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EMPLOYMENT

Can an employer unilaterally impose short time on employees in circumstances of financial distress?

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Independent Commercial Hospitality and Allied Workers Union and others v Commission for Conciliation, Mediation and Arbitration and others (2015) 24 LC 8.18.1

Unilaterally implement short time

Whether an employer experiencing financial difficulty may unilaterally implement short time after consulting with its employees?

Summary

A change in employees' terms and conditions of employment, such as the introduction of short time, may not be done unilaterally. The employees must consent to such change. Should the employees fail to give their consent and the employer may have a valid operational reason for embarking on a retrenchment exercise. Alternatively, the employer may seek to lock the employees out in an effort to obtain such consent.

Implementing short time – Court decision

In *Independent Commercial Hospitality and Allied Workers Union and others v Commission for Conciliation, Mediation and Arbitration and others* (2015) 24 LC 8.18.1 the employer introduced short time in response to financial difficulties. The employer consulted with its employees and their trade union but did not obtain their consent before implementing the short time.

The employees refused to comply with the instruction to observe with the new shift roster and were dismissed for, among other reasons, displaying "disrespect". The Labour Court had to determine whether the employees had refused to obey a lawful and reasonable instruction and, if so, whether their dismissal was fair.

The employees had referred a dispute to the CCMA in terms of **section 64(4) Labour Relations Act 66 of 1995**, as amended ("**LRA**") requiring the employer to restore the original terms of employment until such time as the dispute was declared unresolved and the employees could embark on strike act.

In such a case, the employer is obliged to restore the original terms and conditions of the employees' employment within 48 hours of the service of the dispute referral. Should the employer fail to comply, the trade union or employees would be entitled to interdict the employer to enforce compliance or, alternatively, embark upon strike action. In the present instance, the employees did neither. Rather they simply elected to do nothing, which is to say, they resisted the change and tendered their services in the ordinary course.

The court found that this was a legitimate response by the employees. The employer would have been entitled to lock the employees out or, if appropriate, embark upon a retrenchment exercise, offering short-time as an alternative to retrenchment.

The employer would ultimately be entitled to dismiss the employees provided valid operational reasons where present justifying same (importantly, the employees' dismissal in this instance would be for valid operational requirements and not for refusing to accept a change to terms and conditions of employment. If the employees are dismissed for the latter reason it would be automatically unfair). However, in this case, the employer had not exercised either of these options. It simply proceeded in unilaterally introducing the short time.

The Court held that in such an instance the instruction given to employees to work in accordance with the new short time system was unreasonable as it constituted a unilateral amendment to the terms and conditions of employment. The employees' refusal to comply did not amount to insubordination. The employees' dismissal was therefore found to be unfair.

Importance of this case

The introduction of short time constitutes a change in the terms and conditions of employment. Such a change cannot be implemented unilaterally. An employer wishing to institute short time must first try to obtain the employees' consent to such change.

If the employees will not agree to the change it may be necessary to embark on a retrenchment procedure and offer short time as an alternative to retrenchment. Alternatively, the employer may seek to obtain such consent by utilizing a lock-out.



Andre van Heerden

Director

View Profile



Jacques van Wyk

Director

View Profile