

DISPUTES

Claims for non-payment in terms of Section 73A of The Basic Conditions of Employment Act

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Section 73A of The Basic Conditions of Employment Act (BCEA)

In 2019, the Basic Conditions of Employment Act 75 of 1997 ("BCEA") was amended in several respects. One such amendment was the introduction of section 73A of the BCEA, which expanded the jurisdiction of the Commission for Conciliation Mediation and Arbitration ("CCMA") to include disputes relating to employers' failures to pay employees certain amounts to which they are entitled. This article briefly considers how some section 73A disputes have been dealt with by the CCMA (and bargaining councils).

Before Section 73A

Prior to the introduction of section 73A, an employee alleging that an employer failed to pay any amount to which that employee is entitled, would approach the Department of Employment and Labour ("DEL") to refer a complaint.

The DEL would then allocate an inspector tasked with taking the necessary steps (by engaging with the employer) to resolve the dispute. By expanding the CCMA's jurisdiction to allow for section 73A referrals, employees are now permitted to approach the CCMA to resolve such disputes (in addition to the existing DEL option).

Section 73A Referral Procedure

Section 73A(1) of the BCEA provides that any employee (as defined in section 1) or worker (as defined in section 1 of the National Minimum Wage Act 9 of 2018 ("NMWA")) may refer a dispute to the CCMA concerning the failure to pay any amount owing to that employee or worker in terms of the BCEA, the NMWA, an employment contract, a sectoral determination, or a collective agreement.

This provision, however, is intended to assist low-income earners as it does not apply to employees or workers who earn more than the prescribed threshold of R211 596.30 per annum. Employees or workers earning above the threshold may instead institute a claim concerning failure to pay any amount in section 73A(1) in either the Labour Court, High Court, Magistrates Court or Small Claims Court if they meet the necessary jurisdictional requirements for either court.

In a section 73A referral, the CCMA must appoint a commissioner to attempt to resolve a dispute by conciliation. If the matter remains unresolved, an arbitration must commence immediately thereafter. Importantly, rule 25(1)(c) of the CCMA Rules provides that no legal representation is permitted in such disputes except in the limited circumstances provided therein.

Overview of Cases following a section 73A referral

What follows is a brief overview of some cases that have been determined following a section 73A referral.

- The applicant in *Ntanta / Cape Bakkies Taxi Spares (Pty) Ltd* [2020] 7 BALR 755 (CCMA) alleged that he was unlawfully underpaid by the respondent for services rendered. Having heard the parties, the CCMA commissioner found that the applicant was neither an "employee" in terms of the BCEA, nor a "worker" in terms of the NMWA. Accordingly, the CCMA held that it lacked jurisdiction to deal with

the dispute and dismissed the matter on that basis. In *Abanqobi Workers Union on behalf of Mnguni & Others and J & D Construction* (2020) 41 ILJ 2917 (CCMA) the commissioner also found that the CCMA lacked jurisdiction to determine the applicant's referral. In that matter the applicants alleged that the employer applied to the UIF Covid-19 Temporary Employer/Employee Relief Scheme ("TERS") for salary relief for its employees, and that monies were paid from that fund by the DEL to the employer, who had failed to pay that money over to them. However, the commissioner correctly pointed out that TERS payments (and UIF claims, by necessary inference) did not fall within the ambit of section 73A disputes, and that those matters rather fell within the jurisdiction of the DEL.

- The applicants in *Olivier and Others / KPMM Services (Pty) Ltd and Another* [2020] 4 BALR 339 (BCEI) resigned after not receiving their salaries for several months. They jointly referred a constructive dismissal dispute and a section 73A dispute. The commissioner found that the employees had been constructively dismissed and awarded them compensation (in terms of section 194 of the Labour Relations Act 66 of 1995) for the unfairness thereof. The commissioner further ordered the employer to pay the applicants the outstanding amounts due to them, which constituted salaries, leave pay, benefits and other disbursements.
- In *Vissie / AK Groceries & Take Away* [2020] 11 BALR 1251 (CCMA) the applicant claimed that the employer had paid her wages which were below the prescribed national minimum wage in terms of the NMWA. In response, the employer alleged that the applicant had worked fewer hours than she claimed. However, the commissioner found that the employer had failed to prove this claim, and accordingly ordered that the applicant be paid the amount by which she had been underpaid. Contrary to the position in *Olivier* above, the commissioner in this case held that if the applicant wished to pursue an unfair dismissal dispute, they should do so by referring a separate dispute to the CCMA.
- The applicants in *South African Transport and Allied Workers Union obo Qendwana and Others / Bidvest Protea Coin (Pty) Ltd* [2020] 11 BALR 1235 (CCMA) summarily resigned from their employer. Upon their resignations, the employer withheld certain amounts (leave pay and wages) from their remuneration, contending that the amounts were lawfully deducted in terms of section 34 of the BCEA as the employer was acting in accordance with the terms of a loan agreement concluded between a third-party credit provider and the applicants (all of whom had outstanding loans with the third-party). The commissioner held that because the loan agreement was between the applicants and the third-party, the employer was not lawfully permitted to withhold payment of their remuneration. The employer was therefore ordered to pay the applicants the outstanding amounts.
- In the matters of *Mavume / Ubank* [2020] 1 BALR 72 (CCMA) and *Mbanyala / Odyssey Security Solutions* [2020] 5 BALR 460 (CCMA), the employers made deductions from the applicants' remuneration based on the employees' misconduct. In *Mavume*, the applicant was dismissed for gross negligence as a result of a monetary shortage, after which the employer withheld the applicant's leave pay in order to recover the loss it had suffered. The employer justified its actions by relying on a provision in its disciplinary code (which formed part of the applicant's employment contract) permitting it to do so. In *Mbanyala* the employer deducted a portion of the applicant's salary as a "fine" for him arriving late at work. In both matters, the commissioners found that the deductions from the applicants' salaries were unlawful, as any agreement signed between employer and employee cannot take precedence over the BCEA.
- Following the termination of his employment, the applicant in *Mbolekwa / Shoprite Checkers (Pty) Ltd* [2020] 8 BALR 869 (CCMA) challenged the employer's decision not to pay him a bonus in terms of an internal policy. The commissioner, however, found that the applicant was not entitled to the bonus, as the policy specifically stated that the bonus was only payable to persons who were in service during the month in which it was paid, which the applicant was not.
- In several cases, claims in terms of section 73A were dismissed on the basis that applicants failed to establish that they were lawfully entitled to the amounts they claimed. Such was the case in the following matters:
 - *GIWUSA obo Kalake and Others / Fourie's Poultry Farm (Pty) Ltd t/a Chubby Chick* [2021] 4 BALR 384 (CCMA) wherein the applicants claimed, but failed to show that they were entitled to "travel allowance";
 - *Mgabi and Others / Modern Plumbing Works (Pty) Ltd* [2020] 12 BALR 1297 (CCMA) and *Mojapelo and Another / South African Post Office Ltd* [2020] 8 BALR 873 (CCMA) in which the applicants unsuccessfully sought to claim remuneration for periods during which they had not tendered services; and
 - *Motswane / Kwathlano Shuttle and Chauffeur Services CC* [2021] 3 BALR 274 (CCMA) where the applicants alleged but could not provide evidence to show that they had performed "overtime" work and that they were consequently entitled to remuneration arising therefrom.
- In *Workers Against Regression obo Motshegetsa and Others / Atlas Finance* [2021] 3 BALR 332 (CCMA) the applicants alleged that as a result of the employer incorrectly taking payment of commission into account in determining their minimum wage, they had been paid less than they were entitled to in terms of the NMWA. The commissioner agreed, stating that the employer had misinterpreted and misunderstood the definition of "wage" as defined in section 1 of the NMWA, which bases the amount payable to a worker on the

number of hours worked, and not commission. Accordingly, the commissioner ordered the employer to pay the shortfall due to the applicants. Additionally, the commissioner ordered the employer to pay a fine in terms of section 76A of the BCEA (titled “Fine for not complying with the national minimum wage”), as a result of which the applicants were awarded twice the amount (shortfall) they were owed by the employer.

Conclusion

From the above cases, it is clear that the possible success of a section 73A referral will ultimately depend on the facts of a specific dispute. It is therefore important for employers to adequately acquaint themselves with their legal obligations in terms of the BCEA, NMWA and other employment legislation to shield themselves against possible disputes. Inversely, it is equally important for employees to empower themselves by acquainting themselves with their legal entitlements to protect themselves from any unlawful infringements of their rights.

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