EMPLOYMENT LAW
ALERT

5 DECEMBER 2022

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Paradigm shift: Automatically unfair or a genuine operational requirement

On 10 November 2022, the Labour Court handed down its judgment in *Inqubela Phambili Trade Union and Others v Pioneer Foods (Pty) Ltd, Wadeville Beverages* (JS740/2019) [2022] ZALCJHB 314 (10 November 2022). This case revisits the fine line between whether a dismissal is automatically unfair because of a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer, or for a genuine operational requirement.

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

Paradigm shift: Automatically unfair or a genuine operational requirement

On 10 November 2022, the Labour Court handed down its judgment in *Inqubela Phambili Trade Union and Others v Pioneer Foods (Pty) Ltd, Wadeville Beverages* (JS740/2019) [2022] ZALCJHB 314 (10 November 2022). This case revisits the fine line between whether a dismissal is automatically unfair because of a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer, or for a genuine operational requirement.

In 2018 Pioneer Foods issued a written invitation to employees at its Wadeville beverages plant to consult about a proposed change from a three- to a four-shift work system. The four-shift system, amongst other things, would increase production closer to market, improve lead times and reduce transport and other associated costs. The four-shift system would allow for a continuous operation, more efficient use of working hours and avoid costly weekly restarts. The four-shift system would cut down on overtime hours. Although the system required that employees work on Sundays, they would only be required to work 15 to 16 days a month on average, as opposed to 22 days under the three-shift system. Despite the reduction in overtime hours Pioneer calculated that employees under the four-shift system would earn approximately 7% more than they did under the three-shift system. In addition, the four-shift system would create 50 new jobs. A *"win – win"* situation, you would think.

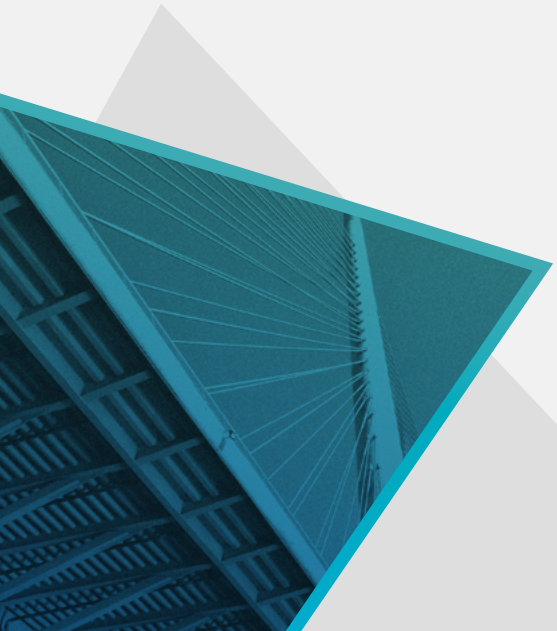
However, the Inqubela Phambili Trade Union (ITU) and its members treated the proposal with suspicion. ITU contended that any change to a four-shift would be a unilateral change to terms and conditions of employment. ITU refused to participate in the process unless Pioneer issued a notice to consult in terms of section 189(3) of the Labour Relations Act 66 of 1995 (LRA). Although it did not contemplate any dismissals at all, but to progress the process, Pioneer complied with this demand.

CONCILIATION ATTEMPT

By early April 2019 the consultation process was exhausted. Pioneer issued a letter informing affected employees that it intended implementing the four-shift system from 1 July 2019. Employees were offered positions within the four-shift system. ITU members did not accept the four-shift system. They refused to accept the positions they were appointed to and did not apply for new positions in the four-shift

Paradigm shift: Automatically unfair or a genuine operational requirement

CONTINUED



system. ITU referred a dispute to the Commission for Conciliation, Mediation and Arbitration alleging a unilateral change to terms and conditions of employment. At conciliation the parties agreed to an extended conciliation period. Pioneer agreed to consult further with ITU in this period.

Pioneer informed the employees that employees who did not accept the offer of employment on the four-shift system would be issued with notices of termination on 1 July 2019 and that they would not be eligible for severance pay on account of refusing a reasonable offer of employment. On 27 June 2019 a last-ditch effort was made by management to persuade employees who did not want to accept the four-shift system to accept the change. All shifts were addressed by the managing director, the HR director and the manufacturing executive. A handful of employees accepted the offer. The 125 ITU members who did not accept the new appointments were dismissed.

BEFORE THE LABOUR COURT

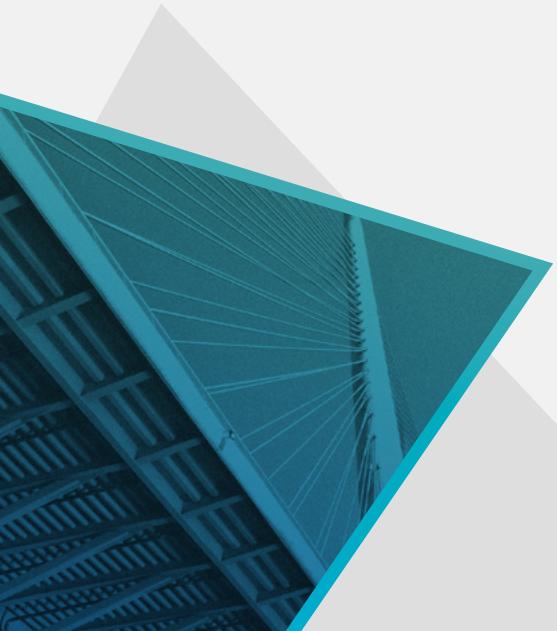
Relying on section 187(1)(c) of the LRA, ITU referred a dispute to the Labour Court claiming that its members had been automatically unfairly dismissed because they refused to agree to a matter of mutual interest, namely the change from the three-shift to the four-shift system. Alternatively it claimed that its members were unfairly retrenched. Pioneer contended that the change to the four-shift system was a genuine operational need and that the employees had been fairly retrenched.

The Labour Court considered the appropriate test to determine whether the dismissals were automatically unfair. The Constitutional Court in *NUMSA v Aveng Steel* [2021] 42 ILJ 67 (CC) was divided when considering the appropriate test. Two different tests were supported in the Constitutional Court, namely a two-step causation test (the *Afrox* test), versus a preponderance of probabilities test (the *Algorax* test).

On the causation test, a court must first determine whether the dismissal would not have occurred, but for the happening of the event, which has to be established to prove a claim of automatically unfair dismissal. In this case – would the dismissals have occurred if the applicants had not refused to take up any of the available

Paradigm shift: Automatically unfair or a genuine operational requirement

CONTINUED



positions which also entailed working the four-shift system? If the answer to the first question is that they would not have been dismissed but for that, then the next question is whether that reason was probably the *"only real or proximate cause"* of the dismissal.

On the alternative test, the true reason for the dismissal, in the face of two conflicting versions, has to be determined by the conventional method of deciding the question on a balance of probabilities, without recourse to the two-step causation enquiry.

LABOUR COURT FINDINGS

The court noted that the Labour Appeal Court had in a subsequent matter found that without a majority decision in the Constitutional Court that the *Afrox* test still applied. However, the two tests were not incompatible. If one concludes, on a balance of probabilities, that an employee was dismissed for a particular reason, this finding would simultaneously establish factual causation, in that the employee would not have been dismissed but for the particular reason.

The court rejected ITU's argument that the change to the four-shift system was a unilateral change to terms and conditions of employment. In terms of their employment contracts the employees expressly acknowledged that the determination of working hours at the plant was a matter for the employer to decide. A change to working hours did not require an amendment to the contract of employment and did not entail a unilateral change to terms and conditions of employment. The court also noted that the fact that the four-shift system would create 50 more jobs was of no interest to the ITU members if it meant any deterioration in their own conditions.

The key question to be determined was whether the applicants' dismissals were for operational reasons or because they refused to work the four-shift system. There was no doubt that the applicants would not have been dismissed if they had been willing to work the four-shift system.

The court found that the imperatives driving Pioneer to change the shift system came from its overarching operational objectives. Pioneer did not anticipate that anyone would lose their job as a result of the changes. The four-shift system was an integral and necessary component of a reorganised production process which would enable it to operate continuously and increase production volumes. It went to great lengths to persuade employees about the merits of the four-shift system and that their remuneration would improve. Even though the four-shift system entailed

Paradigm shift: Automatically unfair or a genuine operational requirement

CONTINUED

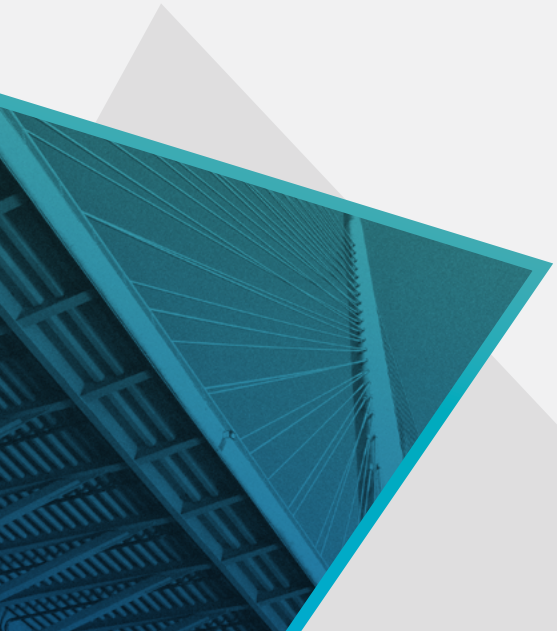
a significant change in the pattern and extent of working hours, this did not amount to the employees doing something they were not already obliged to do, namely work the hours determined by the employer. Pioneer's genuine operational needs reasonably justified moving to a four-shift system as part and parcel of a restructured production process aimed at reducing inefficiencies. The alteration of working hours was not a separate standalone measure. The three-shift system that ITU and its members insisted on was plainly operationally incompatible with Pioneer's operational requirements. The court was satisfied that on a preponderance of probabilities the real reason for the applicants' dismissals was for *bona fide* operational reasons and not for the illegitimate reason of dismissing them because they refused to comply with a demand, which they believed entailed alteration of their conditions of service:

> *"Put differently, even though their failure to accept appointments because of the change in working hours was part of the reason for their dismissal, the main reason was that the company could not implement the rest of its production restructuring plan and retain workers who would only work in terms of old working arrangements."*

The very fine line between an automatically unfair dismissal and a dismissal for operational requirements is illustrated in this case. It shows how important it is for employers to carefully consider their approach when contemplating dismissals, in circumstances such as the one in this matter. Equally, it highlights the need for more constructive engagements between organised labour and employers in the workplace. The union in this matter advanced the very narrow interests of its members, contrary to the interests of the business, and ultimately to their detriment.

ITU is appealing the judgment.

JOSE JORGE AND
ALEX VAN GREUNING



OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:

Aadil Patel
Practice Head & Director:
Employment Law
Joint Sector Head:
Government & State-Owned Entities
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

Anli Bezuidenhout
Director:
Employment Law
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com

Jose Jorge
Sector Head:
Consumer Goods, Services & Retail
Director: Employment Law
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com

Fiona Leppan
Joint Sector Head: Mining & Minerals
Director: Employment Law
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com

Gillian Lumb
Director:
Employment Law
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com

Imraan Mahomed
Director:
Employment Law
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com

Bongani Masuku
Director:
Employment Law
T +27 (0)11 562 1498
E bongani.masuku@cdhlegal.com

Phetheni Nkuna
Director:
Employment Law
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com

Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Hugo Pienaar
Sector Head:
Infrastructure, Transport & Logistics
Director: Employment Law
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com

Thabang Rapuleng
Director:
Employment Law
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com

Hedda Schensema
Director:
Employment Law
T +27 (0)11 562 1487
E hedda.schensema@cdhlegal.com

Njeri Wagacha
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com

Mohsina Chenia
Executive Consultant:
Employment Law
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com

Faan Coetzee
Executive Consultant:
Employment Law
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com

Jean Ewang
Consultant:
Employment Law
M +27 (0)73 909 1940
E jean.ewang@cdhlegal.com

Ebrahim Patelia
Legal Consultant:
Employment Law
T +27 (0)11 562 1000
E ebrahim.patelia@cdhlegal.com

Nadeem Mahomed
Professional Support Lawyer:
Employment Law
T +27 (0)11 562 1936
E nadeem.mahomed@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:

Asma Cachalia
Senior Associate:
Employment Law
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com

Jordyne Löser
Senior Associate:
Employment Law
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com

Tamsanqa Mila
Senior Associate:
Employment Law
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com

Christine Mugenyu
Senior Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E christine.mugenyu@cdhlegal.com

JJ van der Walt
Senior Associate:
Employment Law
T +27 (0)11 562 1289
E jj.vanderwalt@cdhlegal.com

Abigail Butcher
Associate:
Employment Law
T +27 (0)11 562 1506
E abigail.butcher@cdhlegal.com

Rizichi Kashero-Ondego
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com

Biron Madisa
Associate:
Employment Law
T +27 (0)11 562 1031
E biron.madisa@cdhlegal.com

Mbulelo Mango
Associate:
Employment Law
T +27 (0)11 562 1742
E mbulelo.mango@cdhlegal.com

Thato Maruapula
Associate:
Employment Law
T +27 (0)11 562 1774
E thato.maruapula@cdhlegal.com

Fezeka Mbatha
Associate
Employment Law
T +27 (0)11 562 1312
E fezeka.mbatha@cdhlegal.com

Kgodisho Phashe
Associate:
Employment Law
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com

Tshepiso Rasetlola
Associate:
Employment Law
T +27 (0)11 562 1260
E tshepiso.rasetlola@cdhlegal.com

Taryn York
Associate:
Employment Law
T +27 (0)21 481 6314
E taryn.york@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE
This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR | cliffedekkerhofmeyr.com

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA