

Implied Terms in Employment Contracts: McKenzie and beyond.

One of the hazards of writing judgments in Bloemfontein is precedent. Counsel cling like limpets to previous cases that may seem to offer them some assistance in their task, usually overlooking the fact that if the authority in question is indeed directly in point and decisive the case would not have reached the Supreme Court of Appeal in the first place. More difficult to deal with are cases, not directly in point, but containing broad statements that appear on their face to be relevant to the matter in hand. *McKenzie*¹ was an instance where the court was confronted with previous cases that had, in general terms, suggested that the contract of employment required constitutional development to incorporate a general duty of fairness.

That always poses problems for the judge. One is obliged to steer carefully among the rocks and rapids of the previous judgments and statements of the law, without going aground in the shallows of the easy way out or, by ignoring or avoiding the difficulty, leaving the waters further muddied. In other words they had to be dealt with. An appellate judgment not only decides the particular case for the parties but also states the law as it is to be applied in other similar situations, so clarity is important. The process is this. The judges debate the issue and a draft is circulated. Revisions invariably follow. Finally after carefully plotting one's way round the difficulties a judgment is produced. You sign it and hand it down thinking modestly that it will be helpful to practitioners in that area of law. Later you read your words of wisdom in the law reports and perhaps permit yourself a small pat on the back or a momentary

¹ *South African Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA); [2010] 3 All SA 1 (SCA)

irritation at spotting a grammatical or spelling mistake. With luck you feel that you have survived. Disappointment begins to set in when, over the following couple of years, you read the law journals and realise that you have upset a number of academic apple carts. To your dismay the cautious views, so carefully formulated, are being treated as a new source of dubious heresy rather than the clear exposition of current law that you intended.

The invitation to speak to a group intimately involved in labour law about a judgment of which you were the author, tempts one to try and explain in greater detail and with – one hopes – greater clarity, why your exposition of the law in the judgment is correct and by no means the revolutionary (or retrograde) step that the academics – depending upon their persuasion – treat it as being. However that is a trap I do not intend to fall into tonight. My reason is that a judgment must speak for itself. Subsequent attempts by the judge to explain it can only confuse or mislead or even lead the audience to believe that the judge didn't know what he was talking about. The only proper place for explanation, if such is necessary, is another judgment and that occasion may only arise by chance.

So I cannot use tonight to explain *McKenzie*. What I can do is use it to highlight the need for those engaged in labour law to identify clearly the source and nature of the rules that regulate the employment relationship and to situate the implied term within that matrix. For that I can use the facts of *McKenzie* to illustrate my points. Mr McKenzie was a senior employee of SAMSA. In 2005 he was dismissed, allegedly unfairly on both procedural and substantive grounds. Like many before him he pursued his remedies under the LRA and at the hearing the case

was settled on the basis of the payment to him of 12 months' salary. Had matters rested there we would never have encountered him in the law reports. However he was advised that he had a right not to be unfairly dismissed; that this right had been breached by his substantively and procedurally unfair dismissal and that he could therefore recover damages from his former employer. These were calculated on the basis of his continued employment by SAMSA for the rest of his working life, with some discount allowed for the fact that he would be getting it in advance. No discount was offered for the fact that he would not have to work in order to receive this and his claim was put at R5.2 million. As modern parlance would have it: 'Nice work if you can get it.'

The starting point was undoubtedly correct. Workers in South Africa had prior to 1996 by way of the construction given by the Industrial Court at first instance and the Labour Appeal Court and Appellate Division on appeal from it a right not to be unfairly dismissed. However the precise parameters of that right and, more particularly, the remedies for a breach, were uncertain and to a great extent dependent upon the views of the presiding officer in the Industrial Court. When the Labour Relations Act was drafted and became law – or, as Professor Ellison Kahn would have it, was 'inured' – these things were expressly dealt with and both the right and the remedies for a breach were codified. Looking at the LRA therefore the position was clearly that workers had a right not to be unfairly dismissed and any breach of that right entitled them to recover, by way of arbitration before the CCMA, the statutory remedies that the LRA afforded them.

The problem is that Mr McKenzie, like Oliver Twist in Charles Dickens' novel, wanted more. Accordingly he contended that the

statutory right not to be unfairly dismissed was to be construed as giving rise to a term of his contract of employment that he should not be unfairly dismissed. The LRA was accordingly the foundation upon which his claim was based. But he sought contractual remedies, in the form of damages, rather than the statutory remedy, limited as it was to 12 months' salary. It is here that the true importance of the case lies. Where a party relies upon a tacit term flowing from the express or imputed intention of the parties the incorporation of the term in that contract has no wider relevance. However where a party to a contract relies upon an implied term properly so called, it claims that this is a term to be included in all contracts of that type in consequence of a common law principle, a custom or trade usage or a statute. The ambit of the claim is therefore broader because it encompasses all contracts of that type.

If it had been held in *McKenzie* that the claimant's contract of employment was subject to an implied term that he not be dismissed unfairly, that would have laid down as a legal principle applicable to all contracts of employment that an unfair dismissal of the employee constitutes a breach of contract and gives rise to a claim for damages. That would have been a fundamental – I might even say a seismic shift – in our law of employment. As an article by Paul Pretorius and Anton Steenkamp, cited in the judgment, pointed out, any unfair dismissal claim could thereafter have been brought in the ordinary courts and the special jurisdiction of labour tribunals and courts established by the LRA would have been undermined. That is not merely a theoretical device to scare employers. As Mr McKenzie's claim demonstrated, the claim on behalf of the dismissed employee would not be subject to the limitations set out in the LRA by way of compensation for unfair dismissal. Let us examine briefly the implications of this.

In contract the employee would be entitled to allege that but for their dismissal they would have remained in the same employment – perhaps with the benefit of promotions and increases in salary – for the remainder of their working life. That is not a claim that the employer could easily rebut. After all no reliance could be placed on the facts giving rise to the dismissal as *ex hypothesi* that would have been unfair and a breach of contract. How does one say on a balance of probabilities that a particular employee would, but for their unfair dismissal, be dismissed at some uncertain future stage? The employer would no doubt say that there is an obligation to mitigate loss, but in a country with structural unemployment on the higher scale running at some 35 or 40%, how would the employer satisfy a court – the onus being on it – that the employee would probably have obtained another job? This considerable difference between the common law claim and the statutory remedy would surely have prompted many lawyers and industrial relations practitioners to advise their clients to follow the common law route. And if some interim and speedier relief was required then they could follow Mr McKenzie’s example and pursue the statutory claim first and the common law claim later. Now that both legislation and our courts have recognised the legitimacy of various forms of contingency fees it is hard to believe that such a change in our law would not have been reflected in the already overloaded rolls in our civil courts.

I mention these matters because it seems to me that they are important elements in the policy debate that should accompany any consideration of the decision in *McKenzie*. Regrettably one does not always find reference to them in academic discussions of employment. Instead ‘fairness’ is recited as a mantra of almost magical proportions and as the remedy for all woes, actual and perceived in our employment law.

It is relatively easy to pluck the notion of fairness from our Constitutional guarantee that everyone has the right to fair labour practices, but implanting it in each and every aspect of the employment relationship is a far more complex matter. Employment is the relationship most frequently encountered in our economy. It has an impact on virtually every enterprise in both the public and the private sector. Labour legislation is accordingly a carefully calibrated balance between the interests and concerns of employer and employee. Government has a range of concerns in regard to employment – as employer, as policy maker and in its role of overseeing the economy in the interests of all citizens. Before fundamental changes are made in such an important relationship it is appropriate for these stakeholders to be engaged in the process to assess its implications for employment, for the economy and for the welfare of all. That is why NEDLAC was created. This enables the stakeholders to balance their competing interests and, once the balance has been struck, to conduct their affairs against a reasonably certain backdrop of contract, statute and regulation. In this way unnecessary conflict is avoided and society as a whole is benefited.

All of this, I suggest, provides a reason why courts will be cautious about using the device of the implied term to make fundamental alterations to the employment relationship. As I have tried to illustrate, on the basis of *McKenzie*, if that is not done the potential ramifications of new implied terms are far-reaching. We already live in a society where there is a perception on the part of employers – justified or not – that employees are a costly hazard of business to be avoided wherever possible. Every survey of employers suggests that there is a reluctance to employ people if that can possibly be avoided and this in a country where unemployment is a major concern. An implied term having the

consequences of the one suggested in *McKenzie* could easily have aggravated the situation, by adding the potential for substantial claims for damages to existing relationships and decisions to terminate employment contracts.

Let me take this one step further and examine the notion of a general criterion of fairness in the contract of employment. Note that I am not speaking of fairness in the employment relationship. There already exists a network of provisions in various statutes that regulate that issue. The Basic Conditions of Employment Act deals with issues of working hours, rest periods, overtime, night work, leave, sick leave, payment of wages and the like. All of these provisions are directed at establishing a bedrock of fairness for the employment relationship. The explicit purpose of the Act as stated in the long title is to give effect to the right to fair labour practices conferred by the Constitution. But what is to happen if courts construe the contract of employment as being subject to a general overarching requirement of fairness? Is it then open to employees to ask for more and sue in the ordinary courts if they do not get it? Let us take section 27, which deals with family responsibility leave and entitles employees to 3 days paid leave in certain limited circumstances. These include the death of the employee's spouse or life partner. But perhaps death may be a welcome release from pain and suffering and the leave would be more useful if it could be used to take the dying spouse or partner on a final visit to the Drakensberg mountains whilst he or she can still enjoy it. Would fairness not dictate that the employer should be given leave at an earlier stage and forego that prescribed by the Act? I don't know but I can certainly see the force of the argument.

When we were engaged in the argument in *NEHAWU v UCT* a related issue arose. It was whether the constitutional guarantee could be invoked, for example, to compel an employer to provide an employee with a pension or membership of a medical aid scheme. Understandably that raises profound constitutional questions relating to the effect of the panoply of statutes that have been enacted to give effect to the constitutional right to fair labour practices. If they do not expressly provide for such a right and impose such an obligation on employers, then is it permissible for the employee to seek that benefit for him or herself by resorting directly to the constitutional guarantee? In view of the approach the Constitutional Court has taken to similar questions I think the answer is probably not. The reason is that the Court has said that such contentions are in substance an attack on the constitutional validity of the relevant legislation on the grounds that it is under-inclusive or fails adequately to give effect to the constitutional right. Such an attack must be mounted directly not by a side wind.

Having said that, if the contract of employment is subject to an over-riding obligation of fairness why can that not form the foundation for precisely the same claim, but on the footing that in present circumstances it is unfair for the employer not to provide that particular benefit to the employee. One can readily imagine the arguments that could be deployed in that regard. They are after all the arguments the government is deploying in favour of a single national pension fund and a national health scheme. But that immediately illustrates the difficulty. Are the courts to forestall or pre-empt the public debate over these issues – and if we want to see how bitter and divisive these debates can be we need only look to the battles over Obamacare in the USA or the debates over the National Health Scheme in the UK – by granting such rights to

employees on the basis of an implied term of fairness in their contracts of employment?

It seems to me that this raises profound constitutional issues. I mention the two principal ones. The first is the problem of invoking the Constitution directly as a way of making an end-run around the uncomfortable fact that the legislation passed, often after heated debate in NEDLAC, does not include such rights. The second is the question of how the extension of rights by way of implied terms impact on the doctrine of the separation of powers. I am not one to deny that judges make law. Clearly we do. What is more controversial is the extent of that power. It is essential to the proper functioning of a democracy that the courts are not seen as trespassing on the proper domain of the legislature in its law-making function. I suggest that the wholesale incorporation of a general duty of fairness into contracts of employment of a duty of fairness owed by the employer to the employee runs the risk of crossing that invisible but necessary line between the judiciary and parliament that is encapsulated in the notion of a separation of powers.

Let me than return to my theme. It is that the implied term has a place in the employment contract but it is necessarily a limited one. Employment is a relationship that has much in common with a child's kaleidoscope. Whichever way one tilts it and examines its contents one sees different facets. One finds its sources in diverse places. Contract is but one of these and although fundamental is rarely decisive. Legislation and regulation are important. Collective bargaining is central to many industries and most importantly in government, which in many Western countries today is the last and strongest redoubt of the trade unions. In South Africa the Constitution is the source of all law but its role in employment is subtle rather than obvious. Its application demands nuance

and subtlety. In this area of our public life it is not to be used as a blunt instrument or as a catch all to every perceived problem in employment. The employment relationship stands at the heart of our economic life. It has the capacity to serve and to disrupt our lives and the functioning of society. I believe that the demands it places upon lawyers are great and that they need to be aware of the different strands that constitute our labour law – the Constitution, the common law, the labour statutes, the collective bargain and custom and practice in employment. An awareness of these different sources of rights and obligations and their differing implications for the employment relationship is fundamental to our understanding of how to achieve fairness in the employment relationship.

M J D Wallis

24th March 2011.