Unfair Labour Practice: Is it limited to instances contained in Section 186 (2) of the Labour Relations Act?

The concept of unfair Labour Practice is not limited to those contained in Section 186 (2) of the LRA.

In terms of Section 186(2) of the LRA:

Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving-

(a) Unfair conduct by the employer relating to the promotion, probation (excluding disputes about dismissal for reasons 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 ; and

(d) An occupational detriment, other than dismissal, in contravention of the Protected Disclosure Act 26 of 2000, on account of the employee, having made a protected disclosure defined in that Act.

Section 23(1) of the Constitution provides that: *Everyone has the right to fair labour practices.*

In NEHAWU v University of Cape Town and Others (2003) 24 ILJ 95 (CC) the meaning of "fairness was said to depend on circumstances and involves value judgment:

In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practice".

In an article, Regulated Flexibility: revisiting the LRA and the BCEA (2006) 27 ILJ 663, Cheadle suggests that fairness should not be limited to these interests only- fairness should take into account societal interests such as health and safety, the environment the community and the economy.

This assertion is one that suggests that the concept of unfair labour practice is not limited to Section 186 (2) of the Act.

Article 4 of the ILO Convention 158 of 1982, states that: "*The employment of a worker shall not be terminated unless there is a valid reason for such termination, connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service".*

From the above it is abundantly clear that the concept of unfair labour practice is not limited to those contained in Section 186(2) of the Labour Relations Act, and therefore a closed number of instances(*numerus clausis).* There is a category of complains by employees which do not fall within one or other of the

provisions of the statutory definition of "unfair labour practice". These are known as "non statutory" unfair labour practice.

In terms of Section 185(1):

Dismissal means that –

(a) An employer has terminated a contract of employment with or without notice;

(b) An employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;

(c) An employer refused to allow an employee to resume work after she-took maternity leave in terms of any law, collective agreement or her contract of employment;

(d) An employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but refused to re-employ another; or

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

(d) An employee terminated a contract of employment with or without notice because the new employer, after 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.

A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 of the LRA, that is protection of employees and persons seeking employment, or if the reason for the dismissal is participation in a strike, refusal to bargain by the employee, contravention of a statute by the employer, contravention of section 6 of the Employment Equity Act and acts of discrimination.

In terms of Section 188(1) of the LRA:

A dismissal that is not automatically unfair, is unfair if the employer fails to prove -

(a) That the reason for dismissal is a fair reason-

(i) Related to the employee's conduct or capacity; or

(ii) Based on the employer's operational requirements; and

(b) That the dismissal was effected in accordance with a fair procedure.

In terms of item 2(4) of Schedule 8 Code of Good Practice :Dismissal, in case where the dismissal is not automatically unfair, the employer must show that the reason for dismissal is a reason related to the employee's conduct or capacity, or is based on the operational requirements of the business. If the employer fails to do that, or fails to prove that the dismissal was effected in accordance with a fair procedure, the dismissal is unfair.

In terms of Section 189 when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult –

(a) Any person whom the employer is required to consult in terms of a collective agreement;

(b) A workplace forum;

(c) Any registered trade union;

(d) If there is no trade union, the employees likely to be affected by the proposed dismissals or their nominated representatives.

The employer and the other consulting party must engage in a meaningful joint consensus-seeking process and attempt to reach consensus on-

(a) Appropriate measures-
- to avoid the dismissals;
- to minimize the number of dismissals;
- to change the timing of the dismissals;
- to mitigate the adverse effects of the dismissals;

(b) the method for selecting the employees to be dismissed; and

(c) the severance pay for dismissed employees.

In Kotze v Rebel Liqour Discount Group (2000) 21 ILJ 129 (LAC) the court said:

"*The function of the court in scrutinizing the consultation process is not to second-guess the commercial or business efficacy of the employer's ultimate decision but to pass judgment on whether such a decision was genuine and not merely a sham. The court's function is not to decide whether the employer made the best decision under the circumstances, but only whether it was a rational commercial or*

operational decision, properly taking into account what emerged during the consultation process".

In National Union of Mineworkers & Others v Alexkor Ltd (2004) 25 ILJ 2034 (LC) the elements of a substantively fair retrenchment were set out as follows:

(a) If there was a commercial rationale;
(b) Whether the decision was taken in a manner that was fair to the affected employees;
(c) Whether there was a reasonable basis on which it is so predicated;
(d) The court has to examine the content of the reason;
(e) The court has to consider that fairness and not correctness is the test ; and
(f) That there was fairness to both employer and employee.

In Oosthuizen v Telkom SA Ltd (2007) 28 ILJ 2531 (LAC), the employee who had been employed for thirty years was made redundant after the restructuring of the employer's business. He applied for twenty –two vacancies before he was retrenched and four after he had been dismissed.

The employee contended that there was no need for the termination of his employment because there existed alternative positions within the employer's structures and that the employer failed to retrain and redeploy him despite having undertaken to do so.

In Simelane &Others v MEC for Education, Province of the Eastern Cape & Others (2001) 22 ILJ 1688 the labour court accepted that the LRA's definition of "unfair labour practice" is not necessarily exhaustive; other forms may be recognized under the broader constitutional guarantee of fair labour practices.

These include unilateral variations of terms and conditions of employment and the transfer of employees.

The employer may not unilaterally amend the terms of a service contract with an employee. If the employer changes an employee's terms and conditions

unilaterally, the employee has an election either to terminate the contract or sue for damages in terms of the contract. Unilateral change by the employer is unlawful only if it constitutes a change of terms and conditions of employment.

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