



EMPLOYMENT

The Clock is Ticking on Unfair Labour Practice Referrals – Labour Court Confirms They Are One-Time Events

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In the recent case of *NEHAWU obo Makhubele & others v Ramalatso NO & others*, the Labour Court reaffirmed that disputes over unfair labour practices must be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) within 90 days of the employee becoming aware of the alleged act. In this case the complaint was about equal work for equal pay, and unequal salaries. The unions' members, it was alleged, were being paid different amounts despite doing the same type of work, merely because they were employed on different grades.

The employees, represented by NEHAWU, alleged an unfair labour practice and referred the matter to the CCMA after the 90-day period, arguing that the conduct was a "continuing wrong" and that the referral period should restart each day until the conduct was remedied. The union claimed that the wrong was perpetuated each month in which the unequal salary was paid. As such, although the difference in salaries had arisen and was known to the union in 2016, the complaint was only referred to the CCMA in 2019, but the union claimed that the referral was still in time. Both the CCMA and the Labour Court rejected this argument. The Court held that an unfair labour practice in terms of section 186(2) of the Labour Relations Act occurs at a specific point in time — the date of the conduct or action which is the cause of the complaint – in this case the difference in salaries being implemented. While the effects of the act may endure, this does not extend or refresh the statutory referral period. The court made the crisp statement that "*the time to hide behind the alleged 'continuous' or repetitive' nature of the dispute has come to an end.*" The Labour Court found that the union was well outside of the 90 day time period for the referral of an unfair labour practice.

Where a dispute is referred late, an applicant can always seek condonation but will then be required to demonstrate good cause for the delay, including a full explanation for the delay and convincing the CCMA that there are reasonable prospects of success. The CCMA has previously held that if a matter is a lost cause, even a good reason for the delay shouldn't entitle the employee to have the matter heard. In this case, NEHAWU failed to satisfy these requirements.

The practical takeaway from this case is that employees and unions must act promptly when challenging an unfair labour practice. Employees must act timeously and employers should note that lateness is a robust procedural defence. The ongoing impact of an act will not convert it into a continuing wrong.

Timing is critical — miss the referral deadline, and the merits of the dispute may never be heard.



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