NEWSLETTER

LERASA

INSIDE THIS ISSUE:

Welcome to the first edition of LERASA's Newsletter for 2022, a publication that includes information highlighting important information relevant to Labour and Employment Relations in South Africa.

LABOUR AND EMPLOYMENT RELATIONS ASSOCIATION OF SOUTH AFRICA

CASE LAW

NEHAWU V MINISTER OF PUBLIC SERVICE AND ADMINISTRATION AND OTHERS CCT 21/21

On Monday, 28 February 2022 the Constitutional Court handed down a unanimous judgment in an application for leave to appeal against the judgment and order of the Labour Appeal Court, which dismissed the applicants' application to enforce clause 3.3 of Resolution 1: Agreement on the Salary Adjustments and Improvements on Conditions of Service in the Public Service for the Period 2018/2019; 2019/2020 and 2020/2021 (the collective agreement) between the State and various trade unions which determined public sector wage increases for the 2020/2021 period.

It is common cause that clause 3.3 was not implemented on 1 April 2020.

As a result, on 2 April 2020, the trade union representatives referred a dispute to the PSCBC. The dispute was conciliated on 20 May 2020, however, the issue about the enforcement of clause 3.3 of the collective agreement remained unresolved. Consequently, the unions referred the dispute to arbitration.

Before the arbitration was finalised, on 8 June 2020, the unions launched an application in the Labour Court seeking an order compelling the State to enforce the collective agreement for the 2020/2021 financial year. The State launched a counter-application seeking declaratory relief about the legality of the collective agreement and its enforcement. The arbitration was subsequently postponed by agreement pending the outcome of the Labour Court application. The parties agreed to request the Labour Appeal Court to hear the matter as a court of first instance in terms of section 175 of the Labour Relations Act 66 of 1995 (LRA). The request was granted.

The Labour Appeal Court had to determine whether clause 3.3 was concluded in contravention of regulations 78 and 79 of the Public Service Regulations GN R877 GG 40167, 29 July 2016. The Labour Appeal Court found that the cost of the collective agreement could not be covered solely from the Minister of Public Service Administration's budget; that Treasury did not provide a written commitment to guarantee additional funding and no further agreements were made by other departments or agencies in accordance with the regulations. Therefore, it declared the enforcement of clause 3.3 unlawful for violating sections 213 and 215 of the Constitution and the impugned regulations and dismissed the application.

Aggrieved by this outcome, the applicants, the National Education Health and Allied Workers Union (NEHAWU), the South African Democratic Teachers Union (SADTU), Police and Prisons Civil Rights Union (POPCRU), Democratic Nursing Organisation of South Africa (DENOSA), Public Servants Association (PSA), the National Professional Teachers Association of South Africa (NAPTOSA), the Health and Other Services Personnel Trade Union of South Africa (HOSPERSA), the South African Teachers Union (SATU), the National Teachers Union (NATU) and the National Union of Public Service and Allied Workers (NUPSAW) each lodged separate applications to the Constitutional Court appealing the order and judgment of the Labour Appeal Court. The DPSA and the Minister of Finance oppose the applications.

Before this Court, NEHAWU and NUPSAW submit that the Labour Appeal Court's judgment undermines and limits the right to engage in collective bargaining. NEHAWU further submits that the Labour Appeal Court erred when relying on sections 213 and 215 of the Constitution when the LRA specifically regulates collective bargaining. Furthermore, that the Court erred in relying on the Minister of Finance's letter dated 14 February 2018 in refusing to accept that the respondents had authority to negotiate on behalf of the State. Finally, it also argues that the State's delay in reviewing the collective agreement should not have been condoned because it was inordinate, and it failed to provide an adequate explanation.

The SADTU, POPCRU and DENOSA contend that the collective agreement was lawfully concluded and once Cabinet approved the offer, the respondents were bound by such approval. And following Cabinet's approval, the Labour Appeal Court should have inferred that the requirements of regulations 78 and 79 were satisfied, and that the agreement was therefore lawfully concluded, and even if the collective agreement is found to be unlawful, justice and equity demand that clause 3.3 is enforced. This is because the employees are innocent bystanders to the State's failure to act lawfully.

The PSA, NAPTOSA, HOSPERSA, SATU and NATU submit that the provisions of the LRA take precedence over the impugned regulations, thus the collective agreement is enforceable. In addition, regulation 4 permits the Minister of PSA, under justifiable circumstances, to authorise deviation from any regulation, and such authorisation need not be in writing. The conduct of both the Minister of Finance and DPSA thus demonstrate that National Treasury approved the conclusion of the agreement, alternatively, that deviation from the regulations was authorised. As such, there was actual compliance with the regulations.
The PSA, NAPTOSA, HOSPERSA, SATU, NATU and NUPSAW submit that the Labour Appeal Court failed to consider the doctrine of estoppel which prevents the State from seeking to escape its contractual obligations.

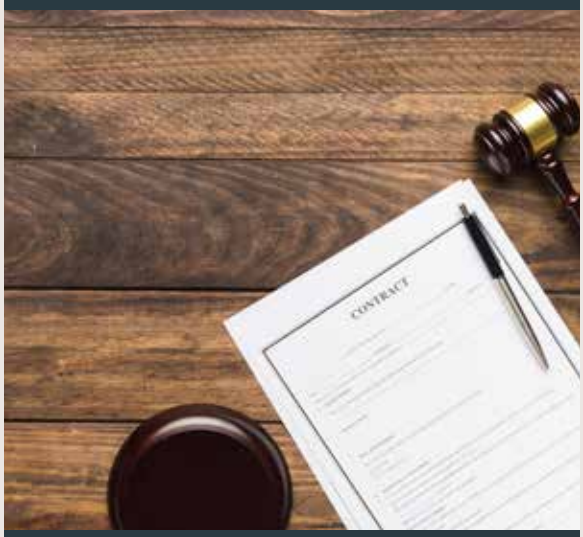
These applicants further submit that the sanctity of contracts must be upheld and allowing the respondents to escape their obligations would undermine the purpose of and the enforceability of collective agreements. And that if the Labour Appeal Court had applied the pacta sunt servanda (agreements must be honoured) principle, it would have come to a different conclusion.

The DPSA and the Minister of Finance contend that organs of state are obliged to act within the confines of the law and that the collective agreement did not comply with the mandatory statutory provisions prescribed by regulations 78 and 79 since the DPSA could not cover the cost of the wage increases from its own budget, no written commitment was made by Treasury, and no written agreements were forthcoming from other departments. They submit that any reliance on estoppel or public policy cannot remedy the agreement because courts cannot validate unlawful contracts. Thus, they submit that the application should be dismissed.

In a unanimous judgment penned by Madondo AJ (Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring), the issue was whether the non-compliance with regulations 78 and 79 rendered clause 3.3 of the collective agreement invalid and unenforceable. The Court noted that regulations 78(2) and 79(c) created jurisdictional facts which must exist prior to the Minister's exercise of power to negotiate and conclude collective agreements on behalf of the State, absent which the Minister acts without legal authority. Regulation 79(c) of the Regulations, which provides that the State can enter into a collective agreement only if the relevant governmental authority can cover the costs from its own departmental budget or based on a written commitment to provide additional funds from Treasury; or from the budgets of other departments with their written agreement and Treasury approval.

The Court found that the jurisdictional facts were not present and that non-compliance with the requirements of regulations 78 and 79 rendered the resultant collective agreement between the State and the trade unions invalid and unlawful, and thus unenforceable.

The Court therefore dismissed the applications for leave to appeal with no order as to costs.



CASE LAW

CASE LAW

WOOLWORTHS VS CCMA AND OTHERS

Judgment was delivered in December 2021 and relates to an abuse of sick leave.

Employee informed his employer that he was ill and could not report for work but was found attending a rugby match on said day.

Upon his return the following day he disclosed to his manager that he attended a rugby game. He was charged with misconduct for breach of company police relating leave of absence.

The employee was dismissed, which he challenged at the CCMA. The CCMA found that the dismissal was substantively unfair on the basis that the employee was not issued with a final written warning and that he was not charged with dishonesty.

Arbitrator reinstated the employee with retrospective effect.

Employer took the matter on review to the Labour Court. Labour court refused to set aside the award holding that the employer was unable to prove that the decision reached by the arbitrator was unreasonable.

Employer took the matter on appeal to the Labour Appeal Court (LAC.) The LAC held that the employee was dishonest even on his own version as he admitted to attending the rugby game on the day he claimed sick leave and too ill to perform his duties.

The appeal was upheld and LAC held that dismissal was substantively fair and set aside the commissioner's award.

World Employment and Social Outlook

Trends 2022

Geneva: International Labour Office, 2022.
ISBN 9789220356982 (web PDF)

PREFACE:

During the second half of 2021, what had been a modest and uneven global labour market recovery lost momentum. In consequence, as the COVID-19 pandemic enters its third calendar year, the global employment and social outlook remains uncertain and fragile.

Throughout 2021, the pandemic weakened the economic, financial and social fabric in almost every country, regardless of development status. At the same time, significant differences emerged, driven largely by differences in vaccination coverage and economic recovery measures. This resulted in developed economies recouping significant elements of their employment and income losses, while emerging and developing countries continued to struggle with the labour market fallout of workplace closures and weak economic activity.

Without concerted and effective international and domestic policies, it is likely that in many countries it will take years to repair this damage, with long-term consequences for labour force participation, household income, and social – and possibly political – cohesion.

This year's World Employment and Social Outlook: Trends provides a comprehensive assessment of how the labour market recovery has unfolded across the world, reflecting different national approaches to tackling the COVID-19 crisis. It analyses global patterns, regional differences and outcomes across economic sectors and groups of workers. The report also offers labour market projections for 2022 and 2023.

The current crisis has made it more challenging to accomplish the United Nations Sustainable Development Goals, especially those relating to long-standing decent work deficits. It is therefore essential that governments and employers' and workers' organizations come together with renewed determination to address these challenges.

In this difficult context, in June 2021 the ILO's 187 Member States adopted a Global Call to Action for a Human-Centred Recovery from the COVID-19 Crisis that is Inclusive, Sustainable and Resilient. Reflecting the Global Call, this report includes a summary of key policy recommendations in support of sustained national and international efforts to bring about that human-centred recovery.

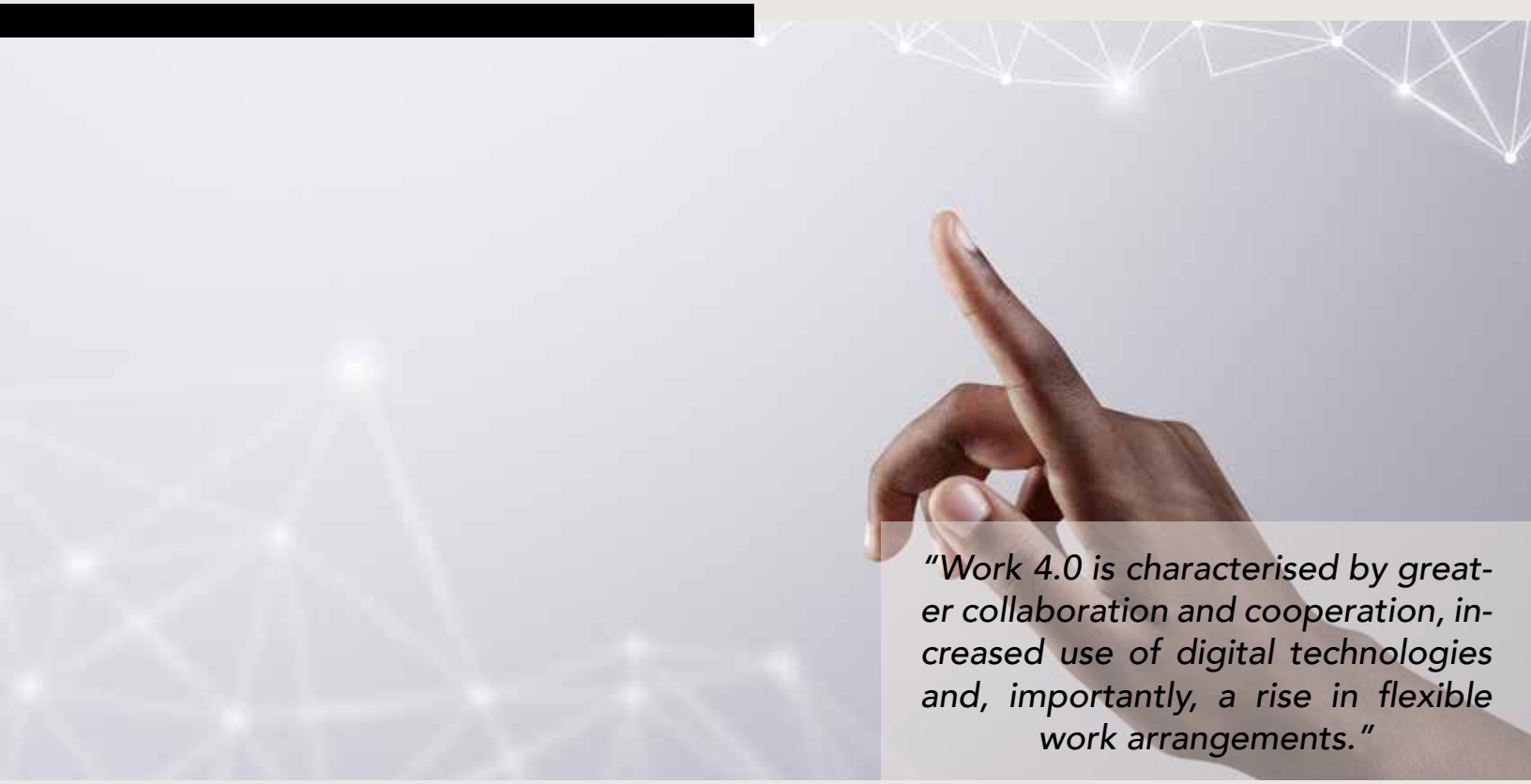
Guy Ryder
ILO Director-General

Read the full report published by the ILO here:

https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_834081.pdf

4 tips to ease the transition into Work 4.0

Written By:
Genevieve Koolen



"Work 4.0 is characterised by greater collaboration and cooperation, increased use of digital technologies and, importantly, a rise in flexible work arrangements."

One of the unexpected positives from two years of widespread pandemic-related disruption is a complete rethink of the world of work.

Two years ago, corporate fixation on time was profound: employees were meant to be at the office at a designated time, and expected to utilise the time at the office as productively as possible. The thought of employees working from anywhere - or more importantly at any time - was not entertained beyond the occasionally-granted privilege.

The switch to remote work during the pandemic has exposed this obsession with time and place as a fallacy. Professionals, untethered from the office and working without the hands-on guidance of management, showed that greater workplace flexibility could not only work, but in some cases exceed older work models.

Since then the world of work has undergone a seismic shift away from inputs - adhering to time, completing tasks, ticking boxes - to outputs, which focus simply on completing tasks successfully and achieving the desired outcomes for the business.

Pandemic influences aside, the world of work is also undergoing huge changes due to the growing impact of next-generation technologies such as artificial intelligence and a rethink of how workers and technology combine for greater effect.

Understanding Work 4.0

In Europe, the future of work is being discussed under the umbrella term 'Work 4.0', referencing the influence of Industry 4.0 and widespread digitalisation.

This follows on from the birth of industrial society and the emergence of the first worker organisations (Work 1.0), the start of mass production and rise of welfare states in the 19th century (Work 2.0), and the emergence of globalisation and digitalisation since the 1970s (Work 3.0).

Work 4.0 is characterised by greater collaboration and cooperation, increased use of digital technologies and, importantly, a rise in flexible work arrangements.

It sees organisations blend together human expertise and digital technologies to create more productive workforces, improve monitoring and training of workers, augmenting workforce capabilities with new technologies, and automating mundane and low-value tasks.

At its core, though, the transition to Work 4.0 will involve much of what we are dealing with now: understanding and enabling a new model of work, and ensuring employees have the support they need to smoothly transition to new forms of work.

Tips for transitioning to a new way of work

It is important to understand that these are uncharted waters and there's no universal playbook for success. Organisations also simply don't have the luxury of slowing down to make careful changes.

Developing new work models is akin to trying to change the tyres and service the engine of a car traveling at 120km/h on the highway. Companies still need to meet sales targets, drive revenue, transform operations and stay on top of all the other changes confronting them.
That said, here are some guidelines that can help business leaders as they reimagine their workplace models:

Firstly, set the intention. Develop a compelling vision for the new world of work in your organisation and get everyone on board. You don't want employees to each work according to their own version of the new world of work, as everyone will be pulling in different directions - to the detriment of themselves and the organisation.

Secondly, prioritise collaboration over control. The old command-and-control managerial approach cannot work effectively when employees are all working from different locations. Understand that the role of managers has changed and that the main priority is to get every employee to collaborate effectively and all work toward shared, clearly defined outcomes.

Next, build flexibility into the work model from the outset. Our new world of work requires different employees with varying skill sets and expectations to work from different locations, at different times. Company leaders will need to create flexible structures that enable employees to work effectively and quickly change approach if the current way is no longer sufficient.

Finally, create a safe space that is not overly punishing of mistakes. Every company will need to find their ideal workplace model through trial and error. If mistakes are punished, employees may disengage from the process and revert to old ways of work, which will invariably be detrimental to the business, as the environment in which they operate has changed dramatically. Ensure there is a safe space where mistakes are met with constructive guidance and support, not punishment.

For the first time in memory, companies have no clear sense of what the end-goal of a changing workplace should look like. There is no manual to guide HR and business leaders, and the road ahead is bumpy and littered with hurdles.

By prioritising collaboration and creating space for experimentation and inevitable mistakes, companies and their employees can co-create a new way of work - one that works for everyone.

Providing hope for South Africa's unemployed youth and women

At this time of the year, we often have many job seekers, who for a variety of reasons are unable to continue onto tertiary education, and are forced to enter the labour market. Here, it is vital that they know that there are NPOs and Corporates that are working tirelessly to provide them with digitally-enabled job opportunities that don't require a formal qualification or prior work experience.

"The drivers of local youth unemployment are well known: beyond a lack of job opportunities, there is a skills gap that has become apparent, be it among school leavers, or those that have completed their graduation," says Careerbox Managing Director, Lizelle Strydom.

She says with the growth in the digital economy, there is also a growing skills mismatch between what is being learnt, and what is required for the multiple new technology-enabled roles that are emerging. It is clear that a deliberate intervention is needed to bridge this skills gap, and to better prepare for the jobs of the future.

"The responsibility for making this a reality needs to be shared - by our education system, corporates, non-profit organisations, and the students themselves. Starting at school level, more needs to be done to ensure that young people are given more guidance, exposure to the future world of work, and even have teachers that they can look up to as role models," she says.

Corporates need to look at putting measures in place to lower the barrier to entry for young people, even if these actions don't directly lead to employment at the time. This can be as simple as providing youth with online training, or even just lowering requirements such as credit checks for entry-level positions.

A more direct impact can be made through enacting recruitment policies that call for employing disadvantaged young people in the workforce.

Here, NPOs such as CareerBox are actively seeking local and international partners determined to change the socio-economic climate of Africa's youth. The organisation helps reduce the risk for corporates by identifying and recruiting underprivileged yet talented youth, and then placing them in its demand-led Work Readiness Programme that is designed to equip them with the abilities needed to be successful in their workplace.

Beyond just matriculants, CareerBox also trains and places school leavers who have a minimum Grade 11 qualification, and no prior work experience.

For their part, the youth need to show commitment and the drive to continue developing themselves, and to find jobs that are available to them. They have to be ambitious and set goals and targets for them-

selves. They also have to know that they might not always get the job or the job that they want.

This attitude is critical in helping them overcome disappointments, and still take full advantage of the opportunities that are presented. It also helps organisations such as CareerBox identify the right individuals - rough diamonds - and look at what specific skills they need to be equipped with in order to match the requirements of the job on offer from their corporate partners.

Over the past two months, CareerBox has trained and placed over 2 000 youth and women in sustainable jobs with corporate partners, taking the total since inception to over 42 000 youth trained.

Beyond just providing these young people with a job, though, the intention is to look at career development and progression, with development programmes that are designed to continue the learning process from the onset, and getting youth and women to invest in themselves.

While this goes hand-in-hand with the compliance requirements around skills and internal training spend, corporates need to ensure that this is more than just a tick box exercise.

In fact, studies have shown that investing in the development of their young people will result in employees who are highly motivated and less likely to leave; that it is possible to do good and make money at the same time.

Youth unemployment is not solely a government issue, but one that affects all of society, and there needs to be a shift in mindset so that corporates and NPOs start looking at what they can do to start making a difference, either on their own, or in partnership with each other - or even government.

Published By:
IOL

"A more direct impact can be made through enacting recruitment policies that call for employing disadvantaged young people in the workforce."

State of Disaster: The end... but not the end for employers

The Presidential address may have brought an end to the National State of Disaster, but that doesn't mean employers can scrap their Covid-19 safety regulations and protocols.

Besides the fact that there are transitional provisions that stakeholders will have to comply with, such as the wearing of masks in indoor public places and the limitations on gatherings, there are three core laws that need to be complied with.

"The Code of Practice on Managing Covid-19 at the workplace applies immediately and requires employers with more than 20 employees to conduct a risk assessment, design a risk mitigation plan that addresses the potential need for mandatory vaccinations as well as other mitigatory provisions such as santisation, mask-wearing, social distancing and ventilation, consultation on the plan with unions and OHS committees and implementation of the plan," says HR expert, John Botha.

Further to this, the Hazardous Biological Agents Regulations that have been recently amended need to be integrated into this plan where, for example, the revised definition of "fully vaccinated" now applies. Fully vaccinated now includes the boosters. The third law being finalised is the National Health Act Amendments.

"With the President bringing forward the expected end of the State of Disaster from 15 April 2022 to [5 April]," continues Botha, "employers have to take quick action as breaches of these laws hold both potential imprisonment and fines clauses."

In addition, there are significant administrative record-keeping obligations including that Covid-19 records must be kept for 40 years. Employers are now allowed to collect various data fields on their staff including comorbidities and vaccination status as the Code expressly provides for this.

"However, the protections of the PoPI Act and the need to secure the data is crucial. Given the wording of the law that continues beyond the State of Disaster, there is no doubt that government views vaccinations as the primary mechanism to protect employees and third parties at the workplace as employers are required to pursue this if the risk assessment justifies this," concludes Botha.

Published By:
Bizzcommunity

Reimbursement: What you can (or can't) claim under the BCEA

On 1 January 2019, section 73A of the Basic Conditions of Employment Act 75 of 1997 (BCEA) came into effect. This relatively new provision permits employees earning below the prescribed threshold to claim monies owing to them in terms of the National Minimum Wage Act, the BCEA, a collective agreement, a sectoral determination or a contract of employment at the Commission for Conciliation, Mediation and Arbitration (CCMA).

In the CCMA matter of Cousins v Bill Buchanan Association [2022], the disruptions occasioned by the Covid-19 pandemic and the civil unrest of July 2021 gave rise to questions as to who bears the cost of Covid-19 tests required by an employer, whether an employee who has exhausted leave entitlements may nevertheless claim compensation in respect of deductions for unpaid leave despite failing to report for duty, and whether the provisions of section 73A of the BCEA might lay the foundation for loss of earnings claims for an employee's private business.

Cousins relied on section 73A when she referred a claims dispute to the CCMA, alleging that her employer owed her monies for:

- deductions of unpaid sick leave in the amount of R6,783.11, and R4,034.94 of unpaid leave due to the unrest in KwaZulu-Natal, totalling R11,718.05 for the period between 30 April 2020 and 31 July 2021;
- R8,500 for 10 Covid-19 tests; and
- loss of income for her private business in the amount of R27,000.

Claims covered under section 73A of the BCEA

The employer in this matter submitted that the referral should be dismissed on the basis that the referred claims are not covered under section 73A of the BCEA. The issue that was to be decided was whether Cousins was entitled to such a claims dispute in the circumstances.

Firstly, the employer submitted that the Directions for Health and Safety in the workplace, dated 4 June 2020, provide that if an employee's sick leave entitlement is exhausted, they must make an application for an illness benefit in terms of clause 4 of the directive issued on 25 March 2020 on the Covid-19 Temporary Employer Relief Scheme (TES Scheme). In terms of Cousins' employment contract, any sick leave in excess of 30 days in the relevant leave cycle may be unpaid.

The employer submitted that Cousins used the sick leave due to her excessively, and as a result of having exhausted her sick leave entitlements, should have directed her claim for unpaid sick leave to the Department of Employment and Labour in terms of section 20 of the Unemployment Insurance Fund, which expressly states that if an employee's sick leave entitlement is exhausted, they must make an application for an illness benefit.

Furthermore, the employer submitted that its business was operating at full capacity during the unrest. At no point in time did the employer instruct Cousins to stay off duty during the unrest. She, however, took a different view, stating that she was not informed that the employer would implement the 'no work, no pay' rule during the unrest. She also claimed that she was not informed that she needed to apply for the illness benefit under the TES Scheme.

Cousins also argued that her employer owed her for the loss of income for closing her nail business, which was operating under the respondent's business.

CCMA findings

In terms of the three claims by Cousins, the Commissioner found that:

- The money that Cousins claims she was owed in terms of her Covid-19 tests, and her loss of income for private businesses, fell outside what is expressly covered by section 73A of the BCEA.
- In terms of her exhausted sick leave, Cousins ought to apply for illness benefits in terms of the TES Scheme.
- As she had exhausted her sick leave and failed to tender her services during the unrest where the employer was fully operational, Cousins could not claim leave for the period of the unrest.

While the issue of compensation for the costs incurred by Cousins in respect of her Covid-19 tests fell outside of the scope of section 73A, the Commissioner remarked that item 27 of the Directions for Health and Safety in the workplace places a clear obligation on employers to implement health and safety measures to curb the spread of Covid-19, such as screening workers when they report for duty and requiring workers to be tested for the virus, when needed.

The Commissioner dismissed Cousins' case, finding that she was not owed any amount in terms of section 73A of the BCEA.

Employers can be comforted by the fact that any monetary claims that fall outside of the payments expressly indicated in section 73A of the BCEA will not be entertained by the CCMA, and employers should carefully scrutinise a monetary claim by an employee when considering whether it should raise this jurisdictional point.

Written By:
Adil Patel & Dylan Bouchier

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VISION

To become a vibrant Organisation enhancing Employment Relations through debate and dialogue.

MISSION

- To facilitate an ongoing forum for constructive relationship building
- To deal with themes of relevance to the South African Employment Relations community
- To enhance the understanding, knowledge and practices of Employment Relations at National, Regional and branch levels in South Africa

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