

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 employer's 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 in an attempt 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 that enjoyed by him or her. 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.

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.

Where a collective agreement exists, an employer will be required to negotiate with 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).

HOW CAN CHANGES BE FAIRLY MADE?

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 exclusion of those governing-

- Ordinary working time
- Night work
- Maternity leave
- Sick leave and
- Child labour
- Payment of the national minimum wage (NMWA)

Where an employer can justify the need to change terms and conditions of employment and despite consultation with the affected employees and/or their representatives no agreement is reached, the employer may exercise its right to engage in consultations towards possible retrenchments. This should always be the last resort and cannot be based on arbitrary reasons. For example, where a variation to the terms and conditions of employment may prevent business closure. The changes would also need to be within the bounds of the law.

REMEDIES

A registered trade union may refer a case of unilateral change to terms of conditions of employment to the CCMA or a bargaining council for conciliation. The trade union, through this referral, may give the employer a 48-hour ultimatum to comply with the demand that it not implement the changes, or where these have been implemented, to restore the terms and conditions of employment as they were before the changes were made. If the employer fails to comply, the union has the option to give notice of strike action. The union may also apply to the Labour Court for an interdict where applicable.

Where one individual is affected, he or she may apply to the Labour Court for relief. 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.

An unfair labour practice dispute may be referred to the CCMA or council within 90 days of the act or omission.

RELEVANT LEGISLATION

Labour Relations Act 66 of 1995
Basic Conditions of Employment Act 75 of 1997
National Minimum Wage Act 8 of 2018