

Think before issuing instructions to employees

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In *Association of Mineworkers and Construction workers Union obo Mkhonto & others* [13 February 2023], the employees were charged with gross insubordination in that they had refused to obey the instruction from their site manager to work two hours of overtime on a particular date. At the internal hearing, the employees conceded that they were aware of the instruction but their defence was that they did not agree to work overtime. The employees were found guilty as charged and dismissed.

The union referred their dispute to the CCMA for alleged unfair dismissal. The commissioner found that the employees did not disagree to work overtime when they were instructed to do so and he concluded that their conduct entailed an implied or tacit agreement to work over time. He also found that in any event, in their employment contracts the employees had already agreed to work overtime. The commissioner upheld the dismissal.

The union launched an application to review the award in the Labour Court. The Court stated that the crisp issue was whether or not the instruction to work overtime was lawful. In this regard, the Court considered whether or not there was an agreement which bound the employees to work overtime. The employer had relied on a particular clause in the employees' contracts of employment.

The Court considered the relevant provisions dealing with overtime in the Basic Conditions of Employment Act 75 of 1997 as amended ("the BCEA"). Section 10(1)(a) of the BCEA provides that an employer may not require or permit an employee to work overtime except in accordance with an agreement. Section 10(5) of the BCEA provides that an agreement concluded in terms of subsection (1) with an employee when the employee commences employment or during the first three months of employment, lapses after one year.

The Court considered the employees' contracts of employment and found that the relevant clause relied upon by the employer had lapsed a year after the conclusion of those contracts. It was held that when the instruction was issued, the overtime clause had already lapsed and therefore, the instruction issued to the employees was unlawful.

It was further held that an agreement contemplated in terms of s 10(1)(a) of the BCEA could be inferred (impliedly or tacitly) only when an employee had actually worked overtime without prior consent, but not where the employee has refused to work. It was further held that without prior consent, an employee is under no obligation to work overtime. Accordingly, the employees' dismissal was found to have been substantively unfair and the arbitration award was substituted with an order reinstating the dismissed employees with effect from the date of dismissal and with full back pay.

In reaching its conclusions mentioned above, the Labour Court relied on *Maripane v Glencore Operations South Africa (Pty) Ltd (Lion Ferrochrome) [2019] 8 BLLR 750 (LAC) (Maripane)* where NUM branch committee had elected Mr. Maripane as a full time health and safety representative (HSR) in 2012 and in terms of the agreement signed between the Union and the Mine, Mr. Maripane was to serve in that position for a period of three years. As a result, Mr. Maripane had moved from his substantive post as raw materials operator ("RMO") to the office designated for the HSR.

In 2013 branch committee held another elections and thereafter the Union had submitted a letter to the Mine indicating the names of the newly elected leadership. Mr. Maripane's name was not in the list because he had not been re-elected. Based on this letter, the Mine instructed Mr. Maripane to vacate the office of the HSR and to resume his duties as the RMO. Mr.

Maripane engaged in two meetings with the Mine at which he maintained that he was still the HSR and refused to vacate the office. He was charged with gross insubordination, found guilty as charged and dismissed from his employment.

The CCMA found his dismissal substantively unfair but reinstated him in the RMO post. The employer approached the Labour Court on review. The Labour Court found Mr. Maripane's dismissal justified and reviewed and set aside the arbitration award. Mr. Maripane appealed to the LAC. In considering the matter, the LAC had this to say:

"[29] Whether the refusal to obey an instruction amounts to insubordination also depends on various factors, including the employee's conduct before the alleged insubordination, the wilfulness of the employee's refusal to obey, and the reasonableness of the instruction. The reasonableness of any instruction also depends on its lawfulness and enforceability. . . any instruction to do what is unlawful, or in breach of a contractual term is not reasonable".

The LAC considered whether there was evidence to establish that Mr. Maripane had been replaced as the HSR. The Mine had relied solely on the letter received from the union indicating the names of the newly elected leadership. The LAC found that the said letter did not state that Mr. Maripane was replaced. The LAC also took into account that in terms of the agreement, Mr. Maripane's term of office as HSR was for three years and had not yet expired. It was found that the Mine had acted in contravention of the terms of the agreement and therefore the instruction that Mr. Maripane return to his position as the RMO before the expiry of his term as the HSR was unreasonable and unenforceable. Mr. Maripane was reinstated as the HSR.

Conclusion

The principle to be deduced from the above authorities is that reasonableness of the instruction depends on its lawfulness and any instruction to do what is unlawful or in breach of a contractual term is not reasonable.

The employers who routinely instruct their employees to perform overtime work are advised to review the employees' contracts of employment at least once a year to confirm that the contracts are still in compliance with the provisions of s 10 of the BCEA, failing which, the employer may find himself issuing unlawful and/or unreasonable instructions relating to overtime work with dire consequences.



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