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EMPLOYMENT

Working From Home: Can Employers Withhold Pay Over Office Attendance?

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ISSUE

In *National Union of Public Service and Allied Workers obo Cesiko / South African Human Rights Commission [2024] 8 BALR 869 (CCMA)*, the Commission for Conciliation, Mediation and Arbitration ("**CCMA**") considered whether withholding an employee's salary and allowances amounted to an unfair labour practice dispute in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 ("**the LRA**").

FACTS

The employee, employed by the South African Human Rights Commission ("**SAHRC**") as a personal assistant, had been advised by a doctor that she should work from home as her office environment had created health problems. The Employee was advised to submit a memorandum to the SAHRC motivating her condition. Her application to work from home was supported by her office manager but declined by her commissioner as well as the Human Resources ("**HR**") department of her employer who reasoned that no work-from-home policy existed. The SAHRC instructed the employee to report to the office and several interactions took place concerning her return. The SAHRC contended that by failing to return to office, the employee had breached her employment contract. The SAHRC responded to her failure to report to the office by withholding her August salary, housing, and data allowance based on the "no work, no pay" principle.

CCMA FINDINGS

The LRA provides that an unfair labour practice refers to any unfair act or omission that arises between an employer and employee. The LRA further clarifies in terms of section 186(2)(a) that an unfair labour practice relates to unfair treatment related to promotion, demotion, probation, training or benefits.

The CCMA Commissioner referred to *Aucamp* v *SARS* [2014] 2 BLLR 152 (LC), where the Labour Court held that remuneration as contemplated by law requires payment to an employee to be quid pro quo for the employee working and that any discretionary decision must be exercised fairly. During the CCMA proceedings, the employee referred to email correspondence with her commissioner to demonstrate she had worked while she was at home. The Employee further indicated that she did not receive any complaints from HR about working from home during this period.

The CCMA Commissioner found that the allowances claimed by the employee formed part of her contractual rights in terms of her employment contract and therefore, the SAHRC had a statutory obligation to comply with the employment contract and the Basic Conditions of Employment Act 75 of 1997. While the employee's contract stipulated that she was required to work at the SAHRC's offices, the SAHRC failed to investigate whether its workplace practices were just and fostered a harmonious environment.

The CCMA Commissioner held that the SAHRC acted arbitrarily in its decision to withhold the employee's salary and allowances. The CCMA Commissioner found that the SAHRC's conduct was unfair and the SAHRC was found to have committed an unfair labour practice when it withheld the employee's salary and allowances for the month in question. The SAHRC was ordered to pay the employee the salary and benefits which had been withheld for the month in question.

IMPORTANCE OF CASE

This CCMA award underscores that withholding an employee's salary and/or allowances without due process or a thorough investigation can amount to an unfair labour practice under section 186(2)(a) of the LRA. Employers are reminded to investigate health-related concerns raised by employees, particularly when there are medical certificates supporting such claims.



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