NTEU
NATIONAL TERTIARY EDUCATION UNION

WHAT'S UP!

NTEU at NMMU

The Common Law Contract of Employment : Part 10

By now it has been established that relationships are important, if not central to the Common Law Contract of Employment. Before modern labour legislation came in, the relationship between employer and employees was characterised as a master/servant relationship and to this day the element of servitude remains, even though it is no longer a master/servant relationship.

As we have seen, those in authority must be respected and their instructions carried out efficiently and correctly. In the modern day, the employer/employee relationship is formalised through a combination of employment contracts, policies and procedures which govern employee conduct in the workplace. The labour laws also play a cardinal role in formalising the relationship and the Labour Relations Act, in particular, strives to provide employment security, ensures labour peace and the democratisation of the workplace. This Act encourages inclusivity and participation in the governance of the workplace, hence the need to consult employees or their representative in all matters that will have an impact on the work relationship.

While both parties (employer and employees) play a vital role in the type of relationship that develops between authority figure and employees, it is the person in the position of authority that is generally charged with the task of ensuring sound and healthy relationships at work. The authority figure needs to create a work environment characterised by fairness, mutual respect, consistency of practice and reasonableness. All employees must be treated alike without favouritism or inconsistency in the application of policies and procedures.

This brings us to the golden rule of sound relationships and that is that the authority figure should treat others as they (person in authority) would like to be treated. However, there is an even more important rule, called the platinum rule that states that those in authority must treat others as they (the other) would like to be treated. That requires understanding the other person and having empathy. Unfortunately, many in positions of authority lack these skills with the result that one finds conflict in many work relationships.

Put simply, conflict is disagreement heated up. The first step in the development of conflict is that a difference arises between two parties (individuals or groups). Differences of opinions or outlooks are obstacles, and when the parties fail to reach agreement (even an agreement to disagree), the outcome is disagreement, the second stage in the development of conflict. If this disagreement leads to anger in either or both the parties, it results in conflict which is the third stage. However, if the parties are able to stay calm and not become angry, the disagreement remains merely disagreement.

To ensure healthy work relationships all parties must strive to respect differences of opinion and outlook in others, particularly in a country with such a diverse workforce as in South Africa. Healthy relations results in a peaceful work place, and a peaceful workplace is far more productive than one where a lot of strife exists.

The onus is on all to interact with others in such a manner that good relationships develop. That is the bottom line.

This is the last part in this series on the Common Law Contract of Employment.

OUR SINCERE THANKS TO PROF NORMAN D KEMP – FORMER NTEU PRESIDENT

INSOURCING OF OUTSOURCED EMPLOYEES

By now all staff members are aware of the decisions in terms of the insourcing of the outsourced employees taken at the Council meeting held on 21 Nov 2015. The NTEU Chairperson was allowed to attend the meeting as an observer. The first meeting on the implementation process took place on 24 Nov 2015. Both unions on campus will form part of the process to ensure that the rights of not only the outsourced staff are protected, but also that of the current NMMU employees. NTEU will keep the membership updated as the process unfolds.

What happens when an employer's offer alternative to retrenchment is not accepted timeously?

May an employer retrench its workers, after making an offer alternative to retrenchment, where the offer was not accepted by a certain date? This was the issue in *DB Contracting North CC v National Union of Mineworkers and Sipho Nkabinde and 105 Others* (Case No. JA 113/13).

The appellant (DB) was a subcontractor of JJ Cables Jointing CC (JJ). JJ lost a large contract with Eskom, which led to DB being unable to pay its wage bill. This was made worse by the stipulated industry increase in wages. On 30 July 2009, DB commenced a formal retrenchment process. At the third meeting between DB and the employee's union, National Union of Mineworkers NUM, the parties agreed to change the termination date to 4 December 2009. However, DB offered to retain the workers if they agreed to being paid at the lower hourly rate, if the offer was accepted by 4 December 2009. The parties agreed that this was a reasonable alternative to retrenchment. DB alleged that the offer was not accepted by 4 December 2009 and thus proceeded to retrench the workers. NUM disputed this.

The majority judgment found that the offer had been rejected for the following reasons:

1. The court reasoned that if a meeting with workers had taken place between 13 November and 4 December 2009, and Bengequla (NUM's Negotiator) was given a mandate to accept the offer, there was no reason for him to wait until the meeting on 4 December to notify DB.
2. NUM's Negotiator testified that, en route to the meeting, he was phoned by a worker who accused him of selling them out as they were receiving dismissal notices, which indicated that he had agreed to retrenchment instead of notifying DB of the workers' acceptance.
3. At the meeting, NUM's Negotiator did not protest the retrenchment and merely discussed other aspects of implementing the retrenchment.
4. In a letter to DB dated 7 December 2009, he accused DB of sending out dismissal notices after the meeting, which contradicted his evidence that dismissal notices were distributed before the meeting took place.

At no stage did NUM's Negotiator oppose the retrenchment. Based on this evidence, the resolutive condition of acceptance that would've prevented retrenchment was never met.

The parties had to adduce evidence, upon which they could rely, from the facts. NUM alleged that it had accepted the offer before 4 December 2009 but failed to provide evidence that it did so. DB was therefore entitled to believe that there was no such timeous acceptance.

This judgment strengthens the employer's position in retrenchment proceedings. Where an employer makes a reasonable alternative offer to retrenchment, the other consulting party must provide clear acceptance of the offer to prevent retrenchment from occurring. It is also worthwhile noting that an offer of wage payments below the minimum prescribed industry rates may be a valid alternative to retrenchment, where the parties agree to it.

By Mohsina Chenia, Director, Employment, Cliffe Dekker Hofmeyr

NTEU CONGRESS 2015

The NTEU Congress takes place in Port Elizabeth from 25 – 27 Nov 2015. The NMMU branch will be represented by a 10 person strong delegation. New national leadership will be elected for the next two year period. Yesterday, delegates attended a capacity building workshop presented by Craig Jessop and Christi Haworth of Brown, Braude & Vlok, and Prof Frans Marx. Topics ranged from Contract Workers and Outsourcing, Retrenchments as a Tool for Limiting Salary Increases, King III Governance report and the POPI Act.

Live so that when your children think of fairness, caring, and integrity, they think of you.
H. Jackson Brown, Jr.