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RESEARCH TOPIC

Changing terms and conditions of employment in the South African Labour Relations arena –
The approach of the courts : a comparative analysis

Research paper presented in partial fulfillment of the requirements for the degree Magister Legum in the Faculty of Law at the University of the Western Cape

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DECLARATION

I declare that *Changing terms and conditions of employment in the South African Labour Relations arena – The approach of the courts: a comparative analysis* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Desmond Petersen November 2004

Signed: . . . . . .

ACKNOWLEDGEMENTS

This work is dedicated to the memory of my grandfather, Henry Sardien, a working class hero.

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CHAPTER 1

1.1 Introduction

The way we do things has changed dramatically over the years and more particularly in the last few decades. Various factors have influenced these changes and in the world of work, paramount amongst these changes, are technological advancements and globalisation. In the South African Labour Relations environment the impact of these changes are being in a manner of speaking being forced onto employers as they are suddenly reintroduced into the global village after the so called South African miracle of 1994. South African companies are being forced to adapt to the pressures of increased competition brought about by globalization and these technological changes. However with 1994 also came an era of constitutional change and the advent of a plethora of legislation designed to protect the rights of workers. It is this need for flexibility on the part of employers in the work practices on the one hand and the need of employees for social justice and work security on the other that is the source of conflict in the workplace

1.2 Conceptual Framework of the study

This paper will focus on how these competing interests of employers and employees are accommodated in the South African Labour Relations arena. An analysis of the legislative framework will be undertaken to establish how the legislation provides for changes in workplace practices as well as the protection that it affords employees against unwanted or unilateral changes. The main focus of the research will be on how the South African Courts have interpreted the legislation and how it has applied the law in cases involving the changing of terms and conditions of employment, that has come before it. A review of some of the literature available with respect to the matter will be undertaken and critically analysed. The way the courts have dealt with similar cases in some foreign jurisdictions will also be looked at briefly. Given the nature of the research the research technique utilised will primarily be a literature-based study. It will accordingly, primarily be a desktop study and will not involve any field research.

1.3 Aim of the Study

The area of research is in my opinion very narrow as compared to other research conducted by students involved in the field of labour law. Furthermore there is a relative dearth of cases dealing with the topic that have come before the Labour Appeal Court and those that have become before the courts have attracted much criticism.

The main aim of this study therefore is simply to stimulate some more thinking on the issue and hopefully more extensive research will be done in future. The comparative analysis with other foreign jurisdictions will also hopefully be able to indicate if South African courts, in dealing with this conundrum are in line with developments in other parts of the world.

Chapter 2 –
Globalisation and its impact on the SA workplace

Globalisation is a term that has different meanings for different people. But how can a single term have different meanings? The reason why people attach different meanings to the term globalisation is because people are affected differently by it. How a person feels about globalisation will affect how they define and explain it. The major supporters of globalistion are big business and governments of industrialised capitalist countries. They generally define globalisation as a process of "freeing economies" particularly so that trade between countries can take place more easily and in their view this is the best way to ensure economic growth, which could lead to job creation and general prosperity for the nation. On the other hand those who oppose[1] globalisation define it differently and call it an "attack" on workers and their standard of living.

Whatever the ideological debate, the impact of globalisation is being felt the world over. The impact of globalisation is best explained by Thompson[2] who states, " The shape of work has, of course, always been changing but things are a little different now.

The sheer volume and mobility of financial capital, the transferability of intellectual capital, the relative immobility of labour, labour's location in different political orders with different cost structures and enabling capacities of especially, information technology, mean that forces of change are driving convergent outcomes across the globe."

South African companies now have to compete with international companies who are able to produce goods cheaper and export them to South Africa at much lesser rates. This is having a profound effect on South African companies, which in the light of this new competition often have to cut back on staff. They often argue that the inflexible nature of the labour laws leave them with no other option.

This increase in competition in the international markets have forced South African companies to adopt strategies that are already being practiced in other more developed countries. More and more companies are searching for ways to ensure a more "flexible"

[1] Those who oppose globalistion is not confined to workers and their organisations. A large part of civil society in viz CBO's , NGO's etc in most countries oppose globalistion.
[2] See Thompson C : "The changing nature of Employment ": 24 ILJ 1793 2003

work force. From outsourcing to casualisation, the search is on for the workforce of perfectly variable size, one that fluctuates in sync with the peaks and troughs of the customer demand for goods and services. And the fluctuation may be annual, seasonal, monthly, weekly, or even hourly.[3]

Although this situation would be the most ideal for most South African companies the implementation of flexible work practices presents the biggest challenge for companies given the present labour law regime.

[3] ibid at p 1797

Chapter 3 –
Legislative Framework

3.1 The Constitution

As alluded to earlier, the advent of democracy in South Africa brought with it the introduction of the Constitution[4], the supreme law of the land. The Constitution will without a doubt affect all branches of the law, providing a mechanism for citizens to challenge legislation and actions by the state, which infringe them.

Chapter 2 of the Constitution, which enshrines certain fundamental rights, contains several provisions of relevance to employment and labour law. These include protection against servitude, forced labour and discrimination, the right to pursue a livelihood, and protection for children against exploitative labour practices and work that is hazardous to workers health and wellbeing. Section 23 of the Constitution deals specifically with labour relations and in relation to employment and labour law the Constitution provides amongst others as follows:

'23 (1) Everyone has the right to fair labour practices.

According to Grogan[5], the entrenchment of labour rights in general terms raises the prospect of a constitutional jurisprudence being developed by the civil courts and the Constitutional Court which may have a far-reaching effect on the way the contract of employment and the employment relationship are approached in future. A similar view is held by Cheadle[6] who with reference to recent decisions of the Constitutional Court states " The Court has claimed jurisdiction over the interpretation and application of the constitutional right to fair labour practices in so far as that right has been given effect in the LRA. Because the determination of fairness is always a matter of interpretation and application of the constitutional right, the Constitutional Court may have opened its portals to every labour practice, including dismissal, in which the fairness of the practice or dismissal is in dispute."

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[4] Act 108 of 1996
[5] See Grogan J : Worplace Law : Seventh Edition: p 15
[6] See : Cheadle : Labour Law and the Constitution: Current Labour Law 2003 p 91 / See also NEHAWU v UCT (2003) BCLR 154 (CC) & NUMSA v Bader Bop (Pty)Ltd (2003) 24 ILJ 305 (CC)

My own view on this matter is that there is a very real danger that the common law approach to labour law might slowly be creeping back into our jurisprudence, particularly in view of the intended removal of the Labour Courts. This is a view shared by Waglay[7] who argues " If indeed labour and employment matters are heard by judges with knowledge of an with expertise in labour law, then (and then only) can the uneasy relationship between labour law and the common law be managed. Failing this, we have no real hope of developing the common law in a direction opposite to its dogmatic foundations." Central to the common law approach is the contract of employment. A discussion on the common law contract of employment will follow later.

3.2 The Labour Relations Act 66 of 1995

To give effect to the provisions of Section 23 of the Constitution the legislature has *inter alia* promulgated the LRA, the BCEA and the Employment Equity Act. The provisions in the LRA, which directly affect the right of employers to change the terms and conditions of employment of employees, are as follows:

3.2.1 Section (1)(c)

This section of the LRA provides as follows:

> *(c) to provide a framework within which employees and their trade unions, employers and employers' organisations can -*
>
> *(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and*
>
> *(ii) formulate industrial policy; and*

The importance of this section is that it emphasizes, in the purpose and application of the Act the right to bargain collectively in order to determine wages and terms and conditions of employment. It is submitted that the way terms and conditions is changed is primarily by collective bargaining.

3.2.2 Section 64(4) of the LRA

In relation to strikes and lock-outs Chapter IV of the LRA in section 64(4) provides as follows:

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[7] See : Waglay B : "The Proposed Re-organization of the Labour Court and the Labour Appeal Court" : (2003) 24 ILJ 1233

64. Right to strike and recourse to lock-out. —

(4) 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.

This section provides for an employee or trade union referring a dispute concerning a unilateral change to terms and conditions of employment to conciliation to, in the referral notice, require the employer not to implement the change or, if it has already done so, to restore the previous terms and conditions of employment for the period of the conciliation proceedings.[8] If the employer fails to comply within 48 hours, the employees concerned may strike without observing the statutory conciliation and notice requirements.[9] In addition they, or their trade union, may seek an interdict in the Labour Court to enforce compliance[10].

3.2.3 Section 186 (1)(e) & 186(1)(f) of the LRA

The LRA under section 186 attempts to define the meaning of dismissal and under section 186(1)(e)[11] and 186(1)(f) provides as follows:

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

[8] See Section 64(4) of LRA
[9] See Section 64(3)(e) LRA
[10] In terms of Section 158(1)(b) of LRA the Labour Court can order compliance with any provision of the Act
[11] Prior to the amendment by Act 12 of 2002 this was section 186(e) and section 186(1)(f) was only introduced by this amendment

(f) an *employee* terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the *employee* with conditions or circumstances at work that are substantially less favourable to the *employee* than those provided by the old employer.

Paragraph (e) introduces the doctrine of constructive dismissal, which had become well established in the jurisprudence of the Industrial Court. "Constructive dismissal " had been accepted by the Labour Appeal Court to mean actions on the part of the employer, which drive the employee to leave, whether or not there is a form of resignation. Such actions could take a variety of forms.[12] Section 186(1)(f) was introduced by the 2002 amendments and gives employees, transferred in terms of section 197, the right to leave the service of the new employer and claim unfair dismissal if the new employer offers inferior conditions. It is therefore a form of constructive dismissal by the new employer and the courts can be expected to apply the same test to that used in constructive dismissal.

3.2.4 Section 187(1)(c) of the LRA

Section 187 of the Labour Relations Act introduces the concept of automatically unfair dismissals. These dismissals are in my view aimed at affording maximum protection to employees for exercising some of the basic rights provided to them by the constitution and would be unfair whether a fair procedure has been followed or not. Dismissals of this nature are automatically unfair. The LRA draws a clear distinction between automatically unfair dismissals and other dismissals and the courts are required to treat them differently. The remedies that the courts can impose are different to that of other dismissals and courts are entitled to award compensation for up to 24 months compared to 12 months in the case of other dismissals.[13] With regards to changing of conditions of employment Section 187 provides as follows:

"187. Automatically unfair dismissals. —(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is ….

[12] See : Du Toit et al : "Labour Relations Law – A Comprehensive Guide" : Third Edition : Butterworths : 1999
[13] See Section 194(3) of LRA: See also Section 193(3) which permits the courts to make any other order that is appropriate.

(c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee;"

Du Toit[14] warns that it is important to distinguish a dismissal based on operational changes from a section 187(1)(c) dismissal. He argues further that, while an employer may fairly dismiss employees because of operational requirements, section 187(1)(c) prohibits the dismissal of employees merely for refusing to accept demands related to such requirements. It is this section that has been the subject of much discussion in the Labour and Labour Appeal Courts in recent times, as we shall see later in the discussion.

[14] See : Du Toit et al :" Labour Relations Law – A Comprehensive Guide" : Third Edition : Butterworths : 1999

Chapter 4 –
The approach of the South African courts to the changing of terms and conditions of employment

4.1 Common Law

The common law in South Africa has its roots in the Roman Dutch law introduced by our previous colonial masters. The first source to be examined when seeking to determine whether parties to a work relationship are employers and employees, respectively, is the contract into which they have entered. The contract of employment is traditionally defined as "contract between two persons, the master (employer) and the servant (employee), for the letting and hiring of the latter's services for reward, the master being able to supervise and control the servant's work".[15] This contract of employment formed the base of the employment relationship and if a dispute arose while the contract was in force, the rules by which it was resolved was derived from the agreement and the common law. The parties were not at liberty to change the terms of the contract unilaterally and to do so would be considered a breach of the contract and a party would in such instances be entitled to approach the courts for damages and specific performance. This principle remains applicable in our law today and parties are still able to approach the courts for relief.[16] Over time most civilizations has seen the gradual decline of the application of the common law principles in labour jurisprudence.

In South Africa the situation has also changed with the introduction of various labour laws starting as far back as the early 1900's. These labour laws have impacted on the application of common law principles in our labour law. For example the introduction of the Basic Conditions of Employment Act[17] saw the introduction of certain minimum standards, which effectively restricted the freedom to contract into any form of contract. Contracts entered into which do not subscribe to the minimum requirements of the BCEA may not be enforceable.

The common law of employment nevertheless remains important because the relationship between employer and employee is "constituted in a contractual form" and because this is

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[15] See: Grogan J : "Workplace Law" : Seventh Edition : Juta : 2003
[16] See for example : Fedlife Asurance Ltd v Wolfaardt [2001] 12 BLLR 1301 (SCA) & Santos Professional Football Club v Igesund and another (2002) 10 BLLR 1017 (C)
[17] Basic Conditions of Employment Act 75 of 1997

so, the common law of employment will continue to weave its way into the social fabric of the present and the conceptual framework of the future[18].

4.2 Refusal to accept changes in terms of conditions of employment as a species of misconduct

The Labour and Labour Appeal courts appear to have developed a rather consistent approach, in favour of the employers, in instances where an employer wishes to change the organisation of work. One of the precedent setting cases brought before the LAC in terms of the 1956 Act is *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & Others*[19]. In this case the employer wanted the employees to operate two machines instead of one. This was possible (and had previously been done) as one machine could be loaded while the other was operating automatically. The workforce resisted the proposal and demanded that employees who had previously been retrenched should be re-employed to operate the additional machines. The employees were eventually dismissed for refusing to obey a lawful instruction. The court held that the fundamental nature of the employees' work was not altered by the instruction to operate two machines. The additional task was to be carried out while one machine was in operation, and it did not amount to an extensive change in the work to be performed by the employees'. The instruction was accordingly lawful and had not constituted a unilateral amendment to the respondents' conditions of services.

The instruction was also reasonable, *inter alia*, as the additional work was to be done for a restricted period, the respondents would have had ample time to perform it, and as employees on the night shift had operated two machines. The appellant accordingly had a valid reason for dismissing the respondents.

The court adopted a similar approach in *Air Products v CWIU & another*[20]. The employer in this case had two adjacent plants and required an employee to transfer to the plant and also to work night shift. After refusing to move to the other plant the employee was dismissed for insubordination. The LAC was split on the decision, but the majority held that the transfer from one plant to the other did not amount to an amendment of the contract, since there was no express, implied or tacit term that he would work only at one plant. The court was

[18] See : Waglay B : "The Proposed Re-Organization of the Labour Court and the Labour Appeal Court " : (2003) 24 ILJ 1223
[19] A Mauchle (Pty)Ltd t/a Precision Tools v NUMSA & Others 1995 4 BLLR 11 LAC
[20] Air Products (Pty)Ltd v CWIU & another (1998) 1 BLLR 1 (LAC)

clearly applying the principles of contract law strictly. It held further that, while an employer was obliged to consult with an employee's union before retrenching, the duty did not arise in *casu* because the appellant did not intend to retrench the second respondent (employee). The court accordingly confirmed the dismissal of the employee for insubordination.

Judge Froneman disagreed with the majority decision and was in particular critical of the judgement in respect of its application of the common law contractual principles. Relying on these principles was according to the judge unjustified. In this regard the then Deputy Judge President had the following to say, "The definition in the old Act does not expressly state that the common law contract of employment is to be used as the only starting point for the determination of fairness under the Act. There are sound reasons for being cautious in allowing the terms of the common law contract of employment to dominate the determination of an unfair labour practice issue. Such kind of thinking easily leads to a rigid distinction between law and fairness, which is unjustified where fairness is part and parcel of, or inherent in, the law itself. Where express contractual terms are agreed upon by the employer and employee it is, generally, fair to insist on compliance with those terms. Where it comes to terms implied by law as *naturalia* of the contract, however, the same considerations do not always apply."

I am inclined to agree with this reasoning on the part of Judge Froneman. In this case the employee was requested to work night shift and might have had reasons for not being able to work night shift, personal or health related. Furthermore as a court of equity, the court is entitled to make a decision based on fairness, even if it is in conflict with the lawfulness of the conduct, for fairness has been accepted as the overriding consideration in our labour relations[21].

The issue of an employee having to operate two machines was again brought before the Labour Court in *NUMSA v Lumex Clipsal*[22]. In this matter, 31 employees were dismissed after being found guilty of misconduct for refusing to work in accordance with the respondent's "rationalisation measures". Part of the employer's rationalisation programme was the introduction of a three-shift system in its paint shop, and a combination of duties, which entailed machine operators attending to more than one machine at a time. The

[21] NUMSA v MacSteel (Pty) Ltd (1992) 13 ILJ 826 (A)
[22] NUMSA v Lumex Clipsal (Pty) Ltd (2001) 2 BLLR 220 LC

Labour Court confirmed the dismissal of the employees and like in the *Precision Tools* case, held that the request to operate two machines did not amount to a unilateral change to terms and conditions of employment. The matter went on appeal to the Labour Appeal Court. The court held that the employees were aware that an earlier change of shift patterns would involve "doubling up", and they had breached an undertaking to work according to that system. They were, in short, guilty of insubordination.

More recently in *NUMSA and other v Alfred Teves Technologies,* the Labour Court [23] dealt with a similar situation. In this case the company operated a continuous two-shift system. In order to reduce the amount of non-contractual overtime, the employer changed the starting times and also the arrangement of work so as to have staggered starts. The effect of this change resulted in *inter alia* a reduction in the amount of overtime worked. When the employees refused to comply with the new arrangements the employer threatened disciplinary action. The employees then sought an urgent order from the Labour Court declaring the proposed disciplinary action inconsistent with the provisions of the LRA and orders restraining the employer from taking such action.

The court dismissed the application with costs and cited the now familiar *Precision Tools* judgment, which has been relied on heavily by both the Labour Court and the Labour Appeal Court in most of the cases of this nature coming before the courts.

Judge Ngcamu in issuing his judgment cited with approval Judge Myburg in the *Precision Tools* case when he held "…. that employees do not have a vested right to preserve their working obligations completely unchanged as from the moment when they first begin work. It is only if changes are so dramatic as to amount to a requirement that an employee undertakes an entirely different job that there is a right to refuse to do the job in the required manner. New work directives amounting only to minor changes in the way work is done do not constitute a variation of the employment contract."

In my opinion the approach used by the courts in dealing with cases involving changes in work organisation has been fairly consistent with employers being afford much latitude to introduce these changes, a view supported by many commentators.[24]

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[23] NUMSA & others v Alfred Teves Technologies (Pty) Ltd (2002) 10 BLLR 955 (LC):
[24] See for example Thompson: " Restructuring and Retrenchment": Current Labour Law: Butterworths : 2002 at p 37

Grogan[25] in an article dealing with the unilateral changing of terms and conditions of employment questioned whether the principles underlying the *Precision Tools* case would survive the new-enacted Labour Relations. It is my submission that *Precision Tools* has indeed done so as things stand at the moment.

4.3 Section 187(1)(c) in the Labour Court

4.3.1 Dismissals not falling foul of Section 187(1)(c)

Put differently the question would be when does Section 187(1)(c) not apply when terms and conditions are varied? Could an employer effect a unilateral change and dismiss employees if they refuse to accept such changes and not fall foul of Section 187(1)(c)?

In most instances when an employer wants to use dismissal to change terms and conditions of employment, employees would argue that they are being compelled to accept a demand in respect of a matter of mutual interest between an employer and employee and bring a claim under section 187(1)(c) with the purpose of having the action of the employer declared automatically unfair. This can take the form of an application to the labour court for an interdict[26] or after being dismissed challenging the dismissal s as being automatically unfair. On the other hand the employer would argue that the changes are being brought about by the operational requirements of the company.

This question came before the Labour Court in *ECCAWUSA & Other v Shoprite Checkers t/a OK Krugersdorp*[27]. Faced with imminent financial collapse before its sale as a going concern to the Shoprite group, *OK Krugersdorp* began consulting with its workers' union. Agreement was reached that both parties would take all reasonable measures to avoid job losses as well as the need for "flexible work practices". However, when the company introduced new and more economical shift patterns, the employees refused to accept them and were subsequently retrenched.

The union argued in the Labour Court that the company had "embarked upon negotiations unilaterally to change the contracts of employment of the individual applicants and therefore

[25] See: Grogan J: "Unilateral Thinking –Changing a work practice": Employment Law Journal : Jan 1996
[26] See NUMSA v Fry's Metals (Pty)Ltd (2001) 22 ILJ 701 (LC)

had to resort to power-play by locking them out" when the dispute arose. In response to the this claim Judge Basson held that " care should be taken not to equate a *bona fide* retrenchment exercise which is aimed at avoiding job losses, but…at amending terms and conditions to suit the operational requirements of the employer… Where the amendment of terms of and conditions of employment is proffered by the employer as an alternative to dismissal during a bona fide retrenchment exercise and it is a reasonable alternative based on the employer's operational requirements, the employer will be justified in dismissing employees who refuse to accept the alternative offer." Accordingly these employees did not receive the protection afforded by Section 187(1)(c) of the Act. The judgement makes it clear that that an employer may change terms and conditions of employment as an alternative to retrenchment; a lockout is unnecessary[28].

The court adopted a similar stance in *MWASA & others v Independent Newspapers*.[29] In this case the company placed its editorial employees in a pool, and required them to work for all its publications, instead of one as before. When they indicated their intention to resist the change, the company gave notice of its intention to retrench them whereupon the workers applied to the Labour Court for an order restraining the company from implementing the change claiming it was a unilateral amendment to their terms and conditions of employment.

The court in this matter began distinguishing between disputes arising during retrenchment exercises and disputes arising in the collective bargaining process. The court held as follows: "On the facts in this case the primary purpose or driving force underpinning the changes in terms and conditions of employment and possible dismissals is the need to restructure for operational reasons so that the respondent can adequately resist the negative economic trends. The changes are mooted not as an end in themselves but with the objective of meeting certain restructuring goals."

Likewise in this case the protection afforded employees by Section 187(1)(c) eluded the employees and rightly so in my view.

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[27] ECCAWUSA & Others v Shoprite Checkers t/a OK Krugersdorp (2000) 21 ILJ 1347 (LC)
[28] See : Grogan J : "Unilateral Change – How is it to be effected?" Employment Law Journal : Vol 18 No 4 August 2002 : Butterworths
[29] MWASA & others v Independent Newspapers(Pty)Ltd 2002 5 BLLR 452 LC

4.3.2 Dismissals that fall foul of section 187(c) of the LRA

In not all instances have employers been able to argue successfully that they have changed the terms and conditions of employees for "operational" reasons. Section 187 (1)(c) of the LRA provides that a dismissal is automatically unfair if the reason for the dismissal is to compel employees to accept a demand in respect of any matter of mutual interest between the employer and the employee. The vital question that the courts have to answer is when is the dismissal, or change in terms and conditions , for operational requirements for a fair reason and when would the dismissal fall foul of Section 187(1)(c) of the LRA?

In a rather uncontroversial matter before the Labour Court, *in NUMSA & others v Zeuna-Starker Bop*[30] the employer dismissed employees for a reason the employer called "operational". During wage negotiations, some of the respondent's employees accepted its final offer, but the applicant employees embarked on a strike. The respondent locked out these employees, and issued an ultimatum. The strikers returned to work. They were then informed that their services had been terminated, and that their dismissals would remain effective unless they accepted the respondent's final offer within seven days. After an extension of the deadline, the employees' services were terminated. The applicants contended that the dismissals were automatically unfair. The respondent claimed that the dismissals were effected because there was "tension and uncertainty" in the workplace, and for operational reasons. The Court found that the termination of employment was a result of the employees' refusal to accept the offer.

The Labour Court held that the dismissals were embarked upon to compel the employees to accept the employer's proposal and that it fell within the ambit of Section 187(1)(c) of he LRA and some employees were reinstated while ten employees received compensation equal to 24 months' remuneration.

In *NCBAWU v Hernic Premier Refractories* [31] the employer embarked on a typical restructuring exercise after a transfer of a another operation in terms of Section 197 of the LRA , in terms of which employees were transferred from Iscor to Hernic. The employer notified both the union and the employees that it intended to embark on a restructuring and

[30] National Union of Metal Workers of SA & others v Zeuna-Starker Bop(Pty)Ltd (2002) 23 ILJ 2283 (LC)
[31] NCBAWU v Hernic Premier Refractories (Pty) Ltd (2003) 1 BLLR 50 (LC)

retrenchment program, and the union was informed that the employer wanted to renegotiate the terms and conditions of employment inherited from Iscor. Once it became clear that the union would not accept the changes, the employer declared all positions redundant and offered those positions to the persons who had been filling those positions but only on condition that they accepted the posts along with the employer's new terms and conditions of employment.

The individual employees concerned in this matter refused to sign the new employment contracts, or to agree to the new terms and conditions. As a result, the employees were informed that they were retrenched. For Hernic the matter was clear – it argued that it had a proper reason to retrench the individual employees, and that it was entitled to implement the restructuring exercise which eventually led to the retrenchment of the employees in order to reduce costs and restructure the business. The Court held via Judge Francis as follows: " On a balance of probabilities the true cause of the dismissal of the individual applicants was their refusal to agree to the new terms and conditions of employment that entailed the signing of a new employment contract and the abolition of certain benefits such as winter jackets, canteen subsidies, transport allowances, bursary schemes etc. The dismissals were therefore automatically unfair. It was argued that the individual applicants should not be reinstated since contract workers replaced them. I do not agree. The respondent brought it upon itself when it dismissed the individual applicants under the guise of a retrenchment. There is no reason why the individual applicants should not be reinstated in their previous positions."

In *NUM v Mazista Tiles (Pty)Ltd*[32] the employer found itself in an increasingly competitive environment and decided in the light of it being continually outpriced , to embark on a restructuring process. The employer indicated to the union that it required changes to terms and conditions of employment to be included in the annual wage negotiations. The union resisted any discussions on this issue focusing only on wages. A separate forum was set up for the purposes of discussing the restructuring and changes to working conditions. In relation to the terms and conditions the employer proposed that the employees either become independent contractors or "incentive" employees. Negotiations failed and the employer resorted to a retrenchment exercise instead.

The trade union argued that the reason for the dismissals had nothing to do with the operational requirements but was to compel the employees to accept changes to their terms and conditions of employment. The employer took the view that there was a *bona fide* and rational economic reason for the proposed change to its incentive systems and that the dismissals were based squarely on the employer's operational requirements. The Labour Court came to the conclusion that the reason for the retrenchment was to compel the individual employees to accept the employer's proposals on changes to their terms and conditions of employment and reinstated the retrenched employees.[33]

Another matter involving the changing of shifts which later turned out to become very controversial is *NUMSA & others v Fry's Metals*.[34] The case entailed the retrenchment of workers who refused to accept the change in the shift system and the withdrawal of their transport subsidy. The facts of the case are briefly as follows: The respondent engaged a firm of consultants to review its operations and make recommendations on how to ensure the continued viability of its operation and where possible, to increase productivity. The respondent decided to act on the consultant's recommendations by calling a meeting between it and the union. At the time the respondents employees were working on a 3-shift; 8-hour system. It was proposed that a 2-shift; 12-hour system be implemented to increase productivity. The union represented by its shop stewards categorically rejected the proposal. The company threatened that those employees who were not prepared to accept the proposed changes "may be retrenched".

The employees approached the Labour Court to interdict the respondent from dismissing them. It was contended that the dismissal would be automatically unfair on the basis of section 187(1)(c) inasmuch as, it was aimed at compelling the employees to accept a demand concerning a matter of mutual interest. The Labour Court found in favour of the applicants and interdicted the respondent from giving effect to the dismissals.[35] With respect to the employers contention that the threat of dismissal was operationally justified it held as follows " The mere say-so by a role player that the issue is one of an operational requirement and that the viability of an enterprise is at stake cannot determine the matter.

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[32] NUM & others v Mazista Tiles (Pty) Ltd : Labour Court Case No JS 1109/01 dated 17/10/02
[33] See: Mishke C: "Changing terms and conditions of employment : When is dismissal an option?" : CLL Vol 12 No 6 Jan 03
[34] National Union of Metal Workers of SA & others v Fry's Metals (Pty)Ltd (2001) 22 ILJ 701 (LC)
[35] See: Hutchinson W: "Compulsive Demands and Dismissals": Labour News and CCMA Reports Vol 12 No 1 February 2003.

The test is objective, having regard to all the relevant facts and circumstances. The respondent sought to avoid using the conciliation mechanism and the possibility of having subsequently to implement a lock-out to persuade the employees to agree with its proposals; instead it seeks to resort to what is effectively a dismissal lock-out, under guise of a retrenchment exercise."

As to whether the "guise" was permissible, the court held: "Dismissal is not a legitimate instrument of coercion in the collective bargaining process. The change in the definition of lock-out means that even the temporary tactical dismissal is precluded. Section 187(1)(c) renders any dismissal to compel acceptance of an employment demand automatically unfair, and so sections 67(4) and 187(1)(a) bar dismissal as a lawful response to procedural strike action. Wage-work deals must be the products of methods stopping short of the dismissal spectre." In the Judge's view, Fry's Metals should have locked the workers out until they were prepared to accept the new system, or until the company withdrew its demand when the lockout became more expensive than retaining the existing shift system.

Grogan[36] makes a very useful comparison with this decision and that of *OK Krugersdorp supra*. He argues very aptly in my opinion, that in the *OK Krugersdorp* case the employees were not engaged in collective bargaining; they were engaged in consultation over ways to avoid retrenchment. The change proposed by the employer had been proposed before that. In *Fry's Metals* however, the change was proposed before retrenchment was contemplated or threatened; the threat, according to the court, was raised in *terrorem* as a way of compelling the workers to accept a demand that should properly have been enforced by "power play".

As alluded to earlier, the *Fry's Metals* case turned out to become very controversial when it went on appeal to the Labour Appeal Court.

In a matter heard in the Labour Court before *Fry's Metals* was decided, the court considered whether a retrenchment after wage negotiations had been concluded was fair or not. In *FAWU v General Food Industries* [37] the company purchased a milling and backing business from another company and merged it with its own operations. After agreeing to a wage increase of 6% for the applicant's members at one of it's mills, the respondent gave notice

[36] See : Grogan J : "Unilateral change- How is it to be effected?" : ELJ Vol 18 No 4 August 2002
[37] FAWU v General Foods Industries (Pty) Ltd (2002) 10 BLLR 950 (LC)

that it intended retrenching employees at that mill in order to give effect to a plan to outsource part of its operation. The applicant claimed that the respondent had used the retrenchment exercise to undo a wage agreement and that the dismissals were automatically unfair as envisaged in section 187(1)(c) of the Act.

The court concluded that the dispute between the company and the union was a “classic dispute of interest” inasmuch as, the company wanted wages reduced or frozen but the union wanted higher wages. According to the judge, that dispute was resolved through the collective bargaining process, which culminated in the wage increase of 6% on 14 October 1999. The company was accused of reneging on the agreement by re-opening the dispute on 16 November 1999 when it indicated its intention to retrench staff. The judge reasoned that the purpose was, “self evidently to reduce its wage levels which it had fixed by agreement barely a month before that.”[38]

In its judgment the court relied on an article by Thompson[39], “Bargaining, Business Restructuring and Operation Requirements Dismissal”. The judge quoted with approval the following extract from the article: “When the contest between management and labour is 'purely' over the wage-work bargain - in other words, the substantive terms of the next collective agreement - dismissal will never be permissible. The 'for profit' termination offends against s 187(1)*(c)*. An employer may argue, however, that not a quest for profit but sheer operational requirements oblige a particular economic outcome, even to the point of sanctioning the discharge of those who hold out. But the Labour Court should lean against a result that allows a dispute on a wage-work deal to escape the protected zone of collective bargaining.

When in exceptional circumstances the case for migration is made, the employer must still overcome a formidable fairness hurdle in the judicial process.”

The court in essence held that once a party elected to resolve a dispute by resorting to the collective bargaining process, it must be held to that agreement “unless that party can show that a deviation is justified by exceptional circumstances.” No such circumstances were found to exist in this case.

[38] See: Hutchinson W: “Compulsive Demands and Dismissals” : LNN : Vol 12 No 1: February 2003
[39] See : Thompson C : “ Bargaining , Business Restructuring and Operational Requirements Dismissal” : (1999) 20 ILJ 755

This judgment also has drawn some criticism from commentators. Miscke[40], with reference to the timing of the retrenchments note " The fact that the notice of intention to retrench is served on the union barely a month after the union had wrested a 6% wage increase from the employer may be, in the final analysis, coincidental (one could wonder whether the Labour Court would have come to the same conclusion if the two events had been six months apart)." Similarly, Grogan writes, " …in General Foods, the court merely restored the balance achieved by the bargaining process. However, if a longer period had elapsed between the conclusion of the wage agreement and the company's announcement of its intention to retrench, …., the outcome of the case might well have been different."

As was mentioned earlier this case was heard by the Labour Court prior to the Fry's Metals judgment in the LAC. The overall opinion however, is that in view of the LAC decision in Fry's Metals, General Foods has a very slim chance of surviving[41]. However, given the criticisms avalanched against Fry's Metals, the decision in General Foods is still in my view the correct one.[42]

4.4 The Labour Appeal Courts view on Section 187(1)(c)

In essence, the view of the Labour Court at this point was that if an employer embarks on collective bargaining in respect of a matter of mutual interest, a lockout dismissal to compel the employees to accept the employer's demand would amount to an automatically unfair dismissal.

The Labour Court held that the employer's use of a "rights" instrument (such as a dismissal for operational requirements) in the context of the "interests" disputes amounted to an automatically unfair dismissal.[43]

Fry's Metals

This position changed significantly however when Fry's Metals appealed to the Labour Appeal Court. In *Fry's Metals v NUMSA & others*[44]. Judge President Zondo delivered a unanimous judgement upholding the appeal. According to JP Zondo

[40] See: Miscke C: " Does a wage settlement preclude an employer from retrenching?" CLL Vol 12 No 3: October 2002
[41] See: Stelzner S : " Workplace Change " : Juta's Annual Labour Law : Update" : Juta 2003 p 85
[42] The decision has indeed recently been overturned by the LAC see case no CA11/2002

"This appeal raises the following questions:

(a) *Does an employer have a 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?*

(b) *If an employer has such a right, what is the relationship between the right, on the one hand, and, on the other, an employee's right implicit in s 187(1)(c) of the Labour Relations Act 66 of 1995 (the Act) not to be dismissed for the purpose of being compelled to agree to a demand in respect of a matter of mutual interest between employer and the employee? "*

The Labour Appeal Court held that there was indeed scope for an operational requirements dismissal in terms of section 189 in these situations, provided that the purpose of the dismissal was not to compel the employees to accept the employers demand but rather to dismiss finally recalcitrant employees to make it possible for the employer to employ other persons who would be prepared to work under the new or changed terms and conditions of employment. In emphasising the purpose and finality of the dismissals the Labour Appeal Court held as follows: " In order to fall within the ambit of section 187(1)(c) a dismissal must have as its purpose the compulsion of the employees concerned to accept a demand in respect of a matter of mutual interest between employer and employee.

If a dismissal is not for that purpose it falls outside the ambit of section 187(1)(c). A dismissal that is final cannot serve the purpose of compelling the dismissed employee to accept a demand in respect of a matter of mutual interest between employer and employee because, after he has been dismissed finally, no employment relationship remains between the two. An employee's acceptance of an employer's demand in respect of a matter of mutual interest can only be useful or worth anything if the employee is going to continue in the employer's employ. Let us say that an employer wants his employees to agree that a transport subsidy be done away with. If the employees accept this demand and continue in the employer's employ, that would serve a useful purpose. However, if the employees are

[43] See: Mischke C : "Changing terms and conditions of employment : The return of the automatically unfair dismissal : CLL Vol 13 No 4 November 03

dismissed finally and irrevocably, their agreement that the employer may do away with the transport subsidy is irrelevant. The people whose agreement matters to the employer are those who are going to be in his employ."

Judge President Zondo cited with approval the decision in *Commercial Catering and Allied Workers Union of SA & Others v Game Discount World*[45] which was heard under the 1956 Act.[46] In this case, the company made a final offer during wage negotiations, and dismissed the union's members when they refused to accept that offer. The court in this matter held that there can be no lock-out if the act forming part of the lock-out was not for one of the purposes specified by the statute. An employer who introduces a lockout must do so to achieve a purpose. Here the dismissals were final and irrevocable: the applicants were not dismissed to compel or induce them to accept the respondent's demand. The termination of their employment the court said was therefore not a lock-out dismissal.

Turning to section 187(1)(c) of the current Act that court noted that the wording between this section and the definition of "lock-out" in the old Act were similar and held that "one is left in no doubt that s 187(1)(c) is based on the definition of the word "lock-out" in the old Act.

The court accordingly held that in this case the dismissals were not lock-out dismissals but ordinary dismissals for operational requirements since they were final and irrevocable dismissals as had been the case in *Game Discount World.*

Grogan[47] observes with reference to *Game Discount World* that once the industrial court decided the termination of the employees contracts did not constitute a lock-out, the court was able to find that the employee's dismissal was nothing more than a dismissal. The way was then open to the industrial court to determine whether the dismissal was fair. The industrial court found it was not because " an employee is not obliged to accept changes in conditions of employment. It is **manifestly unfair** to dismiss him because he refuses to accept such changes. The Act provides a means of compulsion, namely lock-outs. The respondent had no fair reason for terminating employment." He argues that in Fry's Metals, the Labour Appeal Court did not refer to this aspect of the Judgement in *Game Discount World*. For him the industrial court went further than ruling that final and irrevocable

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[44] Fry's Metals (Pty)Ltd v NUMSA & others (Pty)Ltd (2003) 3 BLLR 140 (LAC)
[45] See: Commercial Catering & Allied Workers Union of SA & others v Game Discount World Ltd (1990) 11 ILJ 162 (IC)
[46] Act 28 of 1956
[47] See: Grogan J :"Chicken or egg? Dismissals to enforce demands" Employment Law Journal : Vol 19 Part 2 April 2003

dismissals could never constitute a lock-out and the effect of the judgement was to declare all final and irrevocable dismissals for purposes of compelling employees to accept changes to terms and conditions of employment or other demands in principle (automatically) unfair.

As was alluded to earlier this Judgement has attracted much criticism from commentators. Thompson[48] in his criticism of the judgement notes that the implications of the judgement is that an employer can still pressurise resisting employees by locking them out providing only it does not say it is dismissing them temporarily in the process. He like Grogan states " the policy logic behind this reversal of the pre-1995 position is hard to fathom, so much so that it is hard to credit that this outcome squares with the drafter's intention."

He observes further that, it is "anomalous that the temporary dismissal is found to be more egregious than the permanent one- that a transient, pressuring dismissal in the face of employee obduracy is treated as automatically unfair (with the most severe consequences available under law swinging into play), while the permanent dismissal in the face of employee obduracy is either justified under law or only unfair in the standard sense if of the employer's justification is found wanting."

Likewise Van Voore[49] in his attack on the Judgement states, " The reasoning of the LAC in Fry's Metals was based in part on decisions of the courts under the old Act.

To the extent that the reasoning of the LAC in *Fry's Metals Ltd* permits of the possibility of a lock-out dismissal, the reasoning is, with respect, flawed. In the result, the LAC did not sufficiently balance the right of dismissal for operational reasons contained in section 188(1) against the protection afforded by section 187 (1) (c)."

He argues further that the fact that, according to the LAC, only a conditional dismissal and not the final and irrevocable dismissal fall within the definition of section 187(1)(c) is problematic. The effect of this approach is that the employer determines by electing a "final" or "conditional" dismissal whether or not section 187(1)(c) applies.

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[48] See: Thompson C: "Business Restructuring : Liberties , Constraints & Comparisons": Sixth SASLAW Conference 2003

[49] See: Van Voore R : " Changing Terms and Conditions: Striking a balance or "Anything Goes" " : Paper delivered at the Butterworths Annual Labour Law Conference : July 2004

I cannot agree more with this view since it does not afford employees involved in collective bargaining any protection from dismissal if they could be dismissed "finally" for refusing to accept a demand imposed on them by an employer.

Chemical Workers Industrial Union and others v Algorax[50]

While the Fry's Metals matter was being decided another case based on very similar facts was in the process of coming before the Labour Appeal Court. In *CWIU v Algorax* , the employer decided to change the shift system by introducing a continuous three shift system in order to utilise the workforce more effectively. The Algorax employees also refused to work the new shift system, and the company tried in vain to persuade them to change their minds and ultimately dismissing them. Algorax offered to re-employ the dismissed workers if they were willing to work the new shift system, and kept that offer open until the matter reached the Labour Court. The Labour Court rejected the union's argument that the dismissals were automatically unfair; it held that the company had good reasons for its actions but that it had not followed a fair procedure and awarded compensation.

When the union appealed the Labour Appeal Court raised the same questions that were raised in Fry's Metals. A divided court however in this instance found that the dismissals did fall foul of section 187 (1) (c) of the LRA and ordered the reinstatement of the employees. For the majority Algorax's desire to reinstate the workers (albeit on its own terms) was the critical difference between the company's approach and that followed by the Fry's Metals. Fry's Metals had given no indication that it would consider reinstating the employees once they had been dismissed. The minority judgment delivered via Judge Hlope could discern no material difference between the facts in Fry's Metals and those in Algorax and held that the dismissals were not automatically unfair.

Grogan[51] in his comparison of the Fry's Metals and Algorax judgments makes the following important observation as follows, " … the majority judgment in Algorax is consistent with the judgment in Fry's Metals. Algorax merely confirms that if an employer that dismisses employees who refuse to accept an operational change wishes to avoid perpetrating an automatically unfair dismissal, it must neither give the employees the impression that they can still accept the change after their dismissal, nor relent thereafter. Algorax's mistake (in

[50] CWIU & others v Algorax (Pty)Ltd (2003) 11 BLLR 1081
[51] See : Grogan J : "Termination Lockout" Employment Law Journal : Vol No December 2003

the legal sense) was to be too sympathetic; it could not in one breath say that it was trying to avoid terminating the employment relationship and in the next deny that it was not seeking to induce the workers to comply with its demand"

The comments thereafter by Grogan are in my view crucial to any future debate on this matter. He observes " ... it seems strange that Algorax should have perpetrated an automatically unfair dismissal by making genuine attempts to resuscitate the employment relationship, while Fry's Metals was exonerated for doing the opposite. From any perspective, a conditional dismissal of the kind implemented by Algorax seems more consistent with the purpose of the Labour Relations Act-saving jobs, where possible - than the irrevocable dismissal of employees who decline to accept changed working conditions."

4.5 Constructive Dismissal

My review of the cases involving the application of Section 186(e) of the LRA has revealed that very few involved the unilateral changing of terms and conditions of employment. Although most cases involving claims of constructive dismissal involves conflicts, interpersonal relationship problems and allegations of discrimination some cases that came before the courts did involve a change to terms and conditions of employment.

In *Riverview Manor v CCMA & others*[52] a doctor employed as a medical director was, after the deterioration of the business offered a position of medical practitioner and his salary reduced from R26000 to R15000 per month. The doctor left the employ of the company and alleged that he was constructively dismissed. The CCMA commissioner had held that the dismissal had been procedurally unfair in that the company did not consult with the doctor before making a decision to reduce his salary and terms and conditions of employment but that the dismissal had been substantively fair.

On review the Labour Court noted that it was common cause that the commissioners finding that the dismissal was procedurally unfair because the company had not consulted with the employee before making the decision to demote him and reduce his salary was contradictory and flawed. The nature of constructive dismissal was such that there was and

[52] Riverview Manor (Pty) Ltd v CCMA & others (2003) 24 ILJ 2196 (LC)

could be no procedure by which such a dismissal could be fair. On this ground alone the award had to be reviewed and set aside.

The court found further that, having found that no fair procedure had been followed, the commissioner was not in a position to hold, as he did, that the dismissal was substantively fair.

WL Osche Webb & Pretorius v Vermeulen[53]

This case is one of the leading cases dealing with constructive dismissal in the context of changing terms and conditions of employment and has been widely used and referred to in subsequent cases. In this case the employer had unilaterally reduced its employee's remuneration packages, including that of Mr Vermuelen. It had subsequently decided that all employees who did not wish to accept the new packages could resign. Vermeulen chose to resign and claimed that he had been constructively dismissed. It noted however that a constructive dismissal was not necessarily unfair. Noting that the case raised the issue of interaction between the common law principles of the contract of employment and the unfair labour practice jurisdiction , the court observed that at common law the appellants conduct in confronting the respondent with the choice of alternatives showed a deliberate and unequivocal intention not to be bound by the respondent's previous remuneration package which constituted a breach of contract in the form of a repudiation. The respondent accepted this repudiation and resigned, which would at common law have entitled him to claim damages in the civil courts. Instead he chose to approach the labour courts under it's unfair labour practice jurisdiction. The court held that , under labour law , the employer was entitled to alter its employees' remuneration if it had a genuine commercial reason and if it had consulted properly with the employees. The employer in this case had a fair reason for the change and had consulted exhaustively with its employees and with Mr Vermeulen. He was given an opportunity to suggest alternatives but did not do so. Mr Vermeulen according to the court had jumped the gun by resigning and could not expect compensation.

Given the gist of this judgment, I find it difficult to fathom why there are so few for claims before the civil courts in which the unilateral change to terms and conditions of employment

[53] WL Osche Webb & Pretorious (Pty) Ltd v Vermeulen (1997) 2 BLLR 124 (LAC) see also Van Der Riet v Leisurenet Ltd (1998) 5 BLLR 471 (LAC)

have been challenged on the basis of a breach of contract. One of the reasons could be the relative cost of lodging a claim with the civil courts versus access to the CCMA.

Chapter 5 –
The unilateral change to terms and conditions of employment in other jurisdictions

South Africa has one of the most progressive Constitutions in the world. Similarly the LRA, which had benefited greatly from extensive international experience, in the drafting process has also been hailed as exemplary inasmuch as it protects the rights of workers. Insofar as other jurisdictions are concerned I have not been able to identify something akin to our section 187(1)(c). Other jurisdictions do however grapple with the same problems and an attempt will now be made to have a brief look at what is prevalent in some foreign jurisdictions and how some foreign courts have dealt with this matter.

5.1 United Kingdom

5.1.1 Legislative Framework

Under the Employment Rights Act of 1996 dismissal for reorganisation is potentially fair, but the tribunal would have to decide whether in all circumstances having regard to equity and the substantial merits of the case the employer acted fairly.

Under UK labour law a provision is made under section 98(1) b[54] of the Employment Rights Act for a category of potentially fair reasons for dismissal classified as "some other substantial reason of a kind justifying dismissal" (SOSR). This provision has been variously described as the “dustbin category“ or “employer’s charter”, intended as a safety net to catch substantial reasons for dismissal which did not fall within other potentially fair gateways to dismissal.[55] The "some other substantial reason of a kind justifying dismissal" in the definition, as interpreted by the courts and a specific section of the legislation, is the regulator in the UK. The category of SOSR has been held to cover, for example, cases in which employees have been dismissed for refusing to accept changes in working hours and shift arrangements made in the business interests of the employer. [56]

The question that normally confronts the courts and tribunals in the United Kingdom is, where the employer insists upon changes beyond those expressly or impliedly allowed by the contract, to what if any extent is he entitled actually to break the contract and yet

[54] Employment Rights Act 1996
[55] See: Bowers & Honeyball : “ Textbook on Labour Law” : Third Edition: Blackstone Press 1998

demand compliance? Lets look at a few examples as to how this issue has been dealt with by the courts thus far.

5.1.2 Approach of the Court to changes in terms and conditions in the UK

Hollister v National Farmers Union[57]

This was one of the earlier cases that have come before the courts and have frequently been cited with approval in later judgments. In this case the applicant was employed as a secretary and after a decision by the headquarters to re-organise its operations he was offered different terms and conditions and different methods of working. Upon his refusal to agree to the new terms he was dismissed. He lodged a claim with the Industrial tribunal for unfair dismissal compensation and his claim was dismissed. Thereafter his case was heard by the Employment Appeal Tribunal who held that the Industrial Tribunal had erred in finding the dismissal unfair. The EAT felt that there was insufficient consultation by the employer and set aside the finding by the Industrial Tribunal substituting, a finding that the dismissal was unfair.

The Court of Appeal however had the final say and held that the Employment Appeal Tribunal had erred in finding that the employer had acted unfairly in dismissing the employee following a reoganisation on the grounds that there had not been sufficient consultation or negotiation by the employer with the employee. The court further held that although consultation on such changes was clearly desirable it was not obligatory[58] (unless required by contract). The tribunal it said had to look at all the circumstances of the case and at whether the employer did what was fair and reasonable in the circumstances prior to dismissal. Consultation is only one of the factors, which has to be taken into account when looking at the circumstances of the case and considering when a dismissal is fair or unfair. The court held that in the present case the employee's refusal to accept the new agreement justified dismissal on the grounds that some other substantial reason for justifying dismissal existed.

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[56] See: Deakin and Morris : "Labour Law": Third Edition : Butterworths :UK : 2001

[57] Hollister v National Farmers Union (1979) ICR 542

[58] This is the same approach adopted by Judges Myburg and Conradie in the Air Products case *supra* holding that management did not have to consult but only to persuade.

Evans v Elemeta[59]

Even if the employer can produce evidence of cost savings or enhanced efficiency, however, dismissal may be unfair if new demands are placed on the employee. In this matter an employee was offered a new contract with improved conditions including a salary increase coupled with a requirement that he works overtime, unpaid up to an unspecified number of hours per week. He resigned and claimed constructive dismissal.
The Industrial Tribunal held that his dismissal was for some other substantial reason because there was commercial need of discernible advantage to rationalise the contracts of employment. They went on to hold that the new contracts were "not objectionable or oppressive" and that the employee, Mr Evans had acted unreasonably in refusing to accept the change.

This matter went to the EAT who held that the Industrial Tribunal had erred in holding that the employer had acted reasonably in dismissing the employee for refusing to accept the new terms and conditions. According to the EAT the Industrial Tribunal had misdirected itself in finding that the new terms of the contract, which imposed a mandatory and unlimited obligation to work overtime where previously there had been no obligation to work overtime, were not objectionable or oppressive and in proceeding on the untenable view that the it was not reasonable for the appellant to refuse the contract.

St John of God (Care Services) v Brooks & others[60]

St John of God, a hospital in the UK was funded in part by the National Health Service. When that funding was significantly reduced the company took various steps to make saving one of which was to employ staff on less beneficial terms as an alternative to closure. Under the new terms, holidays were reduced, overtime rates abolished , a generous sick-pay scheme was replaced by statutory sick pay only, and a standstill on pay levels was proposed. Four employees decided to approach the Industrial Tribunal who found that the employees had been unfairly dismissed because no reasonable employer could have expected the employees to agree to such terms.

The case however went to EAT where the majority overruled this decision. According to the EAT the Industrial Tribunal had erred in law in holding that the employer had acted

[59] Evans v Elemeta (1982) IRLR 143
[60] St Johns of God (Care Services) Ltd v Brooks (1992) IRLR 546 EAT 8

unreasonably in dismissing the employees for refusing to accept substantial changes in their terms and conditions of employment made necessary by the company's financial position. In reaching that decision, the tribunal had wrongly directed themselves that, in such circumstances, the crucial question is whether the terms offered were those, which a reasonable employer could offer. The EAT held further that the Industrial Tribunal had applied the wrong test. It held that it was wrong to focus on the offer alone to the exclusion of other factors. The tribunal's approach it said tends to lend undue importance to the factor that the employee is acting reasonably in refusing the offer. The EAT cited Hollister V NFU with approval as follows"…the reasonableness or unreasonableness of the employer's conduct has to be looked at in the context of that reorganization. To look at the offer as the crucial question is apt to blur that aspect of the matter."

According to Whincup[61], employers' powers to change the terms with or without their employees' agreement are very far reaching. In my opinion it appears as the courts in the UK are approaching cases involving the employer's operational requirements and the need to change terms and conditions on a similar basis, as is the case in our courts in South Africa.

5.2 Canada

5.2.1 Legislative Framework

To speak of the Canadian system of labour law, however defined, would be to mislead. In effect there are at least eleven functioning labour relations systems in Canada, embracing the ten provinces and the federal (national) sphere.[62]

Generally, in Canada[63] an employer may not alter the terms and conditions of employment during the currency of a collective agreement.

The employer is allowed to layoff [64] during the currency of the collective agreement, but may do so only for bona fide business reasons subject to seniority provisions in selection and

[61] See: Whincup M: "Terms and conditions of employment: Part 2": Law Society's Guardian Gazette: Vol 85 No.8 p.27

[62] See: Carter et al : "Labour Law in Canada" : Fifth Edition : Kluver Law International : 2002 at p 23

[63] See for example Section 50 of the Canadian Labour Code ; Section 86 of the Ontario Labour Relations Act 1995 ; Section 45 of the British Columbia Labour Relations Code (RSB 1996) & Section 59 of the Quebec: Labour Code all of which makes provision for a "Statutory Freeze" on terms and conditions of employment

[64] Under collective agreements layoffs are temporary suspensions of the employment relationship. See: Carter et al : "Labour Law in Canada" : Fifth Edition : Kluver Law International : 2002 at p 140

recall. It may not layoff to enforce a demand for a change to working conditions. When a collective agreement expires and notice to bargain is given there is a statutory freeze to wages and working conditions until the conciliation and cooling-off period are complete. The employer could not layoff to enforce a demand during the freeze period. That would be a freeze violation. The employer can only lock out once industrial action is legitimate, but it may not dismiss permanently.[65]

In Canada an employee affected by a unilateral change in terms and conditions of employment would ordinarily lodge a claim of constructive dismissal with the courts. In Quebec for example, employment contracts are governed by civil law including the Civil Code[66]. Where an employer decides unilaterally to make substantial changes to an employee's contract of employment and the employee does not agree to the changes and leaves her or his job, the employee has not resigned but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as "constructive dismissal". By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract.

Despite the foregoing there is a growing body of case law in Canada, which appears to have endorsed the notion that an employer is entitled to make unilateral and even fundamental changes to an employment contract as long as sufficient notice of the change is provided to the affected employees. It might be useful at this juncture to look at some of the more important case law with respect to this issue.

[65] See: Thompson C: “Business Restructuring: Liberties, Constraints & Comparisons: Sixth SASLAW Conference: October 2003

[66] See also art. 1670 and art. 1022 of the Civil Code of Lower Canada

5.2.2 Approach of the Courts to changes in terms and conditions in Canada

Farber v Royal Trust Co[67]

This case, which originated from Quebec, is widely regarded as a leading authority on the concept of changing terms and conditions of employment and constructive dismissal. In this case heard by the Supreme Court of Canada a manager brought a claim of constructive dismissal against his employer, after he was as offered a position as manager of a single branch with no base salary, whereas he was previous a regional manager responsible for 21 branches. After having his appeal dismissed by the lower courts the Supreme Court held that he had indeed been constructively dismissed. The court held as follows: " It is clear that the change the respondent unilaterally imposed on the appellant through its offer substantially altered the essential terms of the employment contract. At the time the offer was made any reasonable person in the same situation, as the appellant would come to the same conclusion. To begin with, the change involved a significant and even serious demotion for the appellant. He was being offered the manager's position at a single branch ...a position he held eight.... Asking the appellant to manage that branch undermined his prestige and status all the more." The applicant in this matter was awarded an amount of $150 000 by the court, which comprised one years salary in lieu of notice.

Rosscup v Westfair Foods[68]

The plaintiff (applicant) in this matter worked for the company for 11 years, and one year before her dismissal on January 2, 1998 her employer presented her with a document. The document was Westfair's attempt to vary the plaintiffs's employment contract. Specifically, the document purported to reduce the notice period to which the plantiff would be entitled in the event of termination of employment without cause. The document also underlined the discretionary nature of bonus payments, and that severance payments made in lieu of notice would not include these bonus payments. The plaintiff testified that, in signing the document, she was not accepting the new terms but that was simply acknowledging that she had received notice of the changes.

The Alberta Court of Queen's Bench held that the document was not a bilateral variation of the employment contract, given the lack of consideration provided to the plaintiff and the lack of common intention to amend the existing employment contract.

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[67] Farber v Royal Trust Co (1997) 1 S.C.R. 846

[68] Rosscup v Westfair Foods Ltd (1999) A.J. No. 944(Q.B)(QL)

However, the court determined that the reduced notice period as outlined in the document was nevertheless binding upon the plaintiff for the following reasons: “even if an employer and the employee fail to come to an agreement to vary the terms and conditions of their employment contract, Farber v. Royal Trust Co…stands for the proposition that an employer may make substantial changes to the terms of the employment if it gives the employee reasonable notice of such changes. During the notice period the employee would of course be free to either accept the changes or to seek alternative employment.”
The court pointed out that the document was provided to the plaintiff in January 1997 stating that the changes would become effective from November 1 , 1997 thus giving the plaintiff ten months notice of the unilateral changes imposed by the employer. The plaintiff’s wrongful dismissal claim was therefore dismissed.

Boucher v. Paul S. Pollock Enterprises Limited[69]

In this case before the British Columbia Supreme Court the applicant in the matter argued that he had been constructively dismissed. The applicant accepted employment with the respondent after some lengthy negotiations. In terms of the agreement reached, which incidentally, was not reduced to writing, the applicant received a salary of $60,000. After some six months in employment the applicant was advised by the employer that it could no longer afford to pay the salary of $60,000 a year and suggested a reduction from the $60,000 a year to 11% of the actual sales.

The applicant informed the employer, after numerous requests for a response, that the offer of 11% was not acceptable and that he considered himself constructively dismissed. The court held that, if an employee asserts that he has been constructively dismissed, he must prove that there has been conduct on the part of the employer, which breaches an express or implied term of the contract. The court held further that it is possible to change terms and conditions of employment by mutual agreement and this involves one of the parties being entitled to ask the other party considering a change without thereby repudiating the contract. This is what happened in this case according the facts, the court ruled. The applicant was held to be one that repudiated the contract and his claim was dismissed.

[69] See: Boucher v. Paul S. Pollock Enterprises Limited (2002) B.C.J. No. 1804 (S.C.)(QL)

Vanelli v Albion Price Chopper[70]

This is a case that has its origins in the Ontario region. The applicant in this matter a Mr Vanelli worked for the company, Albion Price Chopper or its predecessor's , from 1975 to 2002 as a manager. In this matter the plaintiff worked for the employer or successor employers from 1975 until 2002 as a Produce Manager. When the company employed an assistant for Vanelli he saw this as a plot on the part of the company to get rid of him and the relationship between him and his employer soured. When requested, together with the other store managers to close the store on a rotating basis he refused arguing that it did not form part of his job description. Vanelli eventually went on extended sick leave. He did not did not return to work and subsequently brought a claim of wrongful dismissal. The matter came before the Ontario Superior Court of Justice. Justice Echlin for the court, noted that previous case law has held that an employer is allowed a certain degree of latitude in making changes, and that the employment relationship must be viewed in its totality. The court noted with approval the decision of Faber v Royal Trust Co which arose in Quebec and held that "… each constructive dismissal case must be decided on it's own facts,since the specific features of each employment contract and each situation must be taken into account to determine whether the essential terms of the contract have been substantially changed. The court was not convinced that there was any fundamental change to the terms and conditions of employment. Echlin J stated " ... I was hard pressed to find any significant changes to Mr Vanelli's workplace status or terms of his employment. His title remained the same. His wages were identical. His seniority was preserved and his vacation entitlement remained constant." Accordingly the court held that Vanelli was not constructively dismissed.

According to Blake[71], writing in an article in the Canadian, Employment and Labour Law reporter, the case law in this area is not entirely settled. He of the view that the weight of recent authorities suggest that a court would not interfere with an employer's decision to make substantial and unilateral changes to an employment contract, provided that the affected employee is given reasonable notice of the changes. Employers have some assurance that a potential constructive dismissal is unlikely to succeed where clear and sufficient notice of unilateral and fundamental change is provided to an employee.

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[70] Vanelli v. Sobeys Capital Inc., c.o.b. as Albion Price Chopper (2003) O.J. No 4705 (Ont.S.C.) (QL)
[71] See: Blake et al: "Avoiding Constructive Dismissal: Reasonable Notice for Unilateral Changes to the Employment Contract": Employment and Labour Law Reporter: Vol 12 No 10 Jan 2003: Canada

Chapter 6 –
Conclusions and recommendations

The purpose for looking at the foreign jurisdictions was aimed at establishing to what extent the approach of the courts differed from that in South Africa when confronted with the claims of unilateral changes to terms and conditions of service. In this regard the focus was on the change in work practices. The length of this paper does permit for a more detailed analysis of the various types of cases involving the unilateral change in terms and conditions of service.

What is clear from the cases both locally and internationally is the courts are following a similar trend when a change in "work practices" is implemented particularly when it involves individuals. On the strength of the cases dealing with these types of issues the general approach is that, contracts of employment are not once-for-all transactions like contracts for the purchase of goods. Employment relationships are often long term, and must necessarily develop and evolve over the years as surrounding circumstances change. No one can realistically demand that he should be employed forever on the terms he began, but equally no-one could draft a contract which will anticipate all possible changes. I believe that the approach by the courts in these instances has been correct and a consistent approach is being developed both locally and in some other jurisdictions.

In the South African context a dark cloud still hangs over the interpretation of section 187(1)(c) of the Labour Relations Act. As things stand at the moment it is questionable whether the intended protection afforded employees by the constitution[72] to engage in collective bargaining is being realised by the interpretation of section 187(1)(c) by the LAC. It is argued that the effect of this approach renders section 187(1)(c) in the LRA as almost superfluous. I have no doubt that the decision in Fry's Metals[73] will be overturned by future decisions in the Supreme Court of Appeal or the Constitutional Court.

[72] The LRA unlike the 1956 Act protects and promotes the constitutionally enshrined right to engage in collective bargaining without being dismissed.
[73] Fry's Metals itself is on Appeal to the Supreme Court of Appeal; See also Chevron Engineering v Nkambule & others (2003) 24 ILJ 1331 which now makes an appeal to the Supreme Court of Appeal possible.

I am of the view that the right to collective bargaining is a right which is provided for by ILO[74] conventions and enshrined in the Constitution and should be afforded the necessary protection. Such disputes are resolved by the power play between the parties and dismissal does not form part of this power. The constitution affords employees protection against dismissal. The courts should not interfere in this process and should leave it up to the parties to resolve. I agree with Thompson when he states, " When the contest between management and labour is "purely" over the wage-work bargain- in other words, the substantive terms of the next collective agreement-dismissal will never be permissible. The "for profit" termination offends against s 187(1)(c) … the Labour Court should lean against a result that allows a dispute on a wage-work deal to escape the protected zone of collective bargaining." To allow an employer engaged in collective bargaining to dismiss or threaten to dismiss in order to improve its negotiating position or outcome would be undermine the constitutional rights to collective bargaining and right to strike enshrined in the constitution. I would argue further that if an employer is entitled, as the courts have suggested, to retrench to increase profits whenever it is expedient to do so would also be to undermine the system of collective bargaining provided for in our constitution. As alluded to earlier by Grogan[75] it is inconsistent with the purpose of the Labour Relations Act, saving jobs.

Many would argue that generally insofar as the unilateral change to terms and conditions of employment in South Africa is concerned, employers generally have the "upper hand" as things stand at the moment. There remains however an area in the law that is relatively untapped by workers and their organizations. This is the chapter dealing with workplace forums.[76] Among the subjects reserved for mandatory consultation within workplace forums are proposals to restructure the workplace, "including the introduction of new technology and new work methods" and "changes in the organization of work". Had a workplace forum, for example been in place at Precision Tools[77], it might not have been possible to rely on the right of the employer "merely to persuade" the employee to accept the changes.

[74] The Freedom of Association and Protection of the Right to Organise Convention (87 of 1948) and the Right to Organise and Collective Bargaining Convention (98 of 1949) were ratified shortly after South Africa's readmission to the ILO.
[75] Ibid at 50
[76] Chapter V of Act 66 of 1995
[77] ibid at 17

The Act permits an employer to implement its proposals after consultation, subject to "any agreed procedure" first being invoked to resolve the difference. In the absence of an agreed procedure, the company could only implement the changes after consulting "with a view to reaching consensus". A mere attempt to persuade would not have been sufficient.

Thompson[78] in support of the introduction of work forums argues that Labour's antagonistic stance on workplace forums is their greatest strategic blunder of the post-apartheid era.

In support of Thompson I would argue that were a union to agree to the establishment of a workplace forum, employees would be able to negotiate an agreed procedure, that would have to be followed prior to the implementation of any changes. This could include going to arbitration. In the absence of a workplace forum all that is required by the employer is required to consult and implement thereafter.

This is a far cry from the situation in Germany from which our workplace forum model was borrowed. In Germany, employees have the right to refuse to work any unagreed or unarbitrated changes. Consequently, until agreement is achieved, any transfer or dismissal would be unlawful.[79]

I believe that the sensible utilisation of the workplace forum provisions, by unions and workers, could bring some balance to the seemingly unfettered right of employers to implement changes unilaterally.

[78] See: Thompson C: "Business Restructuring: Liberties, Constraints & Comparisons: Sixth SASLAW Conference: October 2003

[79] ibid

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