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**Fairness and unilateral change of employment conditions**

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To my family and friends who encouraged me through many late nights I will forever be grateful. Most important to my Heavenly Father, in whom I found more than a friend, I am indebted more than I can ever repay.

Thanks ...

# FAIRNESS AND UNILATERAL CHANGE OF EMPLOYMENT CONDITIONS

## 1 Introduction

Upon investigation it quickly becomes evident that some development occurred in early common law, moving away from the slavery era of a general *Locatio Conductio* to three more specialised fields of the *Locatio Conductio*. The *Locatio Conductio Operarum* is the most relevant to this study, depicting the relationship between employer and employee wherein services are rendered by the employee in exchange for reward from the employer.

In the post industrial revolution millennia since the general *Locatio Conductio*, a further development of common law took place and a principle that prohibits an employer from unilaterally changing employment conditions of an employee to a less favourable position came into being.

As this principle is not codified in any South African statute, or elsewhere, it is a nearly impossible task to determine the exact extent of what an employment condition is and to what extent it may be varied. In *RAM Transport (Sa) Pty Ltd v SATAWU* 2011 3 ZALC (LC) (hereafter the *Ram transport case*) the court investigated the difference between an employment condition and a work practice. In *Van Greunen v Johannesburg Fresh Produce Market (Pty) Ltd* 2010 7 BLLR 785 (LC) (hereafter the *Johannesburg market case*) it was suggested that a mere reduction in the status of an employee could be interpreted as a unilateral change of employment conditions. Similarly in *Magnum Security v PTWU* 2004 7 BLLR 693 (LAC) (hereafter the *Magnum security case*) the Labour Appeal Court held that a reduction in working hours constituted a unilateral change of employment conditions. In *CEPPWAWU obo Konstable & others v Safcol* 2003 3 BLLR 250 (LC) (hereafter the *Konstable case*) the court found that a long-standing practice and yearly custom did not form an employment condition.

From the above examples it quickly becomes evident that numerous factors will be considered by the courts in order to determine what constitutes an employment condition, and when it cannot be reasonably altered without the employee's consent.

This literature study is aimed to deduce mainly from recent case law, but also from other secondary sources, the scope of the term "employment conditions ", and to determine the factors to be considered in determining if a condition of employment exists in contradiction to a mere work practice which may be altered at the discretion of an employer.

It further aims to determine various methods to accomplish such alteration in employment conditions without the conduct of the employer being labelled as infringing the employee's right to fair labour practices as set out in S 23 of the *Constitution of South Africa 1996* (hereafter the *Constitution*). Lastly, it considers the legal consequences of such unilateral changes and the remedies to both the employer and employee parties in order to assist the reader in considering risks in the alteration in employment conditions.

The relevance and the main focus of this study is to determine the current position of the phrase "unilateral change in employment conditions ", to critically analyse such developments and document the findings in a single document.

## 2 Scope of employment conditions

Recent case law made a clear distinction between employment conditions on the one hand and work practices on the other. As common law determines that an employer may not unilaterally alter employment conditions to a less favourable position it becomes vital to understand the exact extent of employment conditions. The labour court has recently given better recognition of employer's need and right to alter some work practices<sup>1</sup> in order to improve business efficiency.<sup>2</sup> In most circumstances this need for constant change takes place unilaterally on the part of the employer and therefore it becomes vital to understand the exact distinction between employment conditions and work practices. The most prevalent factors considered in recent case law will be analysed and discussed in order to assist in drawing the above distinction.

### 2.1 Vested rights

In *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & others* 1995 4 BLLR (LAC) (hereafter *Precision tools* case) the labour court by word of Judge Myburgh clearly stated:

Employees did not have a vested right to preserve their working obligations completely unchanged as from the moment they began work.<sup>3</sup>

In the *Precision tools* case it might be said that the employees did not have this vested right as they had no written contract. However, in *SAPU & another v National Commissioner of the Sa Police Service & another* (2005) 26 ILJ 2403 (LC) (hereafter the *SAPS* case) the employees had written employment contracts and numerous collective agreements in place; the labour court still made the *obiter dictum* that

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1 *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & others* 1995 A BLLR (LAC) (hereafter *Precision tools* case).

2 In most cases employers do not have to consult before effecting changes in work practices as per *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & others* 1995 A BLLR (LAC) in *SAPU & another v National Commissioner of the Sa Police Service & another* 2005 26 ILJ 2403 (LC) 2428.

3 *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & others* 1995 A BLLR (LAC) 12.

employees did not have a vested right to keep employment practices unchanged for the full duration of the employment contract.<sup>4</sup> The court seems to deviate from this principle only in cases in which the employee has specifically contracted to certain provisions in a written contract. One example of such contracted provisions may be in cases in which the employment contract makes specific provision for an eight-to-five working day. In circumstances in which the contract specifies only a 45-hour working week, but neglects to mention the specific working hours, the employer has the discretion to alter the start and ending hours. This was the position in cases such as *Ram transport* where employees were bound to a working week of 45 hours and the employer was allowed to alter shift times from a 10 – 19h shift to a 9 – 18h shift (resulting in the same number of total weekly hours worked).<sup>5 6</sup>

Employees may also obtain a vested right to have certain provisions in their employment contract unchanged through collective agreements.<sup>7</sup> Such a collective agreement need to stipulate the exact functioning of the clause, in other words, in the example as above the specific working hours (eight to six Monday to Friday ) rather than the total number of hours (forty five hours per week ).<sup>8</sup>

Finally, employees may obtain vested rights through bargaining council collective agreements.<sup>9</sup> Such agreements only afford the employee a vested right in so far as the collective agreement specifies the extent of the vested right. In the *Magnum Security* case, the employer reduced the total number of working hours to fewer than the provisions of the bargaining council collective agreement. This constituted a unilateral change in employment conditions.<sup>10</sup>

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4 *SAPU & another v National Commissioner of the Sa Police Service & another* 2005 26 ILJ 2403 (LC) 2428, this was also supported by *Ram Transport (Sa) Pty Ltd v SATAWU & another* 2011 JOL 26805 (LC) 5.

5 Similarly in the case of *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU & others* 2011 3 BLLR 231 (LC) the employer concluded collective agreements regulating the total number of working hours and was also allowed to change the shift times.

6 A more recent case similar to that of *Ram transport* is the case of *Apollo Tyres South Africa (Pty) Ltd v NUMSA and others* 2012 6 BLLR 544 (LC).

7 S 23 LRA.

8 *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU & others* 2011 3 BLLR 231 (LC) 232-7.

9 S 31 LRA.

10 *Magnum Security v PTWU* 2004 7 BLLR 693 (LAC) 705.

In the *Konstable*-case the argument that a repeated practice of an annual shutdown braai constituted a vested right was brought before the labour court. The court defined implied terms<sup>11</sup> and ruled that a continuous practice could not be elevated to a right. The court importantly noted that the intentions of both parties needed to be considered, and in this case it was clear that the employer never intended to create a right, but rather a reward for hard work performed during the year. The case was ultimately dismissed.<sup>12</sup>

From the above it can be deduced that employees only obtain a vested right to have their working obligations unchanged if the specific obligations have been clearly contracted in a written agreement of some kind.<sup>13</sup> If such an agreement was concluded, the employee would obtain a contractual right (vested right), which an employer could not unilaterally amend. The opposite is however also true. If a general clause in a contract is not expressed in writing affording an employee a vested right it may constitute a work practice and the employer will be able to amend such a right without prior consultation.

## **2.2 Entirely different job**

A second important factor the labour court often considers when determining if employment conditions exist is the change of job to an entirely different job. This principle was considered in *NUMSA & others v Lumex Clipsal (Pty) Ltd* (2001) 2 BLLR 220 (LC) (hereafter the *Clipsal* case) where the Labour Court found that additional tasks assigned to machine operators and a revised shift system did not amount to a unilateral change in terms and of employment.<sup>14 15</sup>

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11 See 2.5 below.

12 *CEPPWAWU obo Konstable & others v Safcol* 2003 3 BLLR 250 (LC) 1.

13 Some employment conditions such as salary however do not need to be deduced in writing in order to become a vested right. For example: the employer would however be able to change the frequency of payment to a weekly paid employee if the payment frequency itself is not determined in the employment contract.

14 It remains the prerogative of the employer to assign employees with additional tasks in idle time, as long as such additional tasks do not form an entirely different job.

15 *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU & others* 20113 BLLR 231 (LC) 230.

In *Crewswell v Board of Inland Revenue* 1984 2 All ER 713 (CHD) 720<sup>16</sup> this principle was summed up neatly in the following words:

... although it is undoubtedly correct that an employer may, within limits, change the manner in which his employees perform a work which they were employed to do, there may be such a change in the method of performing the task which the employee was recruited to perform proposed by the employer as to amount to a change in the nature of the job.<sup>17</sup>

In the *Precision Tools* case the court further ruled that even additional work<sup>18</sup> of the same nature would not constitute a unilateral change in employment conditions as such a change would not constitute a wholly different job altogether.<sup>19</sup>

Therefore it should be understood that an employer has the discretion to alter the manner in which an employee conducts his or her duties. Such alteration in the manner in which an employee performs his or her duties may even be done unilaterally as long as it does not alter the fundamental nature of the work. Altering the duties of an employee to such an extent that it alters the nature of the job itself would constitute an entirely different employment contract, resulting in a unilateral change in employment conditions.<sup>20</sup>

### **2.3 Reasonableness**

As in most court cases, the reasonable factor plays a great part in deciding the fairness in a case. However in some recent cases the court has followed a somewhat narrower approach in determining reasonableness.

In *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU & others* 2011 3 BLLR 231 (LC) (hereafter the *Metrobus* case) the Labour Court accepted that the

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16 See also *De Beer's Consolidated Mines Ltd (Finsch Mine v NUM & others* (Northern Cape Division 1111/92).

17 *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & others* 1995 4 BLLR 11 (LC) 18.

18 In *Precision Tools* employees were used to fill machines up with raw products. The employees were idle when the machines processed the materials. At some stage the employer instructed employees to operate two machines, loading one machine while the other machine was processing the materials.

19 *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & others* 1995 4 BLLR 11 (LC) 19.

20 *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & others* 1995 4 BLLR 11 (LC) 18.

employer had acted reasonably even in cases in which employees were inconvenienced and might have been placed in slightly less favourable position.<sup>21</sup> It is however important to note that the court followed a holistic approach and did not limit itself to certain factors in isolation. For example, in the *Metrobus* case the employer attempted to consult with the unions in order to achieve consensus in the change of work practice.

As it is not necessary to consult for changes in work practice the employer went above and beyond his normal duties. Furthermore, employees worked the same number of total working hours, just at different times, and with some off periods between their daily shifts.<sup>22</sup> The court went further and considered other affected areas such as nightshift and standby allowances. The employer was also found to have complied with all collective agreements concluded with the representing unions.<sup>23</sup>

In *Erasmus & others v Senwes Ltd & others* 2006 27 ILJ 259 (T) (hereafter the *Senwes* case) reasonableness was taken to new heights. In this case, Senwes attempted to negatively alter the contributions that the employer contributed to the retired employees' medical aid. The court found this to be unreasonable as the employees had already performed in accordance with the contract. Even in circumstances in which the employer reserved the right to alter this clause in the employment contracts unilaterally such alteration would have to be done *arbitrio bono viri*.<sup>24</sup>

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21 *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU & others* 2011 3 BLLR 231 (LC) 232, 237.

22 Due to changes in work practice employees were inconvenienced by having gaps between the daily shifts; for instance, a driver working the 215 shift would work 5:30am to 9:50am and again 10:20am to 12:10am and again 12:10 to 2pm. The court ruled that this would still be reasonable overall- See also footnote 18.

23 *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU & others* 2011 3 BLLR 231 (LC) 236.

24 The court also found that a contractual right of one contract party to amend terms and conditions of a contract would *be condictio si voluero* and therefore void.

In the *Konstable* case, the Labour Court had to determine if a repeated work practice became an employment condition. The employees claimed that an annual braai became their right and ultimately stopped production on the afternoon of the last work day in 2000. The court considered that the employer would suffer greatly as some raw material would become wastage if it was not processed in time. As the employees had an illegal work stoppage the employer suffered some financial loss owing to wastage. The court found that this was unreasonable on the employees' part and that a lesser means of dispute resolution could have being followed.<sup>25</sup>

In *TGWU & others v COIN Security Group (Pty) Ltd* 2001 22 ILJ 968 (LC) the employer withdrew transport that had always been available to employees, as it was said to be a work practice and not an employment condition. As a result, the employees reported at their head office and were ultimately dismissed for an illegal strike. The Labour Court ruled that the dismissal was substantively unfair and unreasonable on the part of the employer. The court added that the employers' hasty, unfair and unreasonable conduct resulted in a unilateral change in employment conditions.<sup>26</sup>

Therefore, when dealing with the reasonableness factor, employers should consider the situation holistically and never act in a hasty and unreasonable fashion. The less drastic option always wins favour with the labour court when considering reasonableness. It is advisable to go above and beyond the contractual obligations and at least attempt to achieve consensus between parties.<sup>27</sup> This is also true in the context of unilateral change in employment conditions; haste and subjective decisions may often lead to an unfair unilateral change.

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25 *CEPPWAWU obo Konstable & others v SAFCOL* 2003 3 BLLR 250 (LC) 11.

26 *TGWU & others v COIN Security Group (Pty) Ltd* 2001 22 ILJ 968 (LC).

27 This principle was discussed in *SAPU & another v National Commissioner of the Sa Police Service & another* 2005 26 ILJ 2403 (LC).

## 2.4 Breach of contract

Breach of contract is in most cases judged by the terms and conditions of the contract, in the various forms thereof. It is however important to note that a contract does not only come in written form, but may also consist of an oral agreement between parties at the engagement of the contract.

In the *Metrobus* case, as discussed above, the employer altered the work schedule of the employees, but fulfilled its contractual obligations by still allowing senior bus drivers to pick the shifts they would prefer. Therefore, the employer considered the terms of the collective agreement between itself and the union, and adhered to it.<sup>28</sup> This indicates that affect should be given to the exact wording of the particular agreement.

This is however a simple example in dealing with breach of contract. Other forms of breach also exist. One such form is that in which the employer alters the job to such an extent that it forms a completely different job.<sup>29</sup>

Another form of breach may be found in the breach of bargaining council collective agreements. The *Magnum security* case shows that if employers do not abide by the terms and conditions of the collective agreement within the relevant sector it is regarded as a breach of contract. The employee party in the *Magnum security* case was awarded a large amount in punitive damages.<sup>30</sup>

In the *SAPS* case, the national commissioner altered the shift times (and not the total number of working hours) of police officers. The court *obiter dictum* states:

Since there was no express, tacit or implied term in the contracts of employees working 12-hour shifts that they would always be entitled to do so, the employees did not have a vested right to preserve their working times

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28 *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU & others* 2011 3 BLLR 231 (LC) 236.

29 See 2.2 above.

30 *Magnum Security v PTWU* 2004 7 BLLR 693 (LAC) 706.

unchanged for all time. The shift system was merely a work practice, not a term of employment. Hence a change in that work practice was not per se a breach of contract. In addition, the court found that there was no express contractual duty to consult before taking the decision to implement the eight-hour shift.<sup>31</sup>

Yet another far-reaching implication to be considered in dealing with breach of contract is the natural principle of contract law. This was demonstrated by the *Senwes* case, in which the employer contracted the right to unilaterally alter the contributions it made to medical aid for employees. The court ruled that such a discretionary right was *condictio si voluero* and the clause was therefore void.<sup>32</sup> Ultimately the court ruled that a breach of contract had taken place when the employer attempted to alter the medical aid contributions.<sup>33</sup>

Therefore, in dealing with breach of contract as an isolated factor, one should consider all the relevant types of contracts as well as the natural principles of contract law. Although the *SAPS* case makes it clear that if the employee does not have a vested right the employer does not have a duty to consult, it also states that it is advisable to do so in order to strengthen one's case.

## **2.5 Tacit and implied terms**

Another means of altering employment conditions is through tacit agreement to such alterations. It remains a popular misconception amongst employers that if an employee does not express his or her disagreement on such alteration of employment conditions he or she has tacitly agreed to it. In the *Konstable* case the court defined tacit terms as:

An unexpected revision of the contract which derives from the common intention of the parties as invoked by the court from the express terms of the contract and the surrounding circumstances.<sup>34</sup>

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31 *SAPU & another v National Commissioner of the Sa Police Service & another* 2005 26 ILJ 2403 (LC) 2406.

32 *Erasmus & others v Senwes Ltd & others* 2006 27 ILJ 259 (T) 265.

33 *Erasmus & others v Senwes Ltd & others* 2006 27 ILJ 259 (T) 260.

34 *Alfred McAlphine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 531.

A definition of implied terms is found in *Scrutton LJJ Reigate v Union Manufacturing Companies Ramsbottom* 1981 (KB) 592:

A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is if it is such a term that it can confidently be said that if at the time the contract was then negotiated someone had said to the parties: What will happen in such a case? They would both have replied: Of course so and so will happen and we did not trouble to say that, it is too clear.<sup>35</sup>

In the case of *Konstable*, the employer had given an annual shutdown braai for at least the past four years. This braai was a means of showing employees appreciation for the production of that year. The court found that even if the braai occurred annually it could not be said that both parties had the intention of such braai becoming a right and therefore it could not be elevated to a right.<sup>36</sup>

In the *SAPS* case the court examined the specific terms contained within the employment contracts of the employees in order to determine whether tacit, implied or express terms existed. The above was confirmed in the *Metrobus* case in which the court stated:

Without express, implied or tacit contractual rights to such effect, the employees do not have a vested right to preserve their working times unchanged for all times.<sup>37</sup>

An example of a tacit agreement between parties is one in which an employee receives a wage increase. It can easily be deduced that it is the common intention of both parties to afford such increase.<sup>38</sup>

It can therefore be said that tacit and implied terms are found within the employment contract itself, and form common cause between parties to such an extent that it is never deemed necessary for them to be documented. Tacit and implied terms may form part of employment conditions and therefore need to be documented carefully in order to prove the exact content of such an agreement at a later stage.

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35 *Scrutton LJJ Reigate v Union Manufacturing Companies Ramsbottom* 1981 (KB) 592, 609.

36 *CEPPWAWU obo Konstable & others v SAFCOL* 2003 3 BLLR 250 (LC) 8.

37 *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU & others* 2011 3 BLLR 231 (LC) 237.

38 An example of tacit terms in an agreement may be one in which an employee was afforded a raise but this was never documented.

## 2.6 True intention

An important general principle the courts have made is that of true intentions. The labour court has shown that it is not restricted by any means and may take into account the true intentions of parties.

In light of cases which reflect on aspects such as unilateral change in employment conditions due to a status change of the employee;<sup>39</sup> and the concept of unilateral variation in employment conditions not only being confined to the life of the employment relationship;<sup>40</sup> it is important to note that the courts will not easily be fooled, but will always discover the true intent of parties.

One example of parties attempting to fool the court but failing miserably is found in the *Konstable* case. The court evaluated the true intention of parties quite extensively and found that the applicants in the case were never under a *bona fide* impression that they had an employment right.<sup>41</sup> Ultimately this led to the employees' case being dismissed.

Similarly in the *Senwes* case, the true intention of the employer was also evaluated. *Senwes* claimed that they had no contractual obligation to contribute to retired employees' medical aid, but the firm's financial statements indicated that it regarded such contributions as future liabilities.<sup>42</sup>

As illustrated above, the true intention of both parties always plays a vital role in distinguishing between employment conditions and work practice, and it is the function of the court to determine intent in determining unilateral change of employment-conditions.

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39 CCMA Unilateral Changes 1, *Van Greunen v Johannesburg Fresh Produce Market (Pty) Ltd* 2010 7 BLLR 785 (LC).

40 *Erasmus & others v Senwes Ltd & others* 2006 27 ILJ 259 (T) 269.

41 *CEPPWAWU obo Konstable & Others v SAFCOL* 2003 3 BLLR 250 (LC) 11.

42 *Erasmus & others v Senwes Ltd & others* 2006 27 ILJ 259 (T) 264.

### 3 Effecting change in employment conditions

It is clear from the above case law that it is possible to alter employment conditions in some circumstances. The most popular and effective way to reasonably effect such alterations in employment conditions is discussed below.

#### 3.1 *Changing work practices*

The first and most obvious means of introducing change in a workplace is not to change employment conditions, but to alter work practices. As discussed above, it remains vital for an employer to determine and distinguish between employment conditions and work practices. In the case of *Precision tools*, the court stated that it is not necessary for employers to consult in circumstances where only work practice exists.<sup>43</sup> Therefore employers are under no obligation to consult in cases where change is affected to work practice only and the practice was never elevated, by means of mutual intention, to that of an employment condition. It however remains necessary to keep reasonableness in mind even in cases of altering work practice.<sup>44</sup> In *Ram Transport* the court effectively shed light on the issue of determining reasonableness in changing work practices:

Their rights have not been affected by the applicant's conduct, and the applicant was entitled as a matter of law to introduce what amounted to a new work practice.<sup>45</sup>

Therefore, the question an employer should ask before altering anything is whether employees' rights will be affected. In various cases dealing with an employees S 64(4)<sup>46</sup> right to strike it is evident that such right only applies in cases in which employers have altered employment conditions.<sup>47</sup>

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43 *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & others* 1995 4 BLLR 11 (LC) 19, *SAPU & another v National Commissioner of the Sa Police Service & another* 2005 26 ILJ 2403 (LC) 2428 at 86.

44 *SAPU & another v National Commissioner of the Sa Police Service & another* 2005 26 ILJ 2403 (LC) 2428 at 86.

45 *Ram Transport (Sa) Pty Ltd v SATAWU & another* 2011 JOL 26805 (LC) 5.

46 S 64(4) LRA, see 4.1 below.

47 *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU & others* 2011 3 BLLR 231 (LC) 239.

### 3.2 *Collective agreements*

The *Labour Relations Act* 66 of 1995 (hereafter the LRA) regulates many aspects of any collective agreement, from the definition to the parties bound by it. However, common law and most recent case law are still of importance in clarifying the exact effect a collective agreement may have on individual employees, whether it be union members or non-union members, or parties with or without the intention of entering into a collective agreement.

The LRA defines a collective agreement in section 213 as:

A written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade union, on the one hand, and on the other hand (a) one or more employers (b) one or more registered employers' organisations (c) one or more employer and one or more registered employers' organisations.

Four types of collective agreements can be utilised by an employer to alter employment conditions.

Individual collective agreements: S 23(1)(a) of the LRA determines that a collective agreement binds the parties to a collective agreement. In the light of the S 213 definition of collective agreements we can safely assume that this is extended to all representative parties on either side, whether directly or indirectly. Therefore, this binds only the parties to the individual collective agreement. A common example of such an agreement is a collective agreement between an employer and a union.

The second type of collective agreement, other party collective agreements, is when all parties to the collective agreement as well as other members are bound by the terms and conditions contained therein.<sup>48</sup> This is typically the case when wage negotiations are concluded between a union and an employer, which would also be extended to non-unionised employees.<sup>49</sup> This section also affords non-union

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48 S 23(1)(b).

49 Basson et al *Essential Labour Law* 257.

members the right to enforce certain agreements which they do not necessarily form part of. The principle of majoritarianism applies in such circumstances.

The third type of collective agreement is collective agreements between registered unions and registered employers' organisations which affect their members. An example of such an agreement is where unions' and employers' organisations bargain for more than one member at the same time. Such agreements are fairly uncommon as they function mostly in bargaining units.<sup>50</sup>

The fourth type of collective agreement, non-union member collective agreements, happens when a majority union and an employer party or his or her registered trade union conclude a collective agreement specifically binding listed employees or a class of employees. This occurs when a majority union bargains for rights and obligations and it is specifically extended to all or some workers within that department or workplace. A common example of the fourth type of collective agreement is agency shop agreements or closed shop agreements.<sup>51</sup>

Collective agreements have a binding nature as reflected in Sections 23 and 200 of the LRA. S 200 determines that a union may act on behalf of one or more of its members; therefore it seems accepted that it is not necessary for a union to obtain separate mandates for each action. This was confirmed in the case of *Sa Society of bank officials v Standard Bank of Sa Ltd* 1994 15 ILJ 332 (IC) in which a ruling reflected that an employer does not need to establish if a union has obtained a mandate before every action on behalf of its members.<sup>52</sup> Furthermore, a union member does not have to agree to each and every act that a union conducts on behalf of its members.

In *Mzoku & others v Volkswagen of Sa (Pty) Ltd* 2001 22 ILJ 1575 (LAC), the court found that a collective agreement between the union and the employer was also binding on the members of such a union.

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50 Basson et al *Essential Labour Law* 258.

51 Agency shop agreements are regulated in S 25, closed shop agreements by S 26 LRA.

52 Grogan *Workplace Law* 318.

Individual members of a union are further prevented from avoiding certain less favourable agreements. The principle that a union member may not withdraw his or her mandate to the union if negotiations seem less favourable to the individual member has long formed part of South African labour law.<sup>53</sup> The courts found that the principle of majoritarianism applies in such cases and that individual members are also bound to agreements on behalf of union members.<sup>54</sup>

S 23(2) of the LRA determines that a collective agreement is binding, for the whole period of its existence, on the members of the union or persons bound by such agreement at the stage that it was concluded. Therefore, it is impossible for an employee to quit his or her membership at a union in order to evade the provisions of a collective agreement. The above reasoning is supported by the case of *Mazibuko & others v Hotels, Inns & Resorts (Sa)(Pty) Ltd t/a Holiday Inn Garden Court, Johannesburg Airport* 1996 17 ILJ 263.

Employers can therefore apply the collective agreement process in its various forms in order to alter the employment conditions of employees. It is evident from the many sections of the LRA regulating collective agreements that the principle of majoritarianism applies in concluding and negotiating collective agreements. The individual is further prohibited from evading such agreements by either terminating his or her union membership or withdrawing his or her mandate. Once an employee becomes a member of a union, the union obtains the right to act on behalf of that member and in some circumstances even without consulting an individual member. Therefore, the employment conditions can easily be altered by agreement with a majority union.

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53 *Mazibuko & others v Hotels, Inns & Resorts (Sa)(Pty) Ltd t/a Holiday Inn Garden Court, Johannesburg Airport* 1996 17 ILJ 263.

54 *Mzeku & others v Volkswagen of Sa (Pty) Ltd* 2001 22 ILJ 1575 (LAC).

### 3.3 Conditional dismissal

The first consideration in effecting change in employment conditions is negotiation. Such negotiation often fails and the employer is forced to follow a more strict approach in order to successfully implement the desired changes in the workplace. Often the desired changes are necessary for business efficiency and the saying "time is money" applies in the strictest sense thereof. This is clearly demonstrated in cases such as *Ram Transport*<sup>55</sup> and *Metrobus*.<sup>56</sup> The employer may be tempted to dismiss employees on the spot due to their failure to adhere to the proposed changes. The LRA however has provisions aimed at providing employees with protection against such forceful alterations in employment conditions. S 187(1)(c) of the LRA reads:

A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5, if the reason for dismissal is (c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and the employee.<sup>57</sup>

Therefore at first glance it would seem that dismissals in order to compel an employee to accept new terms and employment conditions are taboo.

However, the court made an obiter remark in *Mazista Tiles (Pty) Ltd v NUM & others* 2005 3 BLLR 219 (LAC):

While it is impermissible for an employer to dismiss his employees in order to compel them to accept his demands relating to the new terms and conditions, it does not mean that the employer can never effect the desired changes.

In the above ruling the court was mindful of the 2003 case of *Fry's Metals (Pty) Ltd v NUMSA & others* 2003 24 ILJ 133 (LAC) (hereafter the *Fry's metal* case).

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55 *Ram Transport (Sa) Pty Ltd v SATAWU* 2011 3 ZALC (LC) 3.

56 *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU & others* 2011 3 BLLR 231 (LC) 232.

57 Employers should note that the maximum compensation for automatic unfair dismissals is 24 months remuneration- LRA 194(3).

In the *Fry's metal* case the Labour Appeal Court dealt with the question:

Does an employer have the right to dismiss employees who are not prepared to agree to certain changes being effected to their terms and conditions of employment when such changes are necessary for the viability of the employer's business or undertaking or are necessary to improve productivity or efficiency in the business? <sup>58</sup>

At first glance the above question seems to imply a contradiction between sections 187(1)(c) and 189 (retrenchment) of the LRA. The facts of *Fry's metal* are briefly that the employer conducted certain productivity reviews as these were deemed necessary in order to ensure continuation of the business in the long run. The main change that the employer wished to introduce was to move away from a three-shift system and in future use a two twelve-hour system. This was necessary as the employer found that seven hours of production were lost as a result of the practice of not handing over between the three-shifts shifts.

The employer consulted with the employees and their representatives on numerous occasions, but to no avail. When the parties reached deadlock the employer initiated a S 189 retrenchment procedure based on operational requirements.<sup>59</sup> The employer issued the employees with retrenchment letters stating that they would be retrenched if they did not wish to accept the new shift system.

The union's case was that the employer was unable to dismiss employees in order to compel them to accept certain new employment conditions and based their case on the provisions of S 187(1)(c) of the LRA. The union was of the opinion that the provisions of S 187(1)(C) and S 189 of the LRA were contradictory.<sup>60</sup>

The Labour Appeal Court investigated the history of S 187(1)(c) of the LRA and held that no contradiction between the above-mentioned sections existed.

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58 *Fry's Metals (Pty) Ltd v NUMSA & others* 2003 24 ILJ 133 (LAC) 136.

59 S 189 LRA, the employer offered no retrenchment package as a reasonable alternative to retrenchment was offered but was rejected by the employees.

60 *Fry's Metals (Pty) Ltd v NUMSA & others* 2003 24 ILJ 133 (LAC) 134.

The court further held that if it had become a *bona fide* operational requirement of Fry's metal to increase productivity in order to remain viable and the LRA did not exclude the increase of productivity in the said definition.

What remains critical in circumstances in which conditional dismissals are utilised is that such dismissals should become final at some point. The Labour appeal court stated:

The purpose of a lock-out dismissal is not to get rid of the employees who are not accepting the demand in respect of a matter of mutual interest but it is to keep them under different terms and conditions of employment. That purpose renders an S 187(1)(c) a special kind of dismissal.<sup>61</sup>

The Labour appeal court ruled that an S187(1) dismissal (termed a lock-out dismissal) is a kind of dismissal that is not permanent, allowing employees to return at any stage upon acceptance of the new employment conditions, hence forcing them to accept the change in employment conditions.<sup>54</sup>

However a conditional dismissal should be regarded as a warning to employees of the consequences of non-adherence. It should be a final decision offering employees a final opportunity to accept the new terms and conditions. If employees still refuse the change, employers should initiate a no-turning-back retrenchment procedure in order to wean out employees who are not able to adapt to the new operational requirements of the business. It is important to note that such conditional dismissals always end in either an acceptance of the new terms of employment by employees (in order to avoid retrenchment due to operational requirements) or a formal final<sup>62</sup> retrenchment procedure. Therefore a conditional dismissal in itself does not remedy the employer's predicament but only constitutes a basis towards effecting change.

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61 *Fry's Metals (Pty) Ltd v NUMSA & others* 2003 24 ILJ 133 (LAC) 134.

62 If such a process was not a final one it would constitute a lock-out dismissal prohibited by S 187(1)(c) of the LRA, and result in an automatic unfair dismissal. See *CWIU & others v Algorax (Pty) Ltd* 2003 11 BLLR 1081 (LAC).

### 3.4 S 189 retrenchments

In dealing with retrenchment procedures in the context of unilateral change in employment conditions the following ruling constitutes a relevant starting point:

While it is impermissible for an employer to dismiss his employees in order to compel them to accept his demand relating to the new terms and conditions, it does not mean that the employer can never effect the desired changes. If the employees reject the proposed changes and the employer wants to pursue the implementation, he has the right to invoke the provisions of section 189 and dismiss the employees provided the necessary requirements of that section are met.<sup>63</sup>

The case of *Goldfields Logistics (Pty) Ltd v Smith* (LAC) JA42/08 dealt with the question of retrenching employees in order to effect change in a workplace. The facts of the above case are briefly that the employer employed numerous diesel mechanics in order to maintain their fleet. It was necessary, as an inherent job requirement, for the diesel mechanics to perform weekend duties which they were remunerated for. Smith was made aware of this at the time of his employment, and it was this also reflected in his employment contract. In practice these weekend call-outs were however done by a single employee. When the employee that performed these weekend duties resigned, Smith was informed that he would have to report for such weekend duties. He refused if he were not paid a standby allowance of R700 per week. The result of the above was that Smith was retrenched and the decision challenged. The Labour Appeal Court found that the employer had the right under S189 of the LRA to retrench for operational requirements and found the dismissal to be fair.<sup>64</sup>

Similarly in the case of *SA Airways v Bogopa & others* 2007 11 BLLR 1065 (LAC), the Labour Appeal Court ruled that an employer has the right to utilise S 189 retrenchment procedures in cases in which there is a *bona fide* motive to deal with operational requirements.

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63 *Mazista Tiles (Pty) Ltd v NUM & others* 2005 3 BLLR 219 (LAC), see also footnote 57.

64 Cheadle Thompson and Le Roux *Current Labour Law* 2010 97.

The courts have long since allowed for retrenchment procedures to be followed in cases in which employees no longer comply or fit in with the operational requirements of a workplace. The Labour Appeal Court ruled:

The general rule is that employers conclude contracts of employment with employees on certain terms and conditions because its business requires the employees to work on these terms and conditions in order to satisfy its business's operational needs. When that contract no longer suits the operational requirements or the employees no longer seek to be bound by the agreed terms which are necessary for the employer's business that may be a valid reason for the employer to terminate the contract of employment.<sup>65</sup>

The best illustration of the above is found in the *Magnum Security* case.<sup>66</sup> The operational requirements of Magnum Security were changed with the introduction of a new sectoral determination governing the maximum number of ordinary working hours in a week. The new sectoral determination stated that the maximum number of normal working hours in a week would be 50 hours. As it was the normal practice of Magnum Security to work in 12-hour shifts it intended to alter the employment conditions of employees to limit the working hours to only 48 ordinary hours per week. The Labour Appeal Court finally held that the employer was unable to unilaterally reduce the ordinary working hours of employees beneath that of the sectoral determination. The Labour Appeal Court, clearly frustrated, held:

If it wanted to reduce the second and further respondent's hours of work –in order to suit its operation – lay in negotiating a change to the actual hours of work... to obtain their agreement for a change to be affected. If no agreement was reached, appellant would have the right to dismiss (employees) for operational requirements and employ employees who would be prepared to accept employment on terms and conditions that would satisfy the operational requirements of the appellant.<sup>59</sup>

The above remains true in circumstances in which the employer needs to reduce the wage bill in order to keep the doors open (economical reasons). A retrenchment consultation would be held and benefit withdrawals might be offered as an alternative to retrenchments.<sup>67</sup>

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65 *Freshmark (Pty) Ltd v CCMA & others* 2003 6 BLLR 521 (LAC).

66 *Magnum Security v PTWU* 2004 7 BLLR 693 (LAC) 705.

67 Raphula and Mudely 2010 <http://www.bowman.co.za/lawarticles/law-article~id~2132417458.asp>

### **3.5 Tacit-, implied-change and estoppel**

It is necessary to recap the crucial aspects of tacit and implied terms, in order to understand how best to utilise Estoppel as a defence in affecting change in employment conditions. As per the definitions above<sup>68</sup> both implied and tacit terms occur when parties have a common intention to alter the employment condition. It is embodied in S 13 of the Constitution no person may be forced to enter into an employment condition, and therefore it remains vital as an *essentialia* that both parties intend to alter the employment conditions. The nature of either an implied or tacit alteration to terms and conditions of employment should be to such an extent that both parties are able to indicate the exact extent of the alteration.<sup>69</sup> From the above it can easily be deduced that parties reach *consensus*, implied or tacit, with regard to altering the employment conditions and the exact content thereof. Therefore, tacit or implied terms do not form an effective means of altering employment conditions in cases in which *consensus* cannot be reached between parties.

Another method of dealing with the non-documentary alteration in employment terms and conditions is the rule of estoppel. Grogan states:

The parties' consent need not be express. Silence coupled with acquiescence in change may estop the parties from later denying the legality of the variation.<sup>70</sup>

Estoppel is a legal means of stopping the other party from denying something. For purposes of this research theme, estoppel would be utilised by the employer as a defence in stopping an employee's legal proceedings by virtue that his or her initial silence on the aspect formed an acceptance thereof. Effectively it places the onus

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68 See 2.5 above.

69 *Scrutton LJN Reigate v Union Manufacturing Companies Ramsbottom* 1981 (KB) 592, 609: that is, if it is such a term that it can confidently be said that if at the time the contract was then negotiated someone had said to the parties: What will happen in such a case? They would both have replied: Of course so and so will happen and we did not trouble to say that, it is too clear.

70 Grogan *Workplace law* 39.

on the employee to prove that consensus on a variation in employment conditions was not reached.

Employers may however not be able to utilise estoppel as a defence in cases where an agreement was reached under threat. S 187(1)(c) of the LRA prohibits employers from obtaining agreements while enforcing them with dismissal threats. Such conduct may constitute automatic unfair dismissal.

As with any rule there are exceptions to the defence of estoppel. First, estoppel cannot be utilised in circumstances in which parties have contracted out of the provisions of the *Basic Conditions of Employment Act 75 of 1997* (hereafter the BCEA). S 5 of the BCEA states that the act takes precedence over any agreement.<sup>71</sup>

The second exception involves parties attempting to contract out of the *essentialia* of an employment contract. An example of the latter is parties agreeing that an employee will receive no remuneration for ordinary duties performed.

Finally, parties cannot enter into a contract of employment which contains provisions that are *contra bonos mores* and expect the courts to intervene at a later stage when things go sour. An example of *contra bonos mores* terms is an employee agreeing to work under permanently hazardous conditions.<sup>72</sup> Such terms may also include contracting out of the fundamental rights of parties as contained in the BCEA or the Constitution.

Apart from the above exceptions, the employer may be able to silently affect changes in a workplace on the basis that an employee has been silent regarding the changes. If and when the employee denies the legality of the variations the employer may estop the employee from doing so based on his or her long-held silence on the issue.

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71 Bargaining councils may however alter some conditions of the BCEA in accordance with the *Labour Relations Act 66 of 1995*.

72 Grogan *Employment Rights* 53.

## 4 Remedies

From the above, it is clear that there is no easy way to effect change in employment conditions. Several methods exist which an employer may utilise to implement the desired change in conditions. Because some methods may come with risks, it becomes necessary to investigate the remedies at the disposal of the employee in cases of unilateral change in employment conditions in order for an employer to take informed decisions.

### 4.1 S 64(3) strike action

The most common remedy at the disposal of the employee is statutory and is contained in S 64(4) of the LRA which reads:

Any employee who or any trade union that refers a dispute about unilateral change to terms and conditions of employment to a council or the commission in terms of subsection (1)(a)<sup>73</sup> may, in the referral, and 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.

(5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of service of the referral on the employer.

64(3): the requirements of subsection (1)<sup>73</sup> does not apply to a strike if-

(e) The employer fails to comply with the requirements of subsection (4) and (5).

Therefore employees may embark on a strike without the normal requirements thereof,<sup>74</sup> as determined by S 64, as a result of an employer not returning to the *status quo* after being required by the employee to do so.

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73 S 64(1) of the LRA deals with the right to strike and its requirements.

74 The employee does not need to give notice of the proposed strike action, nor wait 30 days after referral. The only remaining requirements are that the dispute needs to be (correctly) referred and the employer afforded 48 hours in order to temporarily withdraw the changes.

The best example of the operation of S 64 is the *Ram Transport* case, in which the employer altered the shift times of employees.

The change in working hours resulted in a dispute between the parties, as the union was of the opinion that it constituted a unilateral variation in employment conditions. The union invoked S 64 and faxed a strike notice accompanied with a dispute referral to the bargaining council. The employees embarked on a strike four days later.

However the case of *Ram Transport* was ruled not to be a unilateral change in employment conditions, but rather an alteration in work practice,<sup>75</sup> it clearly illustrates the working of S 64. In short, S 64 has three elements: the unilateral change followed by dispute referral and ultimately strike action with only the prior two elements as requirements in contradiction with the normal requirements for a strike.

Identical to the finding of the *Ram transport* case were the *Saps* and *Metrobus* cases. In all three of the above cases the employers were able to succeed in interdicting the strike action on the basis that no alteration in employment conditions had occurred; the alterations were in fact alterations in work practice.

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75 It was held that the employees had no vested right to keep their employment conditions unchanged. And was there no change in the actual number of working hours per week for which they were contracted. *Ram Transport (Sa) Pty Ltd v SATAWU & another* 2011 JOL 26805 (LC) 5.

## 4.2 Sue for damages<sup>76</sup>

Another remedy at the disposal of the employee is to abandon the employment contract and sue for damages on a contractual basis. S 158(1)(a)(vi) and 157 of the LRA provide the labour court with the power to award damages in any circumstances contemplated in this act.<sup>77</sup> The above principle allowing employees to sue for damages, in the form of breach of contract, in cases in which employees were forced to resign due to severe unfair conduct of an employer was accepted *inter alia* in the case of *Murray v Minister of Defence* 2008 29 ILJ 1369 (SCA).<sup>78</sup> 79

The issue of jurisdiction in the above context remains unsure. In *Eskom Ltd v NUM* 2001 22 ILJ 618 (WLD) the High Court ruled that the Labour Court would have exclusive jurisdiction in cases in which jurisdiction was explicitly afforded to the Labour Court.<sup>80</sup> Therefore it is understood that the Labour Court would have exclusive jurisdiction of issues such as determining the fairness of a dismissal.

To further add to the confusion in the jurisdiction issue the BCEA determine:

The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment.<sup>81</sup>

Despite the uncertainty of the issues, jurisdiction remains a very relevant factor and ultimately of great importance to the employer as it determines the compensation for damages suffered that may be afforded to the employee.

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76 This remedy is also at the disposal of the employer in circumstances in which a fundamental breach in the employment contract has occurred. Although the facts of *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* 2001 22 ILJ 2035 (LC) differ, they serve as a clear indication that the courts are willing to afford employees with 'just and equitable compensation' where damages were suffered.

77 S 158(1)(a)(vi) of the LRA, As well as S 77(3) of the BCEA..

78 Grogan *Employment Rights* 53.

79 It would seem that the Supreme Court of Appeal is not of the view that employers have a similarly strong right to fair labour practice (deviate from its disciplinary code) as found in the case of *Denel (Pty) Ltd v Vorster* 2004 25 ILJ 659 (SCA). Employers should therefore be more careful in dealing with such cases and not accept damages will be afforded easily.

80 Basson et al *Essential Labour Law* 343.

81 S 77(3) of the BCEA.

The case of *Jacot-Guillarmod v Provincial Government, Gauteng* 1999 (3) SA 594 (T) best illustrates the functionality of an employee's remedy to claim for contractual damages. In the particular case, the employee was employed under a five-year fixed-term contract, but the contract was terminated after sixteen months and before the end-date as originally contracted. The employee approached the High Court and sued for damages on the basis that the employer unlawfully abandoned the contract. A special plea of jurisdiction was raised by the employer party, but the High Court ruled that the Labour Court did not have exclusive jurisdiction in matters of simple enforcement of an employment contract, and went ahead in determining the matter beforehand. The employee was afforded contractual damages.

In the case of *Magnum security*<sup>82</sup> the court made a further *obiter* remark that employees have a choice to either repudiate the contract and sue for damages, or sue for specific performance in accordance with such contract.

Nonetheless, both employees and employers have the right to abandon a contract when a fundamental breakdown of the employment contract occurs, and sue for damages.<sup>83</sup> In future such claims will most likely be heard under the exclusive jurisdiction of the Labour Court.<sup>84</sup>

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82 *Magnum Security v PTWU* 2004 7 BLLR 693 (LAC) 705.

83 In *Fourie v Stanford Driving School and 34 related cases* 2011 32 ILJ 914 (LC) and *Makhanya v University of Zululand* 2009 30 ILJ 1539 (SCA) the court found that either party could simultaneously sue for breach of contract and unfair dismissal

84 In *Langeveldt v Vryburg Traditional Local Council & others* 2001 22 ILJ 1116 (LAC) 1139 the Judge President of the Labour Court suggested that a policy should allow the Labour Court exclusive jurisdiction in such cases.

### 4.3 Specific performance<sup>85</sup>

As indicated above, another remedy at the disposal of the employee is to litigate and require specific performance. This option is normally used in cases in which the unilateral variations of the employment conditions are not so severe that they logically justify the cancellation of the contract. The choice of remedy however still remains with the employee.

The Labour Court, in the case of *Fourie v Stanford Driving School And 34 Related Cases* 2011 32 ILJ 914 (LC), showed great reluctance in assisting parties that wished to only enforce, or obtain, contractual rights afforded to employees by the BCEA.<sup>86</sup> The court ruled that the labour inspectorate was the correct channel to be used initially to enforce the provisions of the BCEA, and employees should not attempt to punish employers by litigating on the account of the employer.<sup>87</sup>

The case of *Magnum Security* is a clear illustration of the functionality of the specific performance remedy. In this case the employer conducted a security business. For several years a labour order determined that the permissible maximum number of working hours for security guards would be 72 ordinary hours and 12 hours overtime per week. In 2000 a sectoral determination set a work week of 60 ordinary hours and 10 hours of overtime per week. In 2001 yet another change in hours occurred: 50 ordinary hours and a maximum of 10 overtime hours per week. As it was the practice of the employer to use guards in 12-hour shifts, Magnum Security attempted to unilaterally reduce the working hours of its employees to 48 normal hours per week (consisting of four 12-hour shifts).

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85 Specific performance is a remedy that is also available to the employer in cases in which the employee does not perform in accordance with the terms and conditions of the employment contract.

86 S 158(1)(iii) of the LRA affords the Labour Court powers to direct parties to comply with any relevant act that would remedy a wrong.

87 The court indicated that it is not closed for such claims but that a complaint should first be lodged with the Department of labour in accordance with the BCEA S 64, 69, 73 and finally 77.

As a result of this alteration the employees lodged an urgent application with the Labour Court to compel the employer to restore their initial employment terms and conditions.

The court referred to the common law and stated that the parties were entitled to reject the employers' repudiation of the contract, and bring an application to hold the employer to the agreement, which included the provisions of the sectoral determination.<sup>88</sup>

The reduction in working hours was held to be unlawful and the employer was ordered to restore the employment conditions of the employees AND to compensate them by paying the difference between actual hours worked (48) and the hours as contained in the employment contract (60).

It is therefore clear that in many circumstances specific performance constitutes a remedy at the disposal of the employee that can cause the employer a large financial blow. In the *Magnum Security* case the punitive compensation the employees received was the difference in remuneration (60 hours v 48 hours) for a period of 14 months awarded to each of the guards.

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88 *Magnum Security v PTWU* 2004 7 BLLR 693 (LAC) 705.

#### 4.4 Interdict

Another remedy at the disposal of both employees and employers is the interdict.<sup>89</sup> The aim of an interdict is to prevent either party from continuing or implementing specific conduct. In the case of employees applying for an interdict in the context of unilateral change in employment conditions it would be to stop an employer from implementing such a change, or to stop the employer from further continuing with such policies.

An interesting example illustrating the extent and use of an interdict is found in the *Senwes* case. This particular case is quite interesting as it takes form outside the normal employment relationship context, as the parties were no longer in the employment of Senwes, but retired. Upon employment Senwes originally offered the employees a remuneration package which included a contribution towards the medical aid of the employees. The medical aid contribution the employer was to make was contracted between the parties to be a contribution that Senwes could unilaterally amend at any given stage. On several occasions Senwes utilised this contractual power to unilaterally amend the contributions it paid to the medical aid scheme. Such alterations were always done on a basis that would negatively affect the employees. In 2004 Senwes once more proposed to substantially reduce its medical aid contributions, giving rise to the employees applying for an interdict.

The court ruled that Senwes contracted a *condictio si voluero* discretionary power to amend, and as it was not done in an *arbitrio bono viri*<sup>90</sup> (unreasonable) fashion the clause was rendered null and void.<sup>91 92</sup> The employees were granted an order interdicting the employer from further implementing the proposed reduction in the medical aid scheme contributions pending the finalisation of the action as a whole.

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89 S 158(1)(a)(ii) of the LRA.

90 *Friedman v Standard Bank of Sa Ltd* 1999 (4) SA 928 SCA.

91 *Friedman v Standard Bank of Sa Ltd* 1999 (4) SA 928 SCA.

92 *Erasmus & others v Senwes Ltd & others* 2006 27 ILJ 259 (T) 265.

Although the *Senwes* case does not depict the functionality of an interdict within the narrow sense of an employment relationship<sup>93</sup>, it remains a good and clear example thereof.

What needs to be noted with interdicts is that such a remedy is not of a final nature, and can rarely stand alone as a remedy in the employment sphere. Interdicts are merely temporary and mainly utilised on an urgent basis to prevent the respondent party from further implementing new terms and conditions before the finalisation of the case as a whole. Therefore interdicts are, in most circumstances, utilised in conjunction with other remedies, but precede them. Remedies that may be utilised in conjunction with an interdict include specific performance, unfair labour practice and in some occasions also the litigation claiming damages.

As noted, the interdict remedy is also available to the employer party and has great functionality in prohibiting parties from embarking on strike action in cases where work practice is altered and employment conditions are left unchanged. Examples of such may be found in the virtually identical cases of *Ram transport* and *Metrobus*. Simply put, in the *Metrobus* case the employer wished to alter the shift times of employees as it became necessary for business efficiency. Some employees were inconvenienced by this alteration in shift times as they would have greater intervals between their daily shifts.<sup>94</sup> The union viewed the alteration in shift times as a unilateral change in employment conditions and invoked their so-called LRA S 64(3) right to strike. The employer were of the position that the alteration in shift times was not a unilateral change in employment conditions, but rather a change in work practice and informed the union accordingly.<sup>95</sup> The union kept their position and threatened to strike.

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93 The *Senwes* case relied on contractual law principles as there was a binding contract between the parties, even after the employment relationship officially terminated upon retirement.

94 *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU & others* 2011 3 BLLR 231 (LC) 232.

95 *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU & others* 2011 3 BLLR 231 (LC) 234.

The employer successfully used the functionalities of an interdict to prohibit the employees from embarking on a strike action. In practice, as with the interdict used by employees, the employers' interdict is in many cases not a final and sole legal recourse. In the case of employers, interdicts may be used in conjunction with other remedies such as specific performance and litigation for damages, but the interdict precedes both.

#### **4.5 Constructive dismissal**

Another indirect, and difficult to prove, remedy at the disposal of the employee as a result of unilateral change in employment conditions is constructive dismissal. An employee would base his or her case on the facts that the continued employment relationship has become intolerable because of the unilateral change in employment conditions.

The definition of constructive dismissal is found in S 186 (1)(e) of the LRA

Dismissal means that

(e) an employer terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.

The labour court dealt with the question of "intolerable" in the case of *Pretoria Society for the care of the Retarded v Loots* 1997 18 ILJ 981 (LAC) 985:

The enquiry is whether the appellant (the employer), without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It is not necessary to show that the employer intended any repudiation of the contract; the court's function is to look at the employer's conduct as a whole and determine whether ... its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.<sup>96 97</sup>

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96 Basson Et al *Essential Labour Law* 89.

97 Shortly constructive dismissal has four elements: 1) Contract terminated by the employee- Termination must be due to employer's intention to drive employee towards resignation: *Goliath v Medscheme (Pty) Ltd* 1996 5 BLLR 603 (IC), 2) Continued employment was intolerable- Resignation as a last resort: *Beets v University of Port Elizabeth* 2000 8 BALR 871 (CCMA), 3) Intolerability due to the employer- *Jooste v Transnet Ltd t/a Sa Airways* 1995

One such case demonstrating the exact difficulty in proving constructive dismissal is the *Johannesburg market* case. The employee was employed as a manager for the chief executive officer of Johannesburg Fresh Produce Market. Soon after a new CEO was appointed, the employee was informed that the position of personal assistant to the CEO was being advertised, and that she had a choice of two positions in the human resources department. At some stage she was instructed to obtain cv's of three black candidates from an employment agency. On different occasions she was moved out of her office to an equipment-less new office on a completely different floor. She was also stripped of all her duties, and at one stage had no duties at all. All the above led to the employee suffering from depression.<sup>98</sup>

The court however ruled that in the *Johannesburg Market* a case of constructive dismissal was not proven.

The court noted two very important aspects. First, a unilateral variation of an employee's terms and conditions was accepted as a ground for a claim of constructive dismissal.<sup>99</sup>

And second, it referred to Grogan in Workplace law and confirmed:

A unilateral variation of the contract by the employer will not in itself justify a claim of constructive dismissal: the variation must be such as to evince an intention on the employer's part to repudiate the contract, if it is to warrant the conclusion that the employee could not reasonably be expected to endure the situation, or be such as to go to the root of the employment relationship. If the employer's conduct renders it impossible for the employee to work, a constructive dismissal will have taken place.<sup>100</sup>

Yet another interesting example of constructive dismissal is found in the case of *Riverview Manor (Pty) Ltd v CCMA & others* 2003 24 ILJ 2196 (LC). In this case a doctor was involved in developing a hospital. After selling property to the developers, the employee resigned claiming constructive dismissal based on a unilateral

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16 ILJ 629, 4) Intolerable behaviour of the employer lead the employee to resign- Basson Et al *Essential Labour Law* 92.

98 *Van Greunen v Johannesburg Fresh Produce Market (Pty) Ltd* 2010 7 BLLR 785 (LC) 790.

99 *Van Greunen v Johannesburg Fresh Produce Market (Pty) Ltd* 2010 7 BLLR 785 (LC) 791, referring to: *Van Wyk v Albany Bakeries Ltd & others* 2003 12 BLLR 1274 (LC).

100 *Van Greunen v Johannesburg Fresh Produce Market (Pty) Ltd* 2010 7 BLLR 785 (LC) 791, Grogan *Workplace law* unknown.

alteration in his employment conditions. The doctor stated a case that his salary was unilaterally reduced without prior consent or consultation. The court found in favour of the doctor, as the unilateral variation was without consultation and of a serious nature extending to the core of the employment contract.

Although constructive dismissal may be hard to prove, it may very well be caused by something as seemingly unimportant as a mere reduction in status of an employee as reflected in the *Johannesburg Market* case.

*In Fourie v Stanford Driving School and 34 related cases* 2011 32 ILJ 914 (LC) and *Makhanya v University of Zululand* 2009 30 ILJ 1539 (SCA) the court found that either party can simultaneously sue for breach of contract and unfair dismissal. It would therefore seem that the way to the Labour Court in Braamfontein is now via the Supreme Court of Appeal in Bloemfontein. However, it can also simultaneously run in any High Court.<sup>101</sup>

In conclusion, constructive dismissal is one of the hardest cases to prove. However, it can easily be the result of a unilateral change in employment conditions and used as one of a few methods to retaliate against an employer.

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101 Benjamin *Braamfontein Versus Bloemfontein* 2009 30 ILJ 757.

## 4.6 Unfair labour practice<sup>102</sup>

The employee may also use unfair labour practice as a response to an unfair unilateral change in employment conditions. The LRA defines an unfair labour practice as:

Any unfair act or omission that arises between an employer and an employee involving-

- (a) unfair conduct by the employer relating to promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;
- (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
- (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement<sup>103 104</sup>

In the context of unilateral change in employment conditions the most common functionality of this remedy is found in cases in which the employer alters the work standard to be achieved by the employee, a proverbial raising of the bar. A typical example is one in which a new employee is employed for a probation period, with the objective of evaluating the employee's performance<sup>105</sup> and abilities. It may become a unilateral change of employment conditions in circumstances in which the employer raises the standards to be met by the employee without proper consultation or agreement. In the hypothetical example the employer may, for instance, even refuse to appoint the employee permanently on the basis that he or she did not meet the new raised standard.

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102 This remedy is only available for employees (or their representatives) against their employer, and not available for an employer.

103 S 186(2) LRA.

104 In *Nawa v Department of Trade and Industry* 1998 7 BLLR 701 (LC) the court ruled that the list of unfair labour practices as contained in S 186 is exhaustive.

105 The employer is not bound by any legislative procedure to evaluate the employee, although he is bound by his own procedures and such procedures should be fair. See *NUTESA v Technikon Northern Transvaal* 1997 4 BLLR 467 (CCMA).

Such cases would most probably be referred under the heading of unfair labour practice or possibly unfair dismissal, but might also be based on unilateral change in employment conditions.

The LRA explicitly determines that:

- Every employee has the right not to be-
- (a) unfairly dismissed;
  - (b) subjected to unfair labour practice<sup>106</sup>

This provision is a clear indication as to why unfair labour practices carry a possible punitive award of up to two years of compensation if an employee is successful in his or her case. The labour court or an arbitrator in terms of the LRA has an even wider range of outcomes at his or her disposal and may even award reinstatement, re-employment in addition to compensation.

In circumstances in which the dispute is found to be automatically unfair, the Labour Court may also make any order it considers appropriate.<sup>107</sup> Therefore it can be said that such a remedy may be costly for the employer.

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106 S 185 LRA.

107 S 193(3) LRA.

#### **4.7 Alternative relief**

As the labour court is a higher court it is able to give alternative relief to parties, although this relief is slightly different from that of the norm. Normally parties to a dispute may indicate in their relief sought a clause asking for alternative relief. The function of such a clause would be to allow the court to give other relief in circumstances in which it is unable to afford the parties its required relief.

In the case of the labour court this ability is extended even further and the LRA reads:

- (1) The Court may-
  - (a) Make an appropriate ruling, including-
  - (iii) An order directing the performance of any particular act, which order , when implemented, will remedy a wrong and give effect to the primary objects of this act.<sup>108</sup>

Similarly S 193 of the LRA dealing with unfair dismissals and unfair labour practice disputes reads:

- (3) If a dismissal is automatically unfair or, if a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court in addition may make any order that it considers appropriate in the circumstances.<sup>109</sup>

It is clear from the wording in the above sections that the LRA aims to give the Labour Court a greater flexibility in ruling on matters beforehand. Wording such as "make an appropriate ruling " <sup>106</sup> and "make any order that it considers appropriate in the circumstances " <sup>107</sup> clearly indicates the intention of the legislature. The LRA aims to provide the Labour Court with the powers to afford parties alternative relief that would support the objects of the LRA and The Constitution, but it would seem that the Labour Court may do so even without the request of the parties and as an additional form of relief.

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108 S 158(1)(a)(iii) LRA.

109 S 193(3) LRA.

A further form of alternative relief the Labour court is able to give is interim relief.

S 158(1)(a)(i) of the LRA reads:

- (1) The Labour Court may-
- (a) Make an appropriate order, including-
- (i) The grant of urgent interim relief.<sup>110</sup>

Therefore, as such interim relief is within the powers of the Labour Court it may very well be utilised by an employee with other remedies. Often interim relief and interdicts go hand in hand.

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110 S 158(1)(a)(i) LRA.

## 5 Conclusion

Since the earliest *Locatio Conductio* as a type of lease, common law has been developed and extended a great deal. The *Constitution of the Republic of South Africa, 1996*<sup>111</sup> has certain provisions which allow the courts to develop common law in a fashion that would serve the purposes of said Constitution. However, with closer investigation on the common law rule that employment conditions may not be unilaterally altered to a less favourable position it quickly becomes evident that some development has taken place. Most of these developments are not encapsulated in any employment legislation, but may be found in secondary sources such as court rulings of the various courts.

If the *Locatio Conductio Operarum* is closely investigated in its original form, it is clear that the only requirement was that an employee had to be willing to offer his or her services to a potential employer. Secondly, the employer needed to be willing to remunerate for the services rendered. This was the only requirement for the earliest *Locatio Conductio Operarum*.<sup>112</sup> It is clear that some codification has taken place as the current labour legislation has provisions against forced labour.<sup>113</sup>

But more development has taken place, specifically in this common law rule, than meets the eye. It would appear that the rule prohibited every alteration as long as there is no *consensus* between the employee and employer parties.

The first development that is visible is the distinction the courts have drawn between employment conditions and work practice. The latter is not included in the common law prohibition, and is therefore open to unilateral alteration by the employer.<sup>114</sup>

In determining the existence of either an employment condition or a work practice, the court has set certain non-exclusive factors to be considered.

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111 S 39(2) of the *Constitution of the Republic of South Africa, 1996*.

112 Basson et al *Essential Labour Law* 20.

113 S 48 BCEA.

114 *RAM Transport (Sa) Pty Ltd v SATAWU* 2011 3 ZALC (LC).

First, the court will determine where parties draw their rights from, whether it be an employment contract, collective agreement or bargaining council collective agreement. The content of this agreement will be carefully considered and applied to the circumstances. If parties have no contractual vested right to have their conditions unchanged, the court will be reluctant to allow them a stagnant interpretation which would leave all conditions and practices unchanged for ever.<sup>115</sup>

The court will also determine whether the change in work practice constitutes an entirely different job, but have the Labour Court previously found that employees may be required to perform additional tasks in idle time if such additional tasks does not affect their vested rights.<sup>116</sup>

A breach in contract will also be considered by the court in order to determine whether the alteration in employment conditions is so severe that a total breach of the employment contract has occurred. The court uses the same method to determine whether the employee is able to use certain remedies such as suing for damages.

The court may also read certain provisions into a contract if they are found to be either implied or tacit in an agreement. However, this may again affect the case of an employer at a later stage, as he or she may be able to use estoppel as a defence.

The most important factor the Labour Court may use in determining whether employment conditions exist is the true intention of the parties. This was excellently illustrated by the *Senwes* case in which the employer denied its intention to contribute indefinitely towards the medical aid scheme of his former employees, but reflected such contributions in its financial forecasts.<sup>117</sup>

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115 *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & others* 1995 A BLLR (LAC)12.

116 *NUMSA & others v Lumex Clipsal (Pty) Ltd* 2001 2 BLLR 220 (LC).

117 *Erasmus & others v Senwes Ltd & others* 2006 27 ILJ 259 (T).

Finally, once the court has determined whether an employment condition exists, it will entertain the reasonableness thereof.

In many circumstances the alteration of an employment condition is not denied, but the substantive issues are in dispute. It is at this stage that a clear deviation of the common law rule not to alter employment conditions becomes evident. In this study it becomes very clear that unilateral alterations in employment conditions are a possibility and a reality.

The first and easiest method in achieving change is not to tamper with employment conditions in itself. Work conditions should not be unnecessarily be elevated to an employment right by employers, as the former does not require consultation with employees to effect change. Therefore in many circumstances it remains easy to change employment "conditions " by doing so through an alteration in work practice.<sup>118</sup>

Another method for effecting change in the narrow sense of employment conditions is through a collective agreement. This method may in some circumstances be open to parties, and stems directly from the objectives of the common law rule that change should be effected through negotiation.

Once consensus is ruled out between parties it may be forced through procedures such as conditional dismissals. Although this method would not be effective as a method in its own right, it remains an important predecessor to most of the formal procedures which may be utilised by an employer.

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118 *SAPU & another v National Commissioner of the Sa Police Service & another* 2005 26 ILJ 2403 (LC).

A LRA S 189 retrenchment is the most formalistic way to force employees to accept change. Section 189 is however not effective in forcing particular employees to adapt to change, but it is possibly the strongest method of effecting change as a whole. There may be some job losses of particular employees unwilling to accept the new employment conditions,<sup>119</sup> but it will guarantee operational change.

The last means of achieving change in employment conditions is the use of estoppel. Employers may implement a change in actual employment conditions and estop employees who wish to speak out against change at a much later stage. This may not constitute a means in itself, but may become a good defence against an employee's claim for unfair unilateral change in employment conditions.

The change of employment conditions, in its narrow sense, has become a reality in the South African context and so have the remedies of the employee. The first and most popular is the employee's LRA S 64(3) right to embark on strike action. This remedy at the disposal of the employee is popular as it allows the employee to embark on strike action with very little formality once the employer refuses to return to the *status quo*.

Another remedy at the disposal of the employee is the right to sue for damages as an result of breach of contract. This remedy may however only be open to employees in cases of severe change in employment conditions; changes that are so severe that they would cause the breakdown of the contract itself.<sup>120</sup>

The employee may also require an employer to adhere to the employment contract through the action of specific performance. The employee is able to use such a claim in conjunction with other remedies.

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119 *Goldfields Logistics (Pty) Ltd v Smith* (LAC) JA42/08.

120 *Jacot-Guillarmod v Provincial Government, Gauteng* 1999 3 SA 594 (T).

Employees are also able to prohibit the employer from effecting unilateral change by obtaining an interdict. Interdicts remain a popular legal route for employees in conjunction with other remedies such as specific performance. The Labour Court is also able to afford parties interim relief and it may be an ideal method of confronting change in conditions.

Constructive dismissal in the context of unilateral change in employment conditions is possibly one of the most difficult cases to prove; nonetheless it is at the disposal of the employee. In severe circumstances an employee may resign and claim constructive dismissal on the basis that the employer's actions forced the employee to resign as the continued employment relationship became intolerable. Such cases however remain very hard to prove as seen in the *Johannesburg Market* case.<sup>121</sup>

The unfair labour practice route is also a possibility for the employee. The concept of fair dealing was established<sup>122</sup> and it is required of employers to act fairly in all circumstances. This may be applied in the present parameters of unilateral change in employment conditions, and further development in the common law should be expected. Such development will definitely place an even greater burden on employers.

Finally, the Labour Court's powers remain important to both employees and employers alike. The Labour Court is empowered by S 158 and S 193 of the LRA to afford parties alternative relief in whichever form it deems fit and appropriate in the circumstances at hand. It would seem that the legislature aimed to allow the Labour Court a form of discretion that would enable it to apply fair judgement without the normal constraints of the relevant legislation. It may therefore occur that the Labour Court may deviate from the pleadings of the parties in order to achieve a reasonable and fair outcome.

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121 *Van Greunen v Johannesburg Fresh Produce Market (Pty) Ltd* 2010 7 BLLR 785 (LC) 794.  
122 *Boxer Superstores Mthatha & Another v Mbenya* 2007 8 BLLR 693 (SCA).

Therefore it is clear that the unilateral change in employment conditions rule as found in common law no longer remains effective in its original form. The courts have since developed the common law rule allowing for easy change in work practice. The alteration of employment conditions in itself is also now a possibility and achievable through various methods such as, but not exclusive to, retrenchment and conditional dismissals.

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