Job descriptions and extra duties required of an employee

Can the employee refuse extra duties as not being part of the job?

By Johanette Rheeder

Employers and employees are often plagued by the question as to whether the employee is obliged to perform functions which are not contained in a formal or written job description. It causes conflict between the parties as the employer feels that the employee is obliged to execute the instruction as it sees it as a legitimate instruction and the employee in turn, refuses as he does not deem it to be legitimate and a valid instruction. This has also resulted in disputes in disciplinary hearings for insubordination or refusal to execute a valid and fair instruction.

Is it fair to expect an employee to perform a job or function which is not agreed to in a job description or employment contract, but which the employee can execute due to his or her training, skill and vocation? Or would the remedy lie in having no job description or alternatively draft it so wide that it encompasses everything which the employee is capable to perform within a specific job and more? What complicates the matter even more is when the job description is used to determine the grading of the job the employee is performing, hence to determine the salary level or band the employee is earning in. If the employee does not refuse to perform these "duties", the employee may end up complaining about the fact that that she is doing more than what the grading is, therefore is actually entitled to a higher salary, raise in level or a salary raise due to the extra duties heaped upon the job description.

The question to consider is whether the instruction to the employee to perform extra duties is legitimate in terms of the employment contract with the employee or any policy or procedure in place with the employer?

In considering this question, one will have to look at the consultation process if any that the employer may have had with the employees to get them to take on the extra tasks and if not, why the employer elected not to do so. All of these questions may play a role to determine as to whether the instruction to perform these functions, is in fact legitimate and fair? On an initial investigation, the first question to consider when such an instruction is given, is whether it is legitimate and fair. A legitimate instruction for instance, will be based on the employment contract, which allows for the employer to give an instruction to the employee which falls within the employee's vocation and training.

In the case of ***Air Products (Pty) Ltd v CWIU & Another (1998) 1 BLLR (LAC) ("Air Products")*** the court found that:

"What was required of the company in those circumstances, as a matter of fairness and sound industrial relations practice, was to attempt to persuade (the employee) *to cooperate and to accept the change in working conditions*[1]"

In the ***Mauchle*** decision the court found that:

"I agree... 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 the employee undertakes an entirely different job that there is a right to refuse to do the job in the required manner...

As it was not a term of the contracts of employment that an operator was obliged to operate one machine only, there was no requirement in law or fairness for the company to negotiate with the union. What was required of the company, as a matter of fairness and sound industrial relations practice, was to attempt to persuade the applicants to cooperate and to accept the change in practice (of operating one machine). That is precisely what the company did... When that process failed, the company was entitled to issue the instruction: an instruction which was lawful and reasonable. The mere process of labelling the process as 'negotiations' did not change the real nature of the process.

The applicants collectively refused to obey the instruction. The company had a valid reason for dismissing the applicants: an instruction was in fact given; the instruction was lawful; the instruction was reasonable; the refusal to obey the instruction was serious, deliberate and repeated."

This question was also considered in the case of ***Blitz Printers v CCMA and others*** [2] **.** In this matter, the employee refused to execute an instruction to clean a bathroom when it was his turn to do so. He refused on the basis that it was not in his job description to do so. He was charged with insubordination and dismissed. The commissioner found that in the absence of a job description, the employee could not be found to have been insubordinate when he refused the clean the bathroom.

The court found that the question that then remains is simply whether the employee was entitled to so refuse, and to simply refer to and rely on the absence of a job description, is far short of an acceptable determination. The court found that one has to accept that an operator such as the employee would not normally be expected to clean bathrooms as part of his duties. But does the fact that he was expected to merely on occasion also clean the bathroom, as was also required of all his colleagues, amount to a unilateral change of his employment conditions or a variation of his job? In the courts view, this cannot be the case. The employee remained an operator and clearly still spent the vast majority of his time doing this very work. The bathroom cleaning requirement was not a change in employment conditions. It was an introduction of a work practice necessitated by circumstances that were far from normal, and was very limited in application. It was apparent that the employer's survival was actually dependent on cutting out the costs of cleaning contractors and then instructing all its employees to participate in taking turns to clean the bathroom. The instruction therefore has a particular context, is limited to an ad hoc and limited additional duty imposed on the employees.

In dealing with the defence that it is not part of his duties, in ***Silverton Spraypainters***, [3] . the Court considered the context within which the employee was given the instruction to fulfil this different duty, and said that the instruction was simply something that could be inferred from, or at most, which was ancillary to, his normal duties. Put differently, it was simply a variation in his work practice or a change in the manner his job was to be performed — a situation that was occasioned by sound and compelling operational reasons on the part of the company. …'

It is important to note that a company may not just ignore and avoid its own contractual obligations or its own policies and procedures or its undertakings or that it must act unfairly (noting that what may be lawful may not necessarily be fair in the context of the law relating to unfair dismissal). It must also consider the difference between so-called "work practices" as opposed to contractual obligations and the circumstances will dictate as to

whether it has to negotiate a change to terms and conditions or whether it will be a legitimate and fair instruction to the employee. It will always be advisable to first consult with the employees or the union before this instruction is given. The circumstances of the employer and the content of the instructions also bear reference. Is it merely a change in the manner in which the employee is required to do his job, being that in addition to his principal duties he would from time to time and on a shared basis with all his fellow workmates, perform other additional duties, which is necessitated by compelling operational reasons? This will constitute a reasonable and lawful instruction and a persistent refused to obey this instruction, in the presence of other employees will probably amount to grossly insubordinate.

As the Court said in *Silverton Spraypainters:*

'It appears to me … that the company's instruction was a lawful and reasonable one which Mr Van Jaarsveld was obliged and obligated to carry out. His blatant, persistent and public refusal to comply with this lawful and reasonable instruction constituted gross insubordination on his part. He seriously and inexcusably undermined the authority of management. In my view, he was correctly convicted of the misconduct as charged and his dismissal was, therefore, substantively fair.

Another interesting question to consider is whether the employee will have a claim for equal work for equal value with comparator on a higher grade or level, due to the additional duties required of the employee? With the (not so recent anymore) amendments to the Employment Equity Act section 6, the question also arises as to whether employees can then claim for equal pay for work of equal value in the CCMA as well? If their salary falls below the statutory threshold of section 6(3) of the BCEA, currently determined by the Minister on R 205 833,30 the employee may claim in the CCMA. If they earn above the threshold, then the matter must go the labour court. In this regard, the context of the Employment Equity Act 55 of 1998 (EEA) should be remembered. Equal pay for work of equal value does not mean that all employees doing the same or similar job or a job with similar value will be entitled to the same salary, no matter what. This right, as contained in section 6(4) of the EEA stipulates that a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is *directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination*. Therefore, should an employee complaining about doing the same or similar work, which is not stipulated in a job description, want to claim under this section, the employee will have to show that the reason for distinguishing between him and the other employees (the comparator), is based on one of the unfair discriminatory grounds. The mere adding of duties to an uncomplete job description will not muster the requirements of a claim for equal pay.

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1 the court referring to the decision in Mauchle (Pty) Ltd t/a Precision Tools v NUMSA (1995) 4 BLLR 11 (LAC) also reported as A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & others (1995) 16 ILJ 1 (LAC)

2 Unreported case JR1782/12 delivered on 11 February 2014

3 A similar situation came before the Court in Motor Industry Staff Association and Another v Silverton Spraypainters and Panelbeaters (Pty) Ltd and Others (2013) 34 ILJ 1440 (LAC).