditions of employment but running their business in the best way they see fit

Not surprisingly, employers often claim a great deal of discretion and flexibility in determining the manner in which their businesses operate; for example, in relation to working hours and shift systems, the allocation of duties to employees and the introduction of new technologies

Trade unions tend to argue that most changes are material changes to terms and conditions of employment. They want these changes to be the subject of negotiation and agreement between themselves and the employer.

Forms of variation

The changes that an employer may want to introduce usually take one of two forms:

- varying the provisions of workers' contracts of employment, for example, increasing working hours,[1] or
- introducing work practices falling within the broad scope of the employees' contractual obligations.[2]

General rule

The general rule is that if the change does not amount to a material variation of workers' terms and conditions of employment, then the employer may implement the change unilaterally.

For example, if the employer wants to change tea time from 9 to 10 o'clock and the change is not contrary to the BCEA, 1997, the change probably does not amount to a material change to terms and conditions of employment. The material term of employment is usually not when tea time is taken, but that it may be taken and for how long. The employer therefore has the right to make the change. If the worker refuses to work in accordance with the change then the worker may be disciplined for failing or refusing to obey a lawful order

However, if the change is a material change to terms and conditions of employment such as increasing the hours of work, an employer is obliged to obtain the workers' (or the trade union representing the workers) consent to the variation, unless the contract of employment itself provides that the variation can be made unilaterally

When is a change a material variation?

Unfortunately, this is not an easy question to answer. It depends largely on the nature of the change. There is no test or rule that is applied The cases give us a broad direction

A Mauchle v NUMSA

In A Mauchle (Pty) Ltd t/a Precision Tools vs NUMSA and Others,[3] Judge Myburgh held that an employer's instructions to its workers to operate two machines instead of one did not constitute a unilateral variation of the terms and conditions of employment.

Judge Myburgh stated that 'employees do not have the vested right to preserve their working obligations completely unchanged as from the moment when they first begin the work It is only if changes are so dramatic that the employee undertakes an entirely different job that there is a right to refuse to do the job in the required manner'

Therefore an increase in the volume of work, provided that this is reasonable, does not amount to a variation of an essential term of an employment contract.

Air Products vs CWIU

In the case of Air Products (Pty) Ltd v CWIU,[4] a worker was dismissed for gross insubordination after refusing to obey an

instruction to move from one plant to another. The move meant that the worker was required to work a night shift every two weeks. The majority of judges in the Labour Appeal Court held that the move would not have amounted to a unilateral change to that worker's contract of employment. They held that there was nothing in his contract that stated that he would only work at one plant and the only difference between working at one plant instead of the other was that he had to work a night shift. This was not a change to his terms and conditions of employment.

This ruling is somewhat disturbing. We think most employees would consider being suddenly required to work a night shift (even if it were once every two weeks) a change to their terms and conditions of employment.

SAMRI vs Toyota

An employer is free to unilaterally vary certain benefits such as loan schemes, special leave privileges and other discretionary bonuses to which employees are not contractually entitled. There are, however, cases in which the dividing line between such privileges and contractual entitlements is blurred. For example, in SAMRI v Toyota of South Africa Motors (Pty) Ltd,[5] the employer argued that a vehicle benefit scheme was not part of the terms and conditions of its employees and could accordingly be unilaterally amended. The Labour Court held, however, that it constituted part of the employees' remuneration. It was therefore a material term and condition of employment.

Similarly in Gaylard v Telkom South Africa Ltd,[6] the court held that payment for accumulated leave was part of 'remuneration'.

Therefore not every change to work and work practices are material changes to the employment contract. The dividing line is sometimes difficult to draw and will be the subject of many court decisions to come. There are some changes that are clearly material changes to terms and conditions of employment such as being required to work more hours, being paid less, etc. There are others that are not.

There is no clear test as to what constitutes a material term and condition of employment. Whether a variation is material or not may sometimes depend on the ideological approach of the adjudicator.

Employer's options

Let's assume that the employer wants to introduce a change that is a material variation of terms and conditions of employment. For example, the employer wants workers to work a four-shift system instead of a three-shift system and this has the effect of increasing working hours. The trade union refuses to agree. What can the employer do?

The employer must try to negotiate with the trade union and reach an agreement. If no agreement is reached, it has three options:

- declare a dispute and lock-out workers in the hope that the power play will force workers to agree to the changes;
- threaten to dismiss workers for operational requirements, although the new LRA, 1995 has introduced limitations to this option; or
- unilaterally implement.

We do not intend to discuss the option of lock-outs except to say that it is often not the employer's preferred choice.

Dismissing for operational requirements

If the workers refuse to agree to these changes, the employer may threaten to dismiss for operational requirements. In

Increasing hours of work is a material change to terms and conditions of employment.

response, the trade union could allege that these dismissals would be automatically unfair. Section 187(1)(c) of the new LRA states that dismissing a worker in order to compel the employee to accept a demand is automatically unfair. If the employer continues to threaten dismissals the trade union could possibly interdict the dismissals.[7]

But such an option, although difficult for the employer, is not impossible. The employer will have to show that the dismissal was fair, that it had a genuine operational requirement and that the purpose of the dismissals or the threat to dismiss was not for the purpose of compelling a demand. Under the old LRA all the employer needed to do was consult in good faith and have a legitimate commercial rationale for the proposed change.[8] The resulting dismissals were fair.

Unilateral implementation

The third option is for the employer to unilaterally implement as part of the power play. This is how the employer tries to persuade the employees to accept the change. Employers often use this tactic in wage negotiations – simply implementing their final wage offer and hoping that it will take the steam out of any further strike action. The workers may then by their conduct accept the employer's proposed change to the employment contract. Of course they need not do so, and may continue striking in support of their demand.

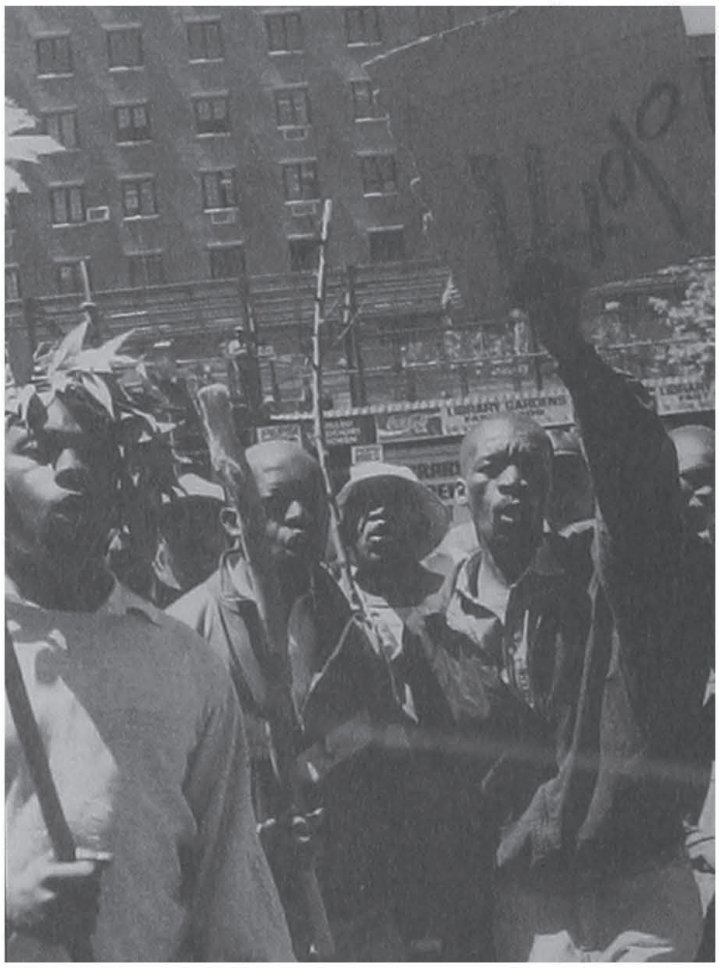
But when it comes to a change like a change in shift patterns, it is trickier. The employer may implement the change. The trade union has a number of options.

Possible responses by workers

The options available to workers must be assessed according to the circumstances confronting the workers. In some cases they will not be appropriate.

Strike action

Firstly, the trade union could refer a dispute to the CCMA or the appropriate bargaining council and require the



Workers may strike to support their demands.

employer to restore the terms and conditions that applied before the change. This is provided for in section 64(4) of the new LRA.

If the employer refuses to restore the terms and conditions that applied before the change, the workers could go out on a protected strike within 48 hours of their trade union's referral.

Interdict the employer

If the employer fails to restore the terms and conditions that applied before the change within 48 hours of the union's referral, the trade union may seek an interdict from the Labour Court. The Labour Court could order the employer to restore the old terms and conditions for the period of conciliation, which is a period of at least 30 days from the date of the union's referral.

To succeed with such an interdict[9] the trade union must prove that:

- unilateral changes have been effected to the terms and conditions of the employment contracts;
- the workers did not agree to those unilateral changes;
- in its referral of the dispute to the CCMA or the appropriate bargaining council, the trade union requested the employer to restore the terms and conditions which applied before the change.[10]

Obviously such an interdict is limited as it is only for the period of conciliation.

Despite pronouncements to the contrary by some of the Labour Court judges, we doubt that such an interdict is legally correct. The reason for this is that the Labour Court does not have the jurisdiction or competence in terms of the new LRA to make such an order. We believe that the remedy that the new LRA provides is that workers may go out on strike within 48 hours of their trade union's referral.

Sue for specific performance

The third option open to workers is suing for specific performance. This means that the workers would ask the court to order the employer to perform in accordance with their agreed terms and conditions of employment. In essence the workers would say to the Labour Court that they reject the cancelling of their contracts of employment, which is the effect of the unilateral implementation. They would ask the Labour Court to order the employer to abide by the terms and conditions of their employment contracts.[11] The Labour Court now has jurisdiction to hear these types of matters because of section 77(3) of the BCEA.

Where a request for specific performance is made, the court has a

discretion to grant such an order or not.[12]

Suing for specific performance may be appropriate where the employer has introduced a new shift system or reduced workers' wages.

Sue for contractual damages

Workers could also cancel their contracts and sue for their contractual damages.

Usually this is not a popular option because workers' damages are limited to the wages paid during their notice pay and they do not want to lose their jobs.

Tender services as agreed

Workers could ignore the change in terms and conditions of employment and continue to tender their services in accordance with their agreed terms and conditions of employment. But they should be sure that the change constitutes a material change to their terms and conditions of employment otherwise they open themselves up to be disciplined and perhaps even dismissed. If it is a material change then any dismissal that would result would be unfair because the employee had not breached the terms and conditions of the employment contract

'Concede' and process a dispute

Lastly, the workers could agree to work in accordance with the new change without prejudice to their rights. At about the same time they could simultaneously declare and process a dispute about the matter. Provided the matter is of mutual interest to employer and employee the workers could then embark upon a protected strike in support of their demands.

For example, they could agree to work in accordance with the changes but say to the employer that they are doing this under protest and without prejudice to their rights. They could also process a dispute in which they demand that the employer revert to the old terms and conditions of employment or, if they are to work in accordance with the new conditions, to pay them a wage increase or give them a hike in their shift allowance

This strategy will not give the employer the grounds for dismissing for operational requirements and it will force the power play on the change in terms and conditions of employment.

In summary, the law provides a range of options for unions and workers. However, unions and workers need to carefully assess each situation and decide what strategy is most appropriate ★

Endnotes

1 *See Van der Merwe and Others Trans Cash & Carry (1997) 18 ILJ 766 (CCMA), Alert Personnel (Pty) Ltd v Leech (1993) 14 ILJ 655 (LAC) and CWIU and others v Sasol Fibres (Pty) Ltd (A Division of the Sasol Group) (1999) 20 ILJ 1222 (LC)*

2 *See A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA and Others (1995) 16 ILJ 349 (LAC), Ndlovu and Others v Steynsfield Restaurants CC (1994) 15 ILJ 655 (IC)*

3 *(1995) 16 ILJ 349 (LAC)*

4 *(1998) 1 BLLR 1 (LAC)*

5 *(1998) 6 BLLR 616 (LC)*

6 *(1998) 9 BLLR 942 (LC)*

7 *See Ndlovu and Others v Steynfield Restaurants CC (1994) 15 ILJ 655 (IC)*

8 *See W L Ochse Webb & Pretorius (Pty) Ltd v Vermeulen (1997) 18 ILJ 361 (LAC)*

9 *Staff Association for the Motor Related Industries (SAMRI) v Toyota of SA Motors (Pty) Ltd (1997) 18 ILJ 374 (LAC) at 379B, CWIU and Others v Sasol Fibres (Pty) Ltd (A Division of the Sasol Group) 1999 20 ILJ 1222 (LC)*

10 *Mukuvebo and Others v ECCAWUSA [1999] 4 BLLR 358 (LC)*

11 *See Monyela and Others v Bruce Jacobs t/a LV Construction (1998) 19 ILJ 75 (LC) at 85F-G*

12 *National Union of Textile Workers v Stag Packing (Pty) Ltd and Another 1982 (4) SA 151 (T)*

Anton Roskam and Henry Ngcobo are attorneys at Cheadle, Thompson and Haysom.