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EMPLOYMENT

When is an instruction to work overtime unlawful and unenforceable?

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AMCU obo Mkhonto v CCMA and Others **(JR 2266/17) [2023] ZALCJHB (13 February 2023)**

Insubordination occurs when an employee fails to obey a lawful and reasonable instruction given by a person in a position of authority over the employee. In *AMCU obo Mkhonto v CCMA and Others* (JR 2266/17) [2023] ZALCJHB (13 February 2023) (***AMCU v CCMA***), the Labour Court (**LC**) was called upon to determine whether there was a fair reason to dismiss employees for their refusal to work overtime and whether such refusal amounted to gross insubordination.

Four employees (**the employees**) of Andru Mining (Pty) Ltd (**the employer**/**ANDRU**), represented by the Association of Mineworkers and Construction Workers Union (**AMCU**) were dismissed for gross insubordination for refusing to obey an instruction from their site manager to work overtime.

Dissatisfied with the dismissal of the employees, AMCU referred a dispute to the Commission for Conciliation, Mediation and Arbitration (**the CCMA**), which remained unresolved at conciliation and proceeded to arbitration. The arbitrator found the dismissal of the employees substantively fair.

AMCU took the matter on review to the Labour Court (**LC**) contending that the CCMA commissioner misdirected himself by finding that there was an agreement which bound the employees to work overtime. AMCU further contended that the employees could not have been guilty of insubordination because the instruction to work overtime was unlawful, given the lack of an agreement between ANDRU and the employees to work overtime.

ANDRU argued that the employees were bound by their respective employment contracts to work overtime. AMCU contended that the instruction to work overtime was unlawful because the overtime clause in the employment contracts lapsed a year after the conclusion of those contracts.

Section 10 of the Basic Conditions of Employment Act 75 of 1997 (as amended) (**the BCEA**) regulates overtime. The section provides, *inter alia*, that:

1. [A]n employer may not require or permit an employee to work –

    a. overtime except in accordance with an agreement;

[…]

5. 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 LC interrogated the employees' respective contracts of employment and found that one employee had not agreed to work overtime at the commencement of his employment like his fellow employees, thus, there was no binding contractual agreement to work overtime insofar as he was concerned. While two of the employees' contracts had an overtime clause in terms of which they had consented to work overtime, these employees commenced their employment with the employer in 2008 and 2011 respectively. When the instruction to work overtime was given in 2017, the overtime clauses had already lapsed in terms of section 10(5) of the BCEA.

The employer's instruction was accordingly unlawful because it violated section 10(1)(a) of the BCEA and, in turn, unreasonable. In making this determination, the LC relied on the precedent set by the Labour Appeal Court (**"LAC"**) in *Maripane v Glencore Operations*

South Africa (Pty) Ltd (Lion Ferrochrome) [2019] 8 BLLR 750 (LAC). The LAC stated that:

> *"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 LC therefore set aside the commissioner's finding that the three employees were guilty of gross insubordination.

The fourth employee's circumstances were distinguishable from that of his colleagues because he consented to work overtime in his employment contract and one year had not yet lapsed at the time of receiving the instruction to work overtime. The instruction was therefore lawful and his refusal to work overtime amounted to insubordination. The Court consequently had to consider the appropriateness of the sanction of dismissal in his case.

An enquiry into the appropriateness of the sanction requires a presiding officer to consider the circumstances holistically. This includes the importance of the rule breached; the reason the employer imposed the sanction of dismissal; the harm caused by the employee's conduct and the effect of the dismissal on the employee.

The Court drew on *Palluci Home Depot (Pty) Ltd v Herskowitz and Others* (2015) 36 ILJ 1511 where the LAC dealt with the appropriateness of the sanction of dismissal in cases of insubordination. The LAC noted that mere insubordination does not justify dismissal. Failure to comply with a reasonable and lawful instruction must be deliberate and serious in order to warrant dismissal. Dismissal is a measure of last resort and must be reserved for instances of gross insubordination.

The LC held that the sanction of dismissal was disproportional and unfair and it set aside the commissioner's findings in respect of the fourth employee. The LC took into account that the insubordination was the first offence and was not accompanied by insolence. The employer could not adduce evidence that the employee acted deliberately and repeatedly. In the LC's view a disciplinary sanction, such as a warning or a final written warning, would have been more suitable.

ANDRU was therefore ordered to reinstate the employees retrospectively with full back pay.

Importance of the case

Employers must be alert to the fact that an overtime clause contained in an employment contract does not enjoy perpetual continuity. Section 10(5) of the BCEA requires that an agreement to work overtime, concluded at the commencement of employment or within the first three months of employment, must be renewed, before it lapses after 12 months. Furthermore, employees cannot be dismissed for insubordination for refusing to work overtime in the absence of a valid and binding agreement and then consideration must be given to all the circumstances surrounding the act of insubordination before the sanction of dismissal is applied.



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