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EMPLOYMENT

Whether employers are obliged to engage with unrepresentative trade unions before dismissing employees who embark on unprotected strike action

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Issue

Whether an employer is required to engage with a trade union, who has no organisational rights / is insufficiently representative, before taking a decision to dismiss employees for engaging in unprotected strike action.

Summary

The duty of an employer to engage with a trade union is restricted to trade unions with organisational rights and which are sufficiently representative. The decision to dismiss employees engaged in unprotected strike action where they had failed to adhere to a number of ultimatums was procedurally fair, notwithstanding the fact that the employer had failed to engage with the trade union regarding its intention to initiate disciplinary steps against the members of that trade union.

Facts

In *Roberts Brothers Construction (Pty) Ltd and Another v National Union of Mineworkers and Others* (PA08/18) [2020] ZALAC 15 the Labour Appeal Court had to consider the above issue. The facts of the matter are briefly as follows.

Roberts Brothers Constructions (Pty) Ltd ("**Roberts**") and Mpumalanga Construction (Pty) Ltd ("**Mpumalanga Construction**") (collectively "**employers**") are construction companies. The employers were jointly engaged in a rural bridge construction project. The employers employed a number of employees for the project. For purposes of the dispute, one employee was employed by Mpumalanga Construction, while the remainder were employed by Roberts. The employees were construction workers who also resided in huts on site and were members of the National Union of Mineworkers ("**NUM**").

The employees embarked on a strike on 21 August 2013 which persisted until 23 August 2013. They were aggrieved about their living conditions on-site. In particular, they had intermittent and inadequate supply of electricity which resulted in them not having heating, lighting and the means to prepare food. The employees did not give the employers a strike notice in terms of section 64(1)(b) of the Labour Relations Act 66 pf 1995 ("**LRA**"), as a result of which, the strike was unprotected. On 21 August 2013, the employers issued the employees with three ultimatums in terms of which the employees were informed that they were engaging in an unprotected strike which caused severe prejudice to the companies. They were instructed to cease the strike action immediately and resume their normal duties, failing which they would be dismissed. The employees did not comply with the ultimatums and, as a result, were dismissed on 25 September 2013 for engaging in unprotected strike action.

NUM referred two separate unfair dismissal disputes to the Commission for Conciliation, Mediation and Arbitration ("**CCMA**"); one against Mpumalanga Construction and one against Roberts. The two disputes were referred to the Labour Court for adjudication and were later consolidated.

The Labour Court held that the employees had sufficient time to consider their decision to continue with the strike action and the implications thereof after the ultimatums were given. Nevertheless, they decided to risk the consequences of continuing with the strike. The Labour Court accepted that the strike was in response to a legitimate demand, however, held that it was not provoked by unreasonable management conduct. The Labour Court held further that the strike was pre-planned and that employees had not utilised available opportunities to engage with senior management, nor did they lodge any grievances before embarking on the strike.

The employees also did not obtain assistance or advice from NUM before embarking on the strike or even after they were issued with the ultimatums. The Labour Court accepted that the strike was serious as it lasted for two days and the ultimatums were ignored despite the reasonable opportunity to reconsider afforded to the employees. The Labour Court also accepted that the strike was calculated and carefully timed to cause maximum inconvenience to the employers. Due to these factors, the Labour Court found that the dismissal of the employees was substantively fair.

Insofar as procedural fairness was concerned, however, the Labour Court criticised the employers' failure to contact a NUM official in an attempt to convince the employees to comply with the ultimatums and cease their unprotected strike action. The Labour Court held that the prospect of union intervention may have resulted in some resolution to the matter. As a result, it was held that the employee's dismissals were procedurally unfair in that the employers did not take *"the necessary and sensible steps"* to contact NUM to try end the strike. The employees were awarded compensation equivalent to six months' salary each.

The employers took the Labour Court's judgment on appeal to the Labour Appeal Court ("**LAC**"). The LAC was required to decide whether item 6(2) of Schedule 8 of the LRA: Code of Good Practice: Dismissal ("**Code**") required the employers to contact NUM prior to issuing the ultimatums or dismissing the employees. The issue of substantive fairness was not taken on appeal.

LAC's evaluation

Item 6(2) of the Code provides:

*"**Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt.** The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it either by complying with it or rejecting." (Emphasis added).*

The LAC held that item 6(2) of the Code should be interpreted to give effect to a primary object of the LRA: the promotion of orderly collective bargaining. In this regard the LAC favours majoritarianism in collective bargaining. Trade unions are entitled to organisational rights only if they represent a majority of members or are substantively representative. While trade unions with insufficient membership may still act on behalf of their members in other capacities, they will be denied an organisational presence or role as a bargaining agent until they become sufficiently representative. The LAC held that "item 6(2) of the Code is restricted to contacting a trade union that has been granted organisational rights under Chapter III of the LRA or enjoys contractual rights under a recognition agreement concluded with the employer."

NUM did not enjoy organisational rights under the LRA, nor had it concluded a recognition agreement with the employers. As a result there was no duty on the employers to contact NUM in terms of item 6(2) of the Code before issuing the ultimatums to the employees or dismissing them. The LAC held that the dismissals were not procedurally unfair and the appeal was upheld.

Importance of the case

If a union being is not sufficiently representative or has not concluded a recognition agreement, there is no obligation on the employer to engage with the union before issuing ultimatums to employees engaged in unprotected strike action. Nor is there an obligation on the employer to engage with the union prior to making a decision to dismiss the employees.



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