THE VARIATION OF
CONDITIONS OF EMPLOYMENT

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SUMMARY

This paper seeks to bring clarity to a number of issues that arise from a process resulting from the unilateral variation of terms and conditions of employment and the conflict management and dispute resolution processes.

The variation of employment terms particularly when it is driven by one party to the employment relationship can cause instability, insecurity, confusion and uncertainty to the parties involved.

The nature of work is not constant and therefore changes are inevitable. This then has an effect of bringing disorder not only to the employer-employee relationship but also to the labour relations balance.

In many instances and depending on whether it is the employer or employee who propagates the changes, the reasons to alter the conditions are different. Employers usually cite operational or economic reasons that are meant for the survival of the business as the need to make the changes.

From the employees’ side the changes are necessitated by reasons aimed at a move from protecting the favourable employment conditions already acquired to improving them or attaining more.

In the event that the parties to the employment relationship do not agree to the changes proposed and implemented, a dispute usually arises. This results from the failure of a consultation process, negotiations, persuasion or collective bargaining in general. In essence such a dispute arises from absence of consent to the changes.

The failure of a bargaining system requires the process to assume a new nature. The dispute resolution systems and the conflict management systems follow as both the appropriate and necessary steps.

The bargaining power together with the intervention of the third party is at the centre of this phase. The parties, depending on the nature of the dispute, the conditions that
are changed and who are affected by the changes, have choices on what dispute resolution mechanisms to employ.

The choice made has a huge impact on both the outcome required in the form of recourse, how the dispute will be resolved or how the conflict will be managed.

There is legislative intervention with regards to the resolution of the conflictual scenarios that arise from disputes on unilateral variation of terms and conditions of employment. There are also non-statutory measures available to the parties.

The choices are vast as to when can the variation take place, the reasons for the changes, the parties involved, the possible dispute resolution mechanisms, what can be varied and whether the unilateral implementation can be viewed as fair.
INTRODUCTION

SOURCES OF TERMS AND CONDITIONS OF EMPLOYMENT

Terms and conditions of employment originate from a number of sources. These include:

1. The contract of employment
2. Legislation
3. Collective Bargaining arrangements
5. Practice

Depending on the origin, the terms and conditions of employment could be as a result of a unilateral, bilateral and/or multilateral system of agreement.

CONTRACT

The contract of employment is the basis of the relationship between an employer and employee. Consensus between these parties forms the basis of the contract at common law.

An agreement to terms and conditions of employment is a prerequisite for a contract of employment. A contract of employment will still be valid because of the agreement to the terms and conditions even if the terms and conditions were formulated in a unilateral manner, as long as that contract meets the other general requirements such as contractual capacity and possibly of performance.

The terms and conditions of employment that form the basis of a contract of employment can be either expressed or implied.
LEGISLATION

Whilst common law forms the basis of the South African law, it has also been shown to have deficiencies due to the ever-changing nature of employment. The way to deal with these deficiencies effectively has been to allow legislation to intervene.

Through this intervention, statutory law in the form of labour legislation has developed to form the main body of South African Labour Law. A few examples of this legislative intervention are the existence of the Labour Relations Act (LRA) 66 of 1995 and the Basic Conditions of Employment Act (BCEA) 75 of 1997.

Section 1(c) of the Labour Relations Act 66 of 1995 states that one of the primary objectives of this legislation is to provide a framework within which employees and their trade unions, employees and employer’s organisation can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest.

Section 2(a)(i) and (ii) of the Basic Conditions of Employment Act 75 of 1997 reads as follows:

“The purpose of this Act is to advance economic development and social justice by fulfilling the primary objectives of this Act which are –

(a) to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution –
   (i) by establishing and enforcing basic conditions of employment; and
   (ii) by regulating the variation of basic conditions of employment;

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation.”

This is clear indication of the decision of the state to legislate on the minimum terms and conditions of employment. This is done by establishing and enforcing basic conditions of employment and regulating the variation thereof.

Section 4 of the same Act clearly stipulates that a basic condition of employment in terms of this Act constitutes a term of any contract of employment to the extent of the factors mentioned in the same section.
Section 5 of the same Act reads:

“This act or anything done under it takes precedence over any agreement, whether entered into before or after the commencement of this Act.”

The provisions of section 5 are clear in showing that the terms and conditions enumerated in the Act shall take precedence over any agreement. “Any agreement” within this context definitely includes agreements that are a result of collective bargaining processes.

COLLECTIVE BARGAINING

The Industrial Relations Journal of South Africa Volume 12 issue 1 pp 61 to 64, 1992 deals in depth with the concept of collective bargaining and unilateral action. Collective bargaining is defined as:

“those social structures whereby employers bargain with the representatives of the employees about terms and conditions of employment, about rules governing work environment and about the procedures that should govern the relations between union and employer”

Unilateral action within the labour relations context is defined as:

“… action taken by a party without due consultation or negotiation, with the other party, whereby the two parties enjoy a recognition or employment relationship.”

These definitions are derived from the NUM v ERGO case discussed in the same journal.

The court noted that a unilateral action constitutes an unfair labour practice if the collective bargaining agent is bypassed unilaterally. It should be noted that this case was heard before the Labour Relations Act of 1995 came into effect.

In the same case the counsel were in agreement that when an impasse is reached in negotiations, either party is free to take unilateral action. The court also noted that the employer may unilaterally implement changes in wages and conditions of employment no more favourable than those offered prior to the impasse. In the
event that the employer negotiates further, he is bound to do that only with the collective bargaining agent that he started the negotiations with.

Collective bargaining is an integral part of the employer – employee relationship as well as the industrial relations system. The process of collective bargaining is therefore, by virtue of its nature, empowered to create its own terms and conditions of employment.

It also has the capacity to make variations to these terms and conditions. Because this system is multilateral in nature, a hypothesis can be raised to the effect that unilateral variations to terms and conditions of employment are either a failure or absence of a collective bargaining arrangement.

**CONVENTIONS**

The International Labour Organisation Convention 98 of 1949 dealing with the application of the principles of the right to organise and to bargaining collectively suggests, among other things, the taking of measures to encourage regulation of terms and conditions of employment by collective agreement. From this it becomes clear that the above-mentioned sections of the Basic Conditions of Employment Act were endeavours by the South African government in attempting to ratify and implement the International Labour Organisation’s standards since the Republic is a member state.

These conventions therefore have a huge impact in the determination of terms and conditions of employment.

**ESTABLISHED PRACTICE**

Established practice, also known as custom, can give rise to terms and conditions of employment especially those that are in an implied form. Established practice gives rise to entitlement. Entitlements, like rights and agreements are ensured by legislation and are legally enforceable. A dispute of established practice would therefore be dealt with as if it was a dispute of right.
DETERMINATION OF CONTRACTUAL PROVISIONS BY ONE PARTY

Kerr, AJ in the South African Law Journal discusses, among other cases, *Friedman v Standard Bank of South Africa Ltd*, also referred to as the *NBS Boland Bank* case. This case deals with the question of whether essential provisions of a contract may be determined by one of the parties alone. The court had to decide on the validity of the right to unilaterally increase the original rate of interest payable by the mortgager.

This case clearly does not relate to employment law. Certain principles that could apply to the contract of employment containing terms and conditions of employment can however be viewed as relevant.

(a) THE COMMON LAW RULE

In this case a long-standing common law contractual rule was raised. The rule states that it is unacceptable for one of the parties alone to fix the price in a contract of sale or the rent in a contract of lease.

Kerr AJ’s discussion in the South African Law Journal examines the question whether essential provisions of a contract may be determined by one of the parties alone.

It was noted in *Dawidowitz v Van Drimmelen* 1913 TPD 672 at 675 that Wessels J said a contract is not valid if it depends on the will of one of the parties.

(b) CONTRACTUAL PRINCIPLE

This principle applies to every form of contract. It is his view that if a contract depends wholly on the will of one party then there is no contract. Contracts are based on consensus. There has to be an agreement by the parties regarding the terms and conditions set out in a contract. This clearly applies to a contract of employment.
The Basic Conditions of Employment Act of 1997 allows for the variation of basic conditions of employment. Section 41 provides for such variation by way of a collective agreement in a bargaining council. Variation is possible where the employee agrees to it subject to permissibility by the Act or sectoral determination.

Section 49, however, goes against the variation of what is known as core rights. These are set out in section 7, dealing with regulation of working time; section 9, dealing with ordinary hours of work, and section 13, dealing with determination by the Minister. This includes limitations to changes on the other rights such as:

- protection afforded to employees doing night work;
- reduction of annual leave to less than two weeks;
- reduction of maternity leave in terms of section 25 of the Act;
- reduction of sick leave; and
- those contained in Chapter 6 of the Act

**BREACH OF EMPLOYMENT CONTRACT**

Unilateral change brought by employer by introducing a change to the conditions of employment without the consent of the employee is a breach of the employment contract.

A party seeking recourse against a breach of contract would generally expect a remedy in terms of remedies available for breach of contract.

(a) **REMEDIES FOR BREACH OF CONTRACT**

Christie RH in *The Law of Contract In South Africa* on page 577 lists the remedies available for breach of contract as: Specific performance, interdict, declaration of rights, cancellation and damages. The first three are regarded as methods of enforcement and the last two as recompenses for non-performance. The choice rests with the aggrieved party.
(b) **THE EMPLOYMENT CONTRACT**

Within the context of an employment relationship, remedies available for breach of a contract of employment may differ depending on the choice of the aggrieved party on recourses available. One of the reasons is that the general remedies are common law remedies. Employment relationships are regulated by labour legislation and legislation takes precedent over common law. Legislative remedies are also available for a party seeking relief.

(c) **LEGISLATIVE RECOREUSE**

(c)(i) **ECONOMIC ACTION**

Section 64(4) of the Labour Relations Act 66 of 1995 is a legislative provision that can be relied on as a remedy to a breach of an employment contract.

The section provides that:

> “Any employee who or any trade union that refers a dispute about a unilateral change to terms and conditions of employment to a Council or the Commission in terms of subsection (1)(a) may, in the referral, and for the period referred to in subsection (1)(a)

a. require the employer not to implement unilaterally the change to terms and conditions of employment; or

b. if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.”

The restoration of terms and conditions that existed before the application of the change are, however, short lived. Since the matter has to be referred to a dispute resolution institution for conciliation, the remedy of restoration comes to an end when the certificate stating that the matter remains unresolved is issued in terms of section 135(5) of the Labour Relations Act. The section reads:

> “When conciliation has failed, or at the end of the 30-day period any further period agreed between the parties –

a. the Commissioner must issue a certificate stating whether or not the dispute has been resolved;
b. the Commissioner must serve a copy of that certificate on each party to the dispute or the person who represented a party in the conciliation proceedings; and

c. the Commissioner must file the original of that certificate with the Commission.”

The section 64 remedy appears in Chapter IV of the Labour Relations Act. This chapter deals with strikes and lockouts. This, therefore, means that at the issuing of the certificate, the parties may proceed with economic action in pursuit of the resolution of the dispute.

(c)(ii) THE ARBITRATION ROUTE

In the event that the unilateral variation of terms and conditions of employment by the employer relates to the provision of benefits to the employee, a different course from the above can be taken. Item 2(1)(b) of Schedule 7 of the LRA provides for conduct that could lead to a dispute that may be resolved through arbitration in terms of Item 4(b) of the same schedule. The arbitration route seems to cater for an aggrieved individual rather than a collective? This same route is followed when a matter is raised as an unfair labour practice. This will be discussed later.

(c)(iii) THE LABOUR COURT ROUTE

In the matter Schoeman v Samsung Electronics SA (Pty) Ltd (J154/97), Mrs Schoeman approached the Labour Court for relief. She was employed by Samsung Electronics as a sales executive earning a monthly commission calculated on sales turnover. Her employer unilaterally decided to reduce her commission.

The relief she sought from the Labour Court included the restoration of her old commission, an interdict restraining Samsung from implementing the changes unilaterally and an order compelling the payment of the commission. The court found that the relief she sought was a contractual claim. That she was seeking to enforce the terms of her contract.

Mrs Schoeman could not be granted the relief she sought as the Labour Court found that it did not have jurisdiction to grant the remedies sought.
(c)(iv) **THE BASIC CONDITIONS OF EMPLOYMENT ACT JURISDICTION**

This finding by the Labour Court in the *Schoeman* case seems strange and confusing. Its clarity however lies on the fact that the Basic Conditions of Employment Act 75 of 1997 had not yet come into effect at the time when the decision on the Labour Court’s jurisdiction was made in the *Schoeman v Samsung* case. Section 77(3) of the Basic Conditions of Employment Act confers on the Labour Court the jurisdiction. Section 77 (3) provides that

“The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.”

**LRA 28 OF 1956 REMEDY**

The fact that Mrs Schoeman could not get the relief she sought from the Labour Court should not be construed to mean that unilateral variation of conditions of employment disputes could not be heard by the courts in the past. It only means that the Labour Court could not enforce the terms of her contract. The relief she sought was a contractual claim and the court did not have the jurisdiction to grant her the remedy.

Before the coming into effect of the LRA of 1995 a case on unilateral variation of conditions of employment was heard in the Industrial Court.

**THE UNFAIR LABOUR PRACTICE CONCEPT**

The case *Roberts v Winkelhaakmyun Bpk* (1996) 2 *BLLR* 249 was heard on application of section 46(9) of the Labour Relations Act 28 of 1956.

The section 46(9) deals with compulsory arbitration and reads as follows:

“If a dispute such as is referred to in section 43(1)(c) has been referred to –
(i) an industrial council having jurisdiction in respect thereof, and that council has failed to settle such dispute within a period of 30 days reckoned from the date on which the dispute was referred to the council, or within such further period or periods as the Minister may determine, the dispute shall be referred to the Industrial Court for determination ..."

Section 43(1) deals with the powers of court to order reinstatement of employees or restoration of terms and conditions or abstention from unfair labour practice.

Unfair labour practice is defined in section 1 as meaning:

(a) Any labour practice or any change in any labour practice, other than strike or a lockout which has or may have the effect that –

(i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities, work security or physical, economic, moral or social welfare is or may be prejudiced or jeopardized thereby;

(ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;

(iii) labour unrest is or may be created or promoted thereby;

(iv) the relationship between the employer and employee is or may be detrimentally affected thereby; or

(b) Any other labour practice or any other change in any labour practice which has or may have an effect which is similar or related to any effect mentioned in paragraph (a).

It has become common knowledge that this definition was very wide and could encompass virtually any eventuality depending on the discretion of the Industrial Court.

The *Roberts v Winkelhaakmyn Bpk* case was heard on the basis of the above legislative provisions. Roberts, the applicant, was declared medically unfit for his
work. His employer had found and offered him an alternative position. This new position was of a lower grade and entailed a reduction in salary. The applicant refused to accept this offer and claimed that this was an unfair labour practice and the matter was referred to court.

The court found that an employer was permitted to unilaterally alter an employee’s conditions of employment after negotiations had deadlocked, provided there were fair and valid reasons for such change and a fair procedure was followed. There must be a commercial reason for the alteration and there must be ample notice period.

The respondent in this case was ordered by a determination in terms of section 46(9) to restore the applicant’s conditions of service retrospectively to the date of the change. The reason why the court found against the respondent was that it found that the reason to alter conditions unilaterally was not a valid reason.

The employer was found to have made the changes because the other employees were not happy about Roberts retaining his original wages whilst he was doing work of a lower grade. The employer’s reason was to avert the pressure from the union.

The Labour Relations Act 28 of 1956 is no longer operative except to deal with issues that arose before the coming into effect of the 1995 Labour Relations Act. The Labour Relations Act of 1995, known as the new LRA, has provisions similar to the old LRA in matters dealing with unilateral alteration of working conditions.

**THE NEW UNFAIR LABOUR PRACTICE**

Schedule 7 Part B of the 1995 Labour Relations Act has “Unfair Labour Practices” as its heading. Item 2(1)(b) of this schedule provides as follows:

“For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee.”
The aggrieved employee would then be able to refer the matter to either the Commission for Conciliation, Mediation and Arbitration or relevant Bargaining Council for conciliation. If the matter remains unresolved at conciliation then it can be referred to arbitration in terms of Item 3(4)(b) of the schedule.

Item 2(1)(b) specifically mentions the provision of benefits. This means in a dispute arising as a result of the employer altering terms and conditions of employment that relate to the provision of benefits, the aggrieved party can pursue this route in search of a remedy.


The memorandum provides:

“... one can clearly see that the focus of the residual unfair labour practice is the protection of the individual employee, not so much a remedy for collective grievances and/or disputes.”

This takes us back to the note made earlier, that this is a matter for arbitration as there can be no strike action by an individual. The remedy of the aggrieved individual is to be found in this item. This therefore also confirms that section 64(4) of the Labour Relations Act is meant to deal with issues by the collective.
A BENEFIT - A CONDITION OF EMPLOYMENT

For the purposes of Item 2(1)(b) and the jurisdiction of both the Labour Court and the CCMA, only a benefit dispute can be arbitrated by the CCMA. A remuneration-based dispute is one that can give rise to a protected strike.

In an attempt to make a connection between benefits and conditions of employment, the question of the distinction between remuneration and benefits shall be avoided in this paper. The reasons are:

1. There is currently conflicting case law on the issue,

2. The dispute resolution mechanisms available for a dispute relating to each are clear, and

3. The distinction would be irrelevant to the content of this paper.

WHAT CONSTITUTES A BENEFIT

In SACCAWU v Garden Route Chalets (Pty) Ltd (1997) 3 BLLR 325 the Commissioner gave clarity to the term benefit as follows:

“In the absence of a clear statutory definition it is permissible to borrow from other jurisdictions. Article 119 of the treaty of Rome makes provision for equal pay claims in European Community Law … In Garland v British Railway Board (1982) ECR 359 the European Court of Justice found that concessionary travel facilities granted voluntarily to ex-employees fell within the scope of the concept ‘pay’. Even payments made ex gratia by the employer fall within the concept, provided that they are granted in respect of employment. Applying these principles to this case, the laying on of free transport constitutes a benefit in terms of Item 2(1)(b) irrespective of whether it is granted in terms of a contract or ex gratia to suit the needs of the employer.”

An action by an employer to unilaterally vary benefits of an employee would then be dealt with in terms of Item 2(1)(b).
A TRANSFER – A CHANGE IN CONDITIONS OF EMPLOYMENT

In the Labour Court matter between JL Matheyse v The Acting Provincial Commissioner, Correctional Services, case number C82/2001, the applicant challenged his transfer from Allandale to Malmesbury Correctional Facility. This clearly constituted a change in terms and conditions of his contract of employment particularly on the basis that he viewed the transfer as a demotion.

The applicant contended to the court that the respondent's decision to transfer him:

1. constituted a residual unfair labour practice within the meaning of Schedule 7 Item 2(1)(b) of the LRA,
2. was effected arbitrarily and/or on the basis of ulterior motives and
3. was procedurally and substantively unfair.

The court found in the applicant’s favour that *inter alia*:

1. There was no reasonable notice of transfer given to the applicant from the date when the transfer was approved and the date of his physical transfer.
2. After the applicant had made a representation against the proposed transfer, the representations were not considered.
3. The respondent did not follow the Departmental Transfer Policy and had therefore acted irrationally, indiscriminately and unfairly.
4. The decision to transfer constitutes an unfair labour practice as defined.

In this case the employee succeeded in basing his claim on Item 2(1)(b), alternatively Item 2(1)(c) of the Labour Relations Act. An interesting fact that also formed the basis of this case is that the applicant had obtained an interim order restraining the respondent from transferring him. A *rule nisi* was issued by the court calling upon the
respondent to show cause why the respondent’s decision to transfer him should not be set aside.

The rule nisi was confirmed as part of the court order together with the order for costs to be paid by the respondent.

The Labour Court dealt with this matter because it was referred to it for review. The court was empowered by section 158(1)(h) of the Labour Relations Act to review the decision. The section reads:

“The Labour Court may review any decision taken or any act performed by the State in its capacity as an employer, on such grounds as are permissible in law.”

In this case the second respondent was the National Commissioner, Correctional Services and the third respondent was the Minister of Correctional Services.

Normally, or in the event that the respondent was not the State, such a dispute would be dealt with through the arbitration process after conciliation has failed. If a need then arose for a review, such review would then be dealt with in terms of section 145, and not section 158, of the Labour Relations Act.

NO RELIEF FROM ITEM 2(1)(b)

In a number of instances where reliance for relief was based on the provisions of Item 2(1)(b), there has not been success.

In FAWU v Enterprise Bakery (1997) 5 BLLR 627 the claim was for payment of overtime and commission. The CCMA held that it did not have jurisdiction to hear and decide disputes of overtime and commission in terms of the residual unfair labour practice. The Commission held that the Department of Labour had jurisdiction in terms of the Basic Conditions of Employment.

In NEHAWU / Government of the Eastern Cape (1995) 5 BALR 550 (CCMA) the applicant also claimed payment for overtime for special work done. The commissioner noted that the CCMA has jurisdiction to entertain only such disputes
as are provided for in the Labour Relations Act. The applicant could only succeed if it was accepted that the employer’s failure to pay amounted to unfair labour practice. The Commissioner held that “benefits” in Item 2(1)(b) did not include payment for overtime.

It is to be noted from these cases that for a claim based on Item 2(1)(b) to succeed, the matter contended should not be just any condition of employment but it should be “relating to the provision of benefits to the employee”, as such wording is used in that item.

The reliance on Item 2(1)(b) failed to bring the desired outcome for the respondents in the matter between Transnet Limited v CCMA and Others, case number P640/2000.

This matter was brought to the Labour Court for review. The applicants in the matter that was referred to arbitration were recruited and employed by Transnet. They said they had accepted that employment on the assumption that they would be trained to attain a “Standard Training Certificate for Watchkeeping” (STCW). This they considered to constitute a material term of their contract. A dispute arose when the course was not made available to them as an element of their employment.

The arbitrator found in favour of the employees on the basis that, inter alia, the provision of the STCW training was a condition of employment which, without consultation or negotiation, was unilaterally amended by Transnet to the prejudice of the employees. The arbitrator went on to classify the dispute as one relating to training.

The court held that a dispute relating to the unilateral change of terms and conditions of service, is one of mutual interest rather than right and as such are not arbitrable by the CCMA.

The provisions of Schedule 7 Item 2(1)(b) were not meant to allow arbitrators to adjudicate upon collective bargaining issues. Support for this contention is found in Hospersa v Northern Cape Provincial Administration (2000) ILJ 1066 (LAC) at 107.
It reads as follows:

“A dispute of interest should be dealt with in terms of the collective bargaining structures and is therefore not arbitrable. A dispute of interest should not be allowed to be arbitrated in terms of item 2(1)(b) read with item 3(4)(b) under the pretext that it is a dispute of right. To do so would possibly result in each individual employee theoretically cloaking himself or herself with precisely the same description of the dispute that is the true subject matter for collective bargaining …”

The court went on to say that not all training disputes are disputes of right. Some legislated functions of some bargaining forums are to promote training schemes. Education and training is also a matter which can be the subject of a Work Place Forum arrangement. Within this context training matters become matters of mutual interest.

From this discussion it is clear that the CCMA did not have jurisdiction to hear the matter. The Court set aside the arbitration award, on among other reasons, the arbitrator exceeding powers by determining a dispute in the absence of statutory jurisdiction.

The court could have also decided the matter on the basis that Item 2(1)(b) was meant to provide relief to an individual employee and not a group of employees as will be shown below.

**WHO CAN USE ITEM 2(1)(b)?**

Whilst it can be argued that a remedial route for unilateral variation of terms and conditions of employment (and/or benefits) depends on the number of aggrieved parties. It is not imaginable that this could have been the intention of the legislature.

Section 64(4) seems to have been intended for the collective and Item 2(1)(b), in its limited sense, seems to have been intended for an aggrieved individual.

This arrangement is a cause for concern on its own. The Commissioner in *Kubeka v Woolworths (Pty) Ltd* (1999) 20 ILJ 3020 (CCMA) attempted to make matters worse.
The applicant in this matter was employed as a permanent casual. Her hours of work were reduced to six hours per week. Her salary was accordingly drastically reduced. The applicant referred the matter to the CCMA in terms of Item 2(1)(b) of the LRA.

She contended that the reduction of working hours constituted a unilateral variation of the terms of her conditions of employment. The commissioner found that the dispute did not fall within the ambit of the definition of “residual unfair labour practice”. Among other things, this finding was based on the fact that there was a contractual provision to say that hours of work would be determined entirely by the needs and demands of the store.

The applicant was in fact challenging the validity of a contractual clause. For this reason the Labour Court or the civil court had jurisdiction and not the CCMA. The commissioner’s mistakes followed when he said this was a matter of mutual interest and should therefore be dealt with in terms of section 64(4) of the LRA.

Section 64 deals with strikes and lock-outs. He continued to say that the employee (Kubeka) had the option of engaging in an industrial action after negotiations have failed. This is incorrect because an individual does not have a right to strike and section 64 is for the collective labour relationship.

Le Roux in Contemporary Labour Law; Volume 6, issue 11 pg 94, June 1997 in discussing the Schoeman v Samsung case points out that:

“The definition of a strike found in section 213 of the LRA states that a strike consists of one or more actions committed by persons who are employed by one or more employers. The same section defines a lockout as the exclusion from the employer’s premises of employees. The finding that section 64(4) does not apply to a dispute between an employer and a single employee and that such a dispute cannot be the subject of a strike or a lock out as defined, certainly accords with these definitions.”

The commissioner in the Kubeka v Woolworths should have advised the applicant to refer the matter to the Labour Court but not in terms of section 64(4) of the LRA. The dispute was about the infringement of the applicant’s common law rights. The matter could also be referred to the civil court.
LABOUR COURT AND SECTION 64

The Labour Court heard a number of cases after its jurisdiction had been increased by section 77 of the Basic Conditions of Employment Act.

In *SAMRI v Toyota South Africa Motors Pty Ltd* (1998) 6 *BLLR* 616 (LC) the applicant sought to interdict the respondent by bringing an application in terms of section 64(4) of the Labour Relations Act. The respondent had decided to introduce a new vehicle benefit scheme, which the applicant did not consent to. The application was for an interdict to prevent the respondent from implementing the new vehicle benefit scheme.

The dispute was referred to the CCMA and read as follows:

“Unilateral change to terms and conditions of employment in that the company intends implementing a monetary allowance based car scheme from the existing lease/assigned car scheme.”

The applicant alleged that the respondent continued with the implementation whilst the applicant requested for consultation.

Judge Reveles noted that the employer was precluded from continuing with the conduct complained of when a dispute has been declared, referred to the CCMA and therefore pending.

“A request by employees for the employer not to continue with the changes for the employer to continue with unilateral implementation when there has been a request not to do so, entitles the employees to approach the Labour Court to compel the employer to adhere to the request.”

The success of the section 64 application depended on two issues:

1. That unilateral changes are effected to the terms and conditions of the employment contract.

2. That there was no consent to the unilateral changes.
Having proved the two above requirements, the applicants were granted the order in terms of their notice of motion.

**INTERIM RELIEF**

As stated earlier a dispute about unilateral changes to conditions of employment in terms of section 64 is one that requires the parties to exercise their right to strike or lockout and there not one for arbitration. Section 64 itself falls under chapter IV dealing with strikes and lockouts.

In **MUKWEVHO and Others v ECCAWUSA** (1994) 4 BLLR 358 (LC) the applicants referred a dispute concerning unilateral amendments to terms and conditions of employment to the CCMA for conciliation. They also launched an urgent application to the Labour Court in terms of section 64(4)(a) of the Labour Relations Act.

The Act in section 64(4), entitles the aggrieved party to require the restoration of the original conditions for a period of 30 days unless a longer period is agreed to.

The Acting Judge Grogan, noted that the implications of this section is that when the restoration requirement has been made, the obligation to restore lapses after the expiry of the 30 days period or the longer agreed period. This was as a result of the fact that the 30 days period expired on the day after the application was heard.

The section 64(4)(a) application was dismissed for *inter alia*, if the relief sought was granted, it would be granted in excess of what the applicant was entitled to under the Act. A section 64 court order is therefore an interim relief lapsing after a period of 30 days after which the parties may engage in an economic action.

In **Airlink Pilots Association of S.A. v S.A. Airlines (Pty) Ltd**, case number J818/01 the Labour Court sat to hear an urgent application. The applicant brought a matter of unilateral amendments to terms and conditions of the pilots. The matter was referred to in terms of section 64 of the Labour Relations Act. The dispute related to a certain system of which the seniority of pilots was the sole criteria for their promotion.
The applicant contended that the respondent did away with this criterium when a new fleet of aeroplanes was acquired. An order was sought to the effect that pilots to be trained for the new fleet must first resign from the respondent. They would then take up new employment with a different airline. The order had to outline that this was a sham used to avoid the obligations they had under a collective agreement they had.

An urgent application was made in terms of section 64(4) for the restoration of the status quo ante for the period of the said referral.

The court’s finding was as follows:

“In this matter, the applicant will have to negotiate with the same persons, who had done away with the seniority system in the first place. The route provided for by the Act, namely to approach the CCMA to conciliate the question of the unilateral changes to the terms and conditions of employment seems to be the only remedy. The applicants’ referral was therefore made in competent terms and the provisions of section 64(4) of the Act may be invoked.”

The relief sought was granted with costs.

The two above cases also prove that a dispute about unilateral variation of terms and conditions of employment is not an arbitrable dispute but one requiring power play.

**THE LABOUR COURT/HIGH COURT**

In *Louw v Acting Chairman of the Board of Directors of the North West Housing Corporation* (2000) 21 ILJ 482 (B), a dispute about unilateral changes to a contract of employment was brought before the High Court. The applicant had received a 7% wage increase during November 1998. In May 1999 the applicant was told that the increase he received was unlawful and had to pay it back. The applicant launched an application for an order that the respondent furnish reasons why the decision in terms of which the applicant’s salary was reduced should not be reviewed and set aside.

The respondent raised as a point *in limine* that the High Court had no jurisdiction to hear the application. This lack of jurisdiction was by virtue of section 157 of the LRA.
The section 157(1) reads as follows:

“Subject to the Constitution … and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.”

The applicant relied on what the court said in *Jacot-Guillardmod v Provincial Government, Gauteng* (1999) 20 ILJ 1689 T where Judge Le Roux said:

“The interpretation and enforcement of a contract of employment fell outside the purpose of the LRA. The LRA did not restrict the right of the High Court to hear an ordinary common law action in connection with contract.”

The applicant also relied on section 77(3) of the BCEA providing the Labour Court concurrent jurisdiction with the civil courts.

The court accepted the arguments by the applicant. In conclusion the court held that the issue to be decided was a common law one dealing with a contract of employment. The court held it had jurisdiction to hear matters relating to the contract of employment and fundamental rights entrenched in the Constitution arising from employment relations. The court ordered the respondent to furnish reasons why the decision to unilaterally change the contract of employment should not be set aside.

From this case it is clear that the civil/High Court has jurisdiction, on matters relating to contracts of employment, to make findings based on common law principles and that it has concurrent jurisdiction to do so with the Labour Court.

In *Mcosini v Mancotywa & Another* (1998) 9 ILJ 1413 a matter was referred to the High Court. The applicant, a town clerk employed by a municipality, was suspended from duty with pay pending the outcome of a disciplinary hearing. He was then reinstated but suspended again.

The employee applied to the High Court for an interdict against the employer’s action. The respondent raised the point that the High Court did not have jurisdiction to hear the matter.
The applicant had contended that the actions of the employer constitute a violation of his fundamental right to just administrative action as provided for by section 157(2) of the LRA. The section reads:

“

The Labour Court has concurrent jurisdiction with the Supreme Court —
(a) in respect of any alleged violation or threatened violation, by the state in its capacity as employer of any fundamental right entrenched in chapter 3 of the Constitution; and
(b) in respect of any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the state in its capacity as employer.”

The court held that the fact that there were violations of fundamental rights to just administrative action does not alter the fact that the matter is concerning a labour issue which falls under the purview of the Labour Relations Act. It went on to say the Labour Court cannot be avoided or side-stepped by alleging that a fundamental right, other than a right to fair labour practices, has been breached. The argument that the High Court had jurisdiction because the matter concerns a constitutional issue had to fail.

That the relief sought by the applicant from the High Court can be granted by the Labour Court was one of the reasons given for the dismissal of the application. From this judgement it is clear that the High Court takes a strict view of its concurrent jurisdiction with the Labour Court in respect of alleged unfair labour practices.

In Louw v Acting Chairman of the Board of Directors of the North West Housing Corporation & Another (2000) 21 ILJ 482 (B) the High Court also dealt with its concurrency with the Labour Court.

The applicant launched an application for the respondent to furnish reasons why the Housing Corporation had summarily reduced his salary. The respondent argued that the High Court did not have jurisdiction, by virtue of section 157 of the LRA.

The court held that the matter related to a dispute between the parties concerning a term of the contract of employment, namely the employee’s salary. It stated further
that there was no question of collective bargaining or issues of peace in the workplace and matters incidental to in the matter before it.

The issue is basically a common law one in connection with a contract of employment. Having regard to the purpose of the Labour Relations Act it was clear that the legislature did not intend to oust the jurisdiction of the High Court to hear an ordinary common law issue relating to a contract of employment.

The court also cited section 34(1) that reads:

"an employer may not make any deduction from an employee's remuneration unless –

(a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or

(b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award."

This section is relevant to the dispute and also gives the High Court the jurisdiction to hear the matter.

The court ordered the respondent to furnish the reasons as applied for and why the decision to unilaterally reduce the salary should not be set aside. This decision by the High Court indicates that while it has concurrent jurisdiction with the Labour Court it will still guard its own common law based jurisdiction.

The two above cases also indicate that while the two courts have concurrent jurisdiction it is still important to look at the type and source of dispute when deciding to make a referral for it resolution. A better opportunity of settling a dispute about unilateral variation of a contractual term through litigation starts with an application to the High Court. An unfair labour practice dispute arising from the variation of terms and conditions of employment (and benefits) would best be referred to the Labour Court, if no provision directs it to either arbitration or economic action. This would also include making the correct referral.

This conclusion was verified in *Makgato and Others v Hi-Line Chicks (Pty) Ltd* (1998) 9 (3) *SALLR* 116 LC. The question to be decided *in casu* was whether the court
could grant the applicant employees an interim interdictory relief, preventing respondent employer from evicting them from accommodation occupied by them.

The relief sought was:

1. That the unilateral change of conditions and terms of employment be declared an unfair labour practice.

2. Restraining and interdicting the respondent from evicting applicants.

3. Directing the respondent to withdraw such action.

4. Grant the applicant such further alternative relief as may seem fit.

The Labour Court declined to grant the relief sought in point number 1. The court held that it is not the function of the Labour Court in proceedings of this nature (section 158 application) to make a declaratory order in respect of the issue in dispute, for instance the prayer for the Labour Court to declare a unilateral change of conditions to be an unfair labour practice.

That is a matter for a different forum to explore fully on the basis of a proper referral of the issues and disputes and the facts relating thereto. It was certainly not for a court in an application of this sort to decide such matter. It is to be note that the application was made in terms of section 158 of the Act.

**THE ECONOMIC ACTION ROUTE**

The Labour Relations Act deals with unilateral variations to terms and conditions of employment under strikes and lock-outs. This forces the matter to be viewed as one for collective bargaining. Matters that are subject to collective bargaining are matters of mutual interest. It is also the matters that may not be referred to either the Labour Court or arbitration.

In fact this limitation is provided for by section 65(1) that reads as follows:
“No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out if—

(a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;

(b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;

(c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;

(d) that person is engaged in—

(i) an essential service; or

(ii) a maintenance service.”

In the matter of National Union of Mineworkers and Others v Gold Fields Security (1999) 10 (1) SALLR 35 LC the context within which a permissible and therefore protected strike action could take place was discussed and outlined at length. The following points emanated from the case.

The Constitution of the Republic of South Africa of 1996 guarantees every one the right to fair labour practices. For the purposes of this paper the unilateral variation of terms and conditions of employment particularly by the employer is viewed as an unfair labour practice. It shall be noted that in the above discussion remedies, principally of an aggrieved individual employee, were outlined. The strike action is therefore taken as a remedy or a course of action available to a group of aggrieved employees.

The Constitution guarantees to employees the right to strike. Both these rights are regulated and given context in the Labour Relations Act of 1995. Even with the limitations as set out above, employees still enjoy a wide right to strike.

Employees who comply with the elementary procedures found in the Act are entitled to both strike and protection from normal legal consequences of withholding their labour. They commit neither a breach of contract nor delict that may expose them to damages. Importantly a dismissal arising out of such action will be viewed as automatically unfair.
EMPLOYER’S RE COURSE TO A STRIKE

An employer who finds his employees engaged in a strike action as a result of not getting consent in his endeavour to change conditions of employment is subject to power play as allowed by collective bargaining determining factors. That employer has few choices other than playing along within the bargaining system.

The employer would have to check and see if the strike action is either permissible or procedural or both, as these factors may bring to a halt the strike or allow him to terminate the services of the striking employees. The employer’s action would be given effect by section 68(5) which reads:

“Participation in a strike that does not comply with the provisions of this Chapter (Chapter IV) is misconduct. Or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account.”

The employer will have to remember that the fact that employees are engaged in strike action that is not permissible does not translate to the right to dismiss. Participation in an unlawful strike is a misconduct that should be treated like other acts of misconduct, which do not always warrant dismissal. Prior to dismissal the employer will have complied with the provisions of Item 6 of the Code of Good Practice found in Schedule 8 of the Act.

In a lengthy case that was heard by the Labour Appeal Court a number of important points were raised within the context of dismissing striking employees. The matter was between Modise and Others v Steve’s Spar Blackheath (1999) 10 (6) SALLR 1.

This case has no direct bearing to a dispute about unilateral changes to conditions of employment. It is however very important to consider when deciding to dismiss striking employees as such disputes are in the correct sense dealt with through power play in the form of strike action (or lockout).
It could be said that the case revolved around the *audi alteram partem* rule. This rule is one of the rules of natural justice and is deeply entrenched in our law. The rule calls for a hearing of the other party’s side of the story before a decision can be taken which may prejudicially affect such party’s or interests or property.

There is, however, no way that consensus can be reached when a party wishing to alter conditions of employment does not allow other affected parties a chance to have a say. The absence of this consensus is the root of disputes on unilateral variation of conditions of employment.

The context within which this rule was examined in this case was different. Before dismissing striking employees the rule must have been applied. Other requirements are as set out in Item 6(2) of the Code. The first being the employer having to, at the earliest opportunity, contact the union to discuss the course of action intended.

The second rule relates to the issuing of an ultimatum. The outcome of this case was that the employees had been fairly dismissed for taking part in an illegal strike. They were given a fair ultimatum to which they did not respond. The appeal failed with costs.

In the event that employees had not actually engaged in the strike action, it is nevertheless possible to refer such a dispute for conciliation even though it may not be possible to take the further step of arbitration, since conciliation also has a potential of diffusing disputes that are strikable. There may be other steps available to take to deal with the issue, for example, if the subject of the dispute is adjudicable by the CCMA where the provisions of the above-mentioned section 65(1)(b) of the Act apply. In that event the right to strike may not be available.

In the case in question (*NUM v Goldfields*) the court held that the dismissal of striking workers was procedurally unfair, which carried with it the connotation that its substance might be questionable. Had the procedural process succeeded it might have avoided the possibility of dismissal.
It is worth noting at this stage that a dispute of mutual interest can arise within a section that is designated as essential services as contemplated in section 74. The employees cannot use the right to strike. A different procedure is set out and entails referring the matter for conciliation and if it fails, be referred to arbitration. Striking is therefore not an option in this instance.

**LOCK OUT – ANOTHER RECURSCE**

A lock out is a form of industrial action by the employer or available to the employer. It is a measure that can be used by an employer to force employees to accept conditions, proposals or employer’s demands.

Section 64(1) of the Labour Relations Act reads:

“Every employee has the right to strike and every employer has recourse to lock-out ...”

Grogan J in *Workplace Law* (6th edition Butterworths 2001 at 370) defines a lock out as:

“... the exclusion by an employer of employees from the employer’s workplace, for the purposes of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches the employee’s contracts of employment in the course of or for the purposes of the exclusion.”

A lockout can therefore be used by an employer who wishes to alter terms and conditions of employment of employees.

There are two types of lockouts. One is the offensive lockout and the other is a defensive lockout. There is no definition nor mention of either a defensive or offensive lockout in the Act. The distinction can only be postulated from the meaning and interpretation of the other provisions of the Act.

An example is section 76(1) which reads:

“An employer may not take into employment any person ... for the purposes of performing the work of any employee who is locked out, unless the lock-out is in response to a strike.”
A lockout in response to a strike is a defensive lockout and a lockout that is initiated by the employer is an offensive lockout. This distinction is important particularly on the basis of whether the employer can hire scab labour or not.

In *National Union of Technikon Employees v Technikon SA* (1999) 10 (9) SALLR 34 LC this matter was at the centre of discussion. A literal interpretation of section 76 was held to mean that whenever an employer wished to employ replacement labour, it could only qualify to do so if its lockouts were, at that stage, in response to a strike. If the strike ended the employment of the replacement labour also ended.

Employees have a constitutional right to strike and employers merely have the recourse to a lockout. The distinction is substantive. It signals the clear intention of the legislature not to treat lockouts and strikes symmetrically. Section 76(1)(b) could not be available in an offensive lockout if there were to be substantive parity in collective bargaining.

If that was the case the employer could make any demand, lockout its employees and employ replacement labour. It was foreseen that an employer could run its operations permanently, with the replacements, under such conditions.

The employees would be disproportionately disadvantaged. Collective bargaining would degenerate to collective begging.

Within the context of this paper then, an employer who wishes to unilaterally make changes to terms and conditions of employment has an option of locking out its employees “offensively”. This does not mean that the employer does not have the option of employing the defensive lockout strategy. However this would make limited economic sense.

As a result of the fact that both strikes and lockouts are viewed as the appropriate means of resolving disputes about unilateral changes to terms and conditions of employment as contemplated by section 64(4), the employer has a lockout in general as an option to engage on, whether it is defensive or offensive.
Also because aggrieved or non-consenting employees would generally make use of section 64(4) provisions and strike, the employer can as a result make use of the defensive lockout strategy and still employ replacement labour.

An employer cannot use the defensive lockout option in its attempt to unilaterally vary terms and conditions of an individual employee. This is because a defensive lockout is a response to a strike and an individual employee is not in a position to be on strike on his/her own.

On the same note I cannot find any reason why an employer cannot institute an offensive lockout against an individual employee. This is endorsed by the fact that section 65 of the Act on limitations to the right to strike and recourse to lockout specifically and continuously mentions person and not persons. For this reason I submit that Item 2(1)(b) would be that individual’s available option for recourse.

A DIFFERENT SCENARION

Within the industrial relations system it is not beyond bounds of comprehension to have the employee party wishing to alter terms and conditions of employment. This probably happens all the time. A different meaning will, however, be attached in such a scenario in the event that the employee party takes measures to give effect to such wishes.

In such a case the employee party will have to negotiate with the employer. If the employer refuses to negotiate (or the employer does not consent), then it can be viewed as a refusal to bargain on the side of the employer.

Refusal to bargain disputes are provided for by section 64(2). Whilst this section makes no mention of matters of mutual interests as a basis for “the issue in dispute”, the net could be said to be cast wider by the legislature in the use of the words “a refusal to bargaining includes …”. In terms of the rules of interpretation of statutes this means there has not been a limit set to the eventualities set out in section 64(2)(a) in the form of (i) and (ii) of the same section.
If this argument could then be acceptable, the employees would after seeking for the matter to be conciliated, proceed and refer the matter for advisory arbitration in terms of section 64(2) read with section 135(3). Because these sections would only bring about an advisory award, nothing stops the employees from proceeding and engaging in a strike action. Power play will then determine whether the employees will be able to determine the implementation of changes they require.

Under issues for bargaining it can happen that variation of terms and conditions of employment arises as a result of an interpretation or application of collective agreements as contemplated by Part B of Chapter 3 of the Act. In such an instance, whilst there is no express provision provided, the aggrieved party has the option of approaching the Labour Court for an order for compliance in terms of section 158(1)(b).

**THE RETRENCHMENT OPTION**

It is possible that the changes that the employer wishes to implement are as a result of economic reason or based on operational reasons requirements. In this instance the employer will have to be able to show that the required change is for sound business reasons and there are no other options but to dismiss.

In *Hlongwane and Another v Plastix (Pty) Ltd* (1990) 11 ILJ 171 (IC) the court made a distinction between retrenchment and redundancy.

Retrenchment is where employees become superfluous due to an economic downturn and redundancy as a result of, for example, the introduction of new technology or reorganisation. In terms of the Labour Relations Act of 1995 these two instances would fall under dismissal for operational reasons. Section 213 of the Act defines operational requirements as requirements based on the economic, technological, structural or similar needs of the employer.

In *Food and Allied Workers Union and Others v Kellog SA (Pty) Ltd* (1993) 14 ILJ 406 IC the court held that a retrenchment will be *bona fide* if it is designed not only to stem losses but also to increase profits. “All that is required is a *bona fide* economic
rationale” the court said in Môrester Bande (Pty) Ltd v NUMSA and Others (1990) 11 ILJ 687 LC.

Section 189(2) of the Act places an obligation on the employer contemplating dismissal to look for alternatives to the dismissal. In the event that the employer is faced with operational reasons related difficulties that may require him/her to dismiss employees for operational reasons, as an alternative to dismissals it can happen that making changes to employees’ terms and conditions of employment can save the business. An example of which would be the reduction of working hours or changing shift systems.

To do this would be to alter terms and conditions of employment. In the event that employees do not agree to this change, surely the employer can dismiss these employees, after complying with the other requirements.

**RE-EMPLOYMENT**

Because these dismissed employees would not have had their contracts of employment terminated for reasons of redundancy, there could still be vacancies or position with the employer. These positions would be different from those of the dismissed employees as there would be changes to terms and conditions of employment for the new positions.

In this way the employer could then be in a position to re-employ the dismissed employees. This will be the case particularly if the employer has a collective agreement with the employees relating to the recall or re-employment of retrenched employees.

This arrangement can also be facilitated by section 189(3)(h) of the Act that deals with the possibility of future re-employment of the employees who are dismissed. An employer who decides on the option of retrenching employees would have to be careful of such dismissals as any flaw may render the dismissals automatically unfair. The employer that engages in this exercise will have to be careful not be seen to be committing an unfair labour practice.
Item 2(1)(d) of Schedule 7 of the Act reads:

“For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving—
(d) the failure or refusal of an employer to reinstate or re-employ a former employee in terms of any agreement.”

The requirement of this item is that there has to be an agreement. If there is an agreement, the employer will be expected to make offers of re-employment to the dismissed employees. The dismissed employees will then use this opportunity to waive their right if they so wish. In the absence of an agreement the employer has no statutory obligation to make the offers.

**SEVERANCE PAY**

The employer who chooses to dismiss employees for operational reasons in the event that there is no consensus to changes to terms and conditions of employment, has to pay the dismissed employees severance pay. This is a requirement of section 41 of the Basic Conditions of Employment Act which reads:

“An employer must pay an employee who is dismissed for reasons based on the employer’s operational requirements severance pay equal to at least one week’s remuneration for each completed year of service, calculated in accordance with section 35.”

It should, however, be remembered that the employee who has to be paid this money is the same employee who the employer had required to have changes made to the terms and conditions of employment. The fact that there is a dismissal is a result of not consenting to the changes. In many instances the refusal to accept the employer’s changes is because the changes made may alter the nature of work, which may result in the changed conditions rendering the “new” position an alternative position.

A problem surfaces then in the form of the provisions of section 41(3) which reads:
“An employee who unreasonably refuses to accept the employer’s offer of alternative employment with that employer or with any other employer is not entitled to severance pay in terms of section 2.”

It is clear that the reason for the employee’s dismissal, in this scenario, is a result of the refusal to take the alternative employment.

There is no cut and dried answer this dilemma. There is no clear legislative direction.

It would also be unfair to say this is a legislative oversight as that may imply the necessity of the legislature intervening in detail in every employer-employee activity. Be that as it may, it is unfortunate that the matter is left open.

In situations of this nature such issues are left to the adjudicators to create jurisprudence. It is hoped that in determining the issue a lot will revolve around the unreasonableness of the employee in not accepting the alternative offer.

In Sayles v Tartan Steel CC (1999) 20 ILJ 647 LC the court held that reasonableness depends on the nature of the alternative job. Examples being new responsibilities that are beyond the employee’s capabilities, drastically reduced income or status and personal prejudice to the employee, such as relocation far from his family.

**DISMISSAL FOR MISCONDUCT**

In Air Products (Pty) Ltd v CWIU and Another (1998) 1 BLLR 1 LAC the court dealt with a case of an employee who was dismissed for gross insubordination. The employee had been given an instruction to move and work at another plant. Work was slack in the plant that he worked in. The employer decided to move him to an adjacent plant where there was night shift worked as opposed to the plant where he was in. He was instructed to move. He refused. He also refused to attend a disciplinary hearing and was dismissed. The court a quo found in the employee’s favour and found the decision to dismiss unfair on the sole ground that the presiding officer had not considered mitigating circumstances.
The Labour Appeal Court found that there was no factual foundation for this finding. On the applicant’s contention that he (and his union) had not been consulted on the move the court noted that the company had no obligation to consult as he was not retrenched. The company’s obligation was to persuade him to co-operate. He was accordingly guilty of insubordination.

In *Slagment (Pty) Ltd v BCAWU and Others* (1994) 12 *BLLR* 1 the court held that persuasion need not go much beyond explaining the reasons for the instruction. The question that lay in front of the judges was whether in the traditional sense an employee must obey the reasonable and lawful instructions of the employer, or in the contemporary sense the notions of fairness in the employment field had to prevail. Judge Froneman concluded that the dismissal was unfair because the employer failed to consult the employee. This was a minority judgement. The majority was satisfied with the mere attempt to persuade before resorting to disciplinary action.

Whilst the judges’ opinions are in conflict, it is clear that an employer will have to start by reasoning with the employee concerned. The instruction given to the employee must be justified operationally.

If the route of consulting with the employee is taken, which should look at alternatives, the end result could be a retrenchment. This however does not erode the duty of the employee to carry out instructions.

This case did not bring much clarity to the matter. However it confirms that whilst the decision to dismiss due to misconduct is possible in this instance, the route of dismissal due to operational grounds is possible, acceptable and preferable. In a later judgement the court held that the dismissal of employees refusing to operate two machines instead of one was fair on the basis of refusing to carry out a reasonable and lawful instruction.

**DISMISSAL CONFIRMED**

In *A Mauche (Pty) Ltd t/a Precision Tools v NUMSA and Others* (1995) 4 *BLLR* 11 LAC the court held that it was not a term of their contract that they would operate
only one machine. It was noted that employees do not have a vested right to preserve their working obligations completely unchanged as from the moment they first begin work. All that was required of the company as a matter of fairness and sound industrial relations practice, was to attempt to persuade the employees to co-operate and accept the change in practice.

It can be learnt from this case that if the proposed change does not involve an alteration of the employee’s contractual obligations, the employer is under no obligation to negotiate. All that is required is persuasion to accept the change. After the refusal dismissal can follow.

**WORKPLACE FORUM**

Chapter V of the Labour Relations Act deals with Workplace Forums. Section 84 of the Act deals with specific matters reserved for joint decision-making and consultation by the Workplace Forum. They include:

(a) Restructuring of the work place, including the introduction of new technology and new work methods;

(b) Changes in the organisation of work;

(c) Partial or total plant disclosure;

(d) Mergers and transfers of ownership in so far as they have an impact on the employees;

(e) The dismissal of employees for reasons based on operational requirements;

(f) Exemptions from any collective agreement or any law;

(g) Job grading;

(h) Criteria for merit increases or the payment of discretionary bonuses;
(i) Education and training;

(j) Product development plans and;

(k) Export promotion.

This is not a closed list as section 84(2) of the Act states that a Bargaining Council can add to this list other matters for consultation.

An analysis of the issues enumerated shows that most of the issues are those that have been the subject of discussion in this paper. They are the issues that translate to disputes about unilateral changes in the event that there is no consensus or collective bargaining has failed.

There may therefore have been an intention by the legislature to pack up all these issues as matters for consultation in a Workplace Forum in view of the fact that there is not a very clear method of dealing with them when they are converted to disputes, or where the method is clear, the route is onerous.

It cannot be said that it is fortunate or unfortunate that there has not been many employers requested to establish Workplace Forums. In cases where a Workplace Forum is in place, the issues raised by above mentioned *A Mauche v NUMSA and Air Products* cases were to be resolved differently. There was not going to be a need to evaluate whether the employee should have been dismissed for misconduct or for operational reasons. This however should not be construed to mean industrial relations life would have been easier.

The Act in section 85 requires that an employer before implementing a proposal in relation to the issues listed in section 84, the employer must consult the Workplace Forum and attempt to reach consensus. There are not many Workplace Forums in existence. There may therefore be not many Workplace related disputes that have occurred. “Attempting to reach consensus” may not have had an opportunity of being tested in adjudication and arbitration circles.
It is safe to assume that the same interpretation assigned to the same wording in section 189 of the Act dealing with consultation in the context of retrenchments will apply.

A question then arises as to what happens in the event that there is no consensus reached in the Workplace Forum in matters for consultation. This question is answered in section 85(4) where it says:

“If the employer and the Workplace Forum do not reach consensus, the employer must invoke any agreed procedure to resolve any differences before implementing the employer’s proposal.”

This attempt by this section to answer the above question leaves a lot to be desired. Whilst it is clear that in the final analysis the employer is allowed to make the changes, that could be viewed as unilateral, it does not say what the employees represented by the Workplace Forum can do.

This section also plays down the importance of some of the issues that fall under issues for consultation as there is a different procedure, as set out in section 86 of the Act, for issues for joint decision-making. A distinction is therefore made between matters for consultation and matters for joint decision-making.

This section (section 85) also does not mention what sort of an agreement can be relied upon. The agreement, it says, will be used to resolve differences. This also casts a wider interpretation as the agreement can only be one that relates to dispute resolution channels to be followed or a collective agreement dealing with something specific as a collective agreement on retrenchments.

All sorts of outcomes can therefore be expected at the instance of invoking the provisions of this section. Section 86 of the Act highlights to us that the Workplace Forum can exist parallel to other collective agreements. However an issue dealt with by a collective agreement is not to be regulated in terms of the rules of the Workplace Forum.
It is therefore tempting to conclude that there are not many Workplace Forums because of these reasons.

The principle set out in the *A Mauche* case seems to be in conflict with this arrangement particularly where the court said:

“It is only if changes are so dramatic as to amount to a requirement that the employee undertakes an entirely different job that there is a right to refuse to do the job in the required manner.”

If the court’s principle is applied, an employer will have been unfair in dismissing an employee who refuses to carry out an instruction within this context. But it remains to be seen whether an employee who is dismissed for the same reason, where the implementation of changes came through the Workplace Forum route, may have recourse through arbitration.

An employee who is aggrieved by the employer’s action of unilaterally changing the conditions of employment has a clear remedy contained in Item 2(1)(b) of Schedule 7. In the absence of specific provision, that employee, if eventually dismissed has a recourse in terms of the unfair dismissal provisions.

If the employees as a group, as represented by the Workplace Forum are not happy with the implementation, they can embark on a strike action as there is no mention of this eventuality in section 65 of the Act where limitations to the right to strike are set out. This right to strike will obviously be curtailed if there is an agreement prohibiting the strike as mentioned in section 85(4) read with section 65(1)(a) of the Act. In that event it would seem that the procedure to be followed is the one that is contained in that strike prohibiting collective agreement.

The right to strike and therefore the protection from being dismissed for striking will be valid if the reason for the strike is the employer’s unilateral changes to terms and conditions of employment. Some of the issues that are listed in section 84 are not strikable issues. An example of which is the dismissal of employees for reasons based on operational requirements. This is currently a dispute of right. This may change in the near future as there is currently a move to make this a strikable issue.
Section 94 of the Act does seem to provide some answers. The section provides that if there is a dispute about the interpretation or application of the chapter dealing with Workplace Forums, it may be referred to conciliation. If conciliation fails, it can then be referred to arbitration. This clarity relates only for the interpretation or application of the chapter disputes and is therefore not of great help.

The chapter on Workplace Forums also fails to mention what should happen in the event that it is the employees who wish to bring changes. Concentration is on the employer’s intention to bring the changes.

It can however be safely assumed that if the matter raised by employees is one of mutual interest, the employees can proceed and embark on a protected strike, if there is no express prohibition in a collective agreement. If the matter is one that relates to rights the matter should then be arbitrated or litigated depending on the nature. This assumption is based on condition that there is no express prohibition to taking mentioned route.

**VARIATION AS A RESULT OF A TRANSFER OF CONTRACT**

Section 197(1) of the Act reads:

“A contract of employment may not be transferred from one employer to another employer without the employee’s consent, unless …”

Section 197(2)(a) reads:

“If a business, ... is transferred ..., all the rights and obligations between the old employer and each employee at the time of the transfer continue in force as if they were rights and obligations between the new employer and each employee and, anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer.”

There are two instances covered by the section. One is when the transfer is made the company being a going concern and when it is not a going concern. The Act is not clear as to what happens when employees do not consent to the transfer. Do
they have an option of not being transferred? If they do not consent to the transfer will they be entitled to severance pay?

It is possible that the employee wants to outsource a portion of its business. The employees would definitely have to choose to fall under a new employer who runs the outsourced portion. Under common law such employees would be deemed to have been discharged by the former employee. If they did not want to work under a new arrangement, they could not be forced.

The Employment Law journal June 1999 Vol 15 no 1 discusses this scenario. The common law rule against non-consensual transfers confirmed, except in the case of a transfer because of insolvency.

In Schutte and Others v Powerplus Performance (Pty) Ltd (1999) 2 BLLR 169 LC the employees sought an order interdicting the employer from altering terms and conditions of employment. Before the application they were employees of Super Rent and Powerplus had purchased 50% of their original company. The employees were to earn less from the new company. They were told that if they did not apply for the new jobs they would be retrenched.

For the employees to rely on section 197 all had to revolve around whether the agreements entered into between the two companies amounted to a transfer of the whole or part of the old employer’s business.

If that was the case, the old employer’s obligation would transfer to the new employer. The respondent argued that this was not a transfer but outsourcing.

The court held that the contracts had been transferred automatically and issued an interdict pending a return date. On the return date the court held that there was a transfer.

The reasons were:
The provisions of section 197 were part of the mechanisms to give security in times of change. The court had an obligation to give meaning the provisions of the section. Such a matter had not been dealt with by a South African court. Reliance was then placed in international jurisprudence. The decisions of the English courts were used in conjunction with the view taken by the British Employment Appeal Tribunal on the Acquired Rights Directive of the Council of the European Communities.

The judgement was founded on this note:

“Numerous factors have been regarded as indicative of a transfer of a business, but no single factor has been regarded as conclusive of this determination. For example a sale of assets may indicate a transfer within the meaning of the Directive, but not necessarily. Conversely the fact that no assets were sold does not mean that there has been no transfer of a business. Likewise the transfer of a significant number of employees and the immediate continuation or resumption of a service or function is regarded as indicative, but not conclusive of a transfer.”

This decision confirmed what was said in *Kgethe v LMK Manufacturing* (1998) 19 ILJ 524 where it was held that the court required evidence regarding agreements between the employers, intention to alienate, details of assets sold and other relevant information. With this information the court was satisfied that there was a transfer.

The employees’ remedy in such a situation is clearly found in section 197. However the courts have said that this section is not clear as much of its application is left to the courts to interpret. This may be the reason why the legislature has decided to change things in the form of proposed changes to section 197. The new section may deal with the problem of a transfer in the event of an insolvency and transfer of organisational rights. From this discussion it should be clear that a going concern transfer inherits conditions of employment as employees know them. In such a situation there will be no need for the payment of severance pay. Severance pay is for dismissed employees as per section 41 of the Basic Conditions of Employment Act.

If the transfer results from insolvency, and since the employees have no duty to take the new employer’s offer in terms of common law, the old employer will have to pay severance pay taking into consideration the above discussion on the payment the payment of severance pay. In practical terms this may prove difficult since if the
employer is insolvent, the employees would be creditors of the old employer as regulated by the Insolvency Act.

It is also hoped that the legislature, in its attempt to revamp labour related legislation, will look at giving such employees the status of preferential creditors.

CONCLUSION

This paper has been intended to be used as a guide to situations where the employer as well as the employee is faced with the dilemma of bringing about changes to terms and conditions of employment. There has not been much concentration on situations where both the employer and employee party agrees to such changes. Much details has been around the absence of consent.

The absence of consent is seen as the root of all instances where the matter converts to a dispute. Instances that have been picked up and discussed have been attached with the dispute resolution mechanisms that are recognised within the Industrial relations system and particularly within the context of the current labour legislation. It can be seen that there are areas that the legislature has left open some spaces. In others there has been strict dividing lines set, whilst some areas are left ambiguous.

It should also be noted that some solutions that are put forward should be understood within the contexts in which they appear. The reason for this is obviously that there is overlap of legislative provisions as well as overlapping options.

The choice of solutions available also largely depend on the intention of the parties, the nature of the dispute and the outcome required. There are also options that are dependent on the strength of the parties within the collective bargaining definition.

Specific questions have been generally answered throughout the paper. These include:

- Is unilateral variation a result of the failure of collective bargaining?
• Can one resort to unilateral variation without exhausting collective bargaining measures?

• What options are there when collective bargaining fails?

• Can the variation be instituted by employees?

• Do matters of mutual interest form part of the definition of collective bargaining?

• At what stage do terms and conditions of employment assume the status of rights?

• Can employee waive rights by consent?

• Can core rights be altered?

• When is there a need to make a variation?

As indicated earlier there are many other channels by which disputes of this nature can be handled. These include permissible non-statutory measures, the use of private dispute resolution mechanisms and arrangements that could be contained in collective agreements dealing with dispute resolution.

Other facts that have been established by this paper are:

• Terms and conditions of employment can either be express or implied.

• There is a clear intention by the state to legislate on minimum terms and conditions of employment and variation thereof.

• Some legislative provisions will take precedence over variation agreements between the employer-employee parties.
• Collective bargaining is an integral part of the employer-employee relationship.

• Failure of collective bargaining results in disputes.

• Not all restorative dictates from the courts have a permanent effect.

• Jurisprudence on variation of conditions disputes mostly derives from the LRA of 1956.

• Item 2(1)(b) of schedule 8 is recourse for individuals.

• Disputes about variation of conditions of employment are not arbitrable.

• Common Law related disputes are reserved for the courts.

• An offensive lockout is better than a defensive lockout in handling variation issues.

• Section 64 provisions provide the most appropriate route for employees who are either aggrieved by the change or instigating the change.

• It is possible to dismiss for reasons that can be traced back to the intention to make variations.

• Workplace Forums may have been intended to avert such problems but do not provide sufficient solace.

• The transfer of business, whether as a going concern or not, is not advisable if the intention is to change conditions of employment.

In the absence of specific legislative provision, case law, jurisprudence and established practice, collective agreements, ministerial determinations, sectoral
determinations and bargaining council arrangements, the common law reigns supreme. In the absence of all, the parties are free to embark on any action they deem fit.
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