GOBHOZA LEGAL PRACTICE

GOBHOZALEGALPRACTICE.CO.BW
+267 3116371

Labour & Employment With Gard.

Published: 04th March 2024

VARIATION OR AMENDMENT OF EMPLOYMENT TERMS AND CONDITIONS.

- ✓ Exception to the general rule
- ✓ Conclusion

A complaint that often arises within the workplace is that an employer has unilaterally changed the original terms and conditions of employment. A question that comes to the fore is whether such changes fall with the employers' prerogative or neccessitate mutual agreement from both parties? In this article we shall be discussing the legal position regarding variation/amendment of employment terms and conditions.

A contract of employment is a consensual agreement whose terms and conditions are legally binding on both parties. Therefore as a general principle an employer is not permitted to unilaterally amend or vary the employment contract because that would constitute a breach of contract. These terms and conditions can be amended or varied by mutual agreement. However, there are instances where a unilateral change to an employee's conditions of employment is considered fair.

Exception to the general rule

It is important to highlight that business enterprises are always evolving and employees must know and accept that their duties cannot completely remain unchanged throughout the employment period. If an employee refuses to accept such change, the employer may according to the principles of equity, under given circumstances, unilaterally amend the terms and conditions of employment.

Therefore, an employer is permitted to unilaterally amend an employee's contract of employment provided:

i. There is a sound commercial reason. Such a reason must be demonstrable by the employer. The reason must not be attributable to any intentional or negligent act or omission on the part of the employer.

ii. The variation/ amendment was preceded by fair procedure, which means proper consultation with the employee. Consultation entails the employer engaging in bona fide considerations or suggestions from employees or their union and nothing more. However, an employer cannot be reasonably expected to consult employees or their union representatives who evade or duck and dive away from the process without any reasonable ground. For prior consultations to qualify as proper they must have been

conducted in a reasonable manner and in good faith. The employee should have been afforded a reasonable opportunity to respond to the clear proposals or intentions of the employer. See **Botswana Mine Workers Union v Debswana Diamond Company (Pty) Ltd 2017 All Bots 106 (IC)**

A practical example on variation of contractual terms and conditions of employment is the Court of Appeal case of Olefile Apei v Kgalagadi Breweries (CACGB-053-22 Unreported). In this case, the Respondent had reduced the Appellant's salary by 10% because the business was faced with operational difficulties arising from the alcohol ban and numerous national lockdowns under the 2020 State of emergency Regulations promulgated during the Covid 19 pandemic. Prior to effecting such change the Respondent proposed a business retention plan which amongst others included the 10% salary reduction, until business resuscitates. Furthermore the Respondent had consulted the Appellant and invited his input. It was held that there was a valid reason and a fair procedure for the changes in the terms of employment, therefore the Appellant was not entitled to the 10% refund that he claimed.

Conclusion

In summation, an employer cannot unilaterally vary contractual terms and conditions unless there is a valid reason and a fair procedure prior to effecting such changes.

If you have interest in an in-depth discussion on this subject matter or any employment and labour issues, feel free to contact us at **info@gobhozalegalpractice.co.bw**
Tel: 3116371

Disclaimer: *This article is for information only and should not be taken as legal advice.*