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EMPLOYMENT ALERT

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ISSUE

REWARDING NON-STRIKING EMPLOYEES?

A discussion of *National Union of Metal Workers of South Africa obo Members v Element Six Production (Pty) Ltd* (JS1106/14) [2017] ZALCJHB 35 (7 February 2017).

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The Labour Court recently had an opportunity to determine when "tokens" of appreciation may be paid to non-striking employees in the case of *National Union of Metal Workers of South Africa obo Members v Element Six Production (Pty) Ltd*.

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The Industrial Court under the old Labour Relations Act, No 28 of 1956 (1956 LRA) did not prohibit employers from rewarding non-striking employees for not participating in a legal strike.

The drafters and subsequent amenders of the current Labour Relations Act, No 66 of 1995, (the LRA) did not take up the opportunity to expressly prohibit the payment of "tokens" to non-striking employees.

The Labour Court recently had an opportunity to determine when "tokens" of appreciation may be paid to non-striking employees in the case of *National Union of Metal Workers of South Africa obo Members v Element Six Production (Pty) Ltd*.

The employer, in that case, paid a "token" to some of its non-striking employees who had performed additional tasks during the course of a protected strike. There was no explanation as to what the "token" was, however, it appeared to be monetary payments. Importantly, the "tokens" were paid to the employees after the strike was over.

The non-striking employees who received "tokens" volunteered to perform extra work during the course of the protected strike. They could not be paid shift allowances or overtime in exchange for performing the extra work, as there was no provision for this in their contracts of employment. It was in light of this, that the employer elected to use a different method of compensation, being payment of a "token".

The employees who went on strike referred a dispute to the Labour Court contending that the decision of the employer to pay the "tokens" to non-striking employees was discriminatory.

The employer argued that the payment of "tokens" was not discriminatory on any specified or unspecified ground. The criteria applied in paying such "tokens" was objective and rational and the payment did not have any effect on the effectiveness of the strike, nor was it likely to have a detrimental effect on future strikes.

The striking employees, on the other hand, argued that they "lost out" by going on strike, as they did not get the "token", and were also not paid for the duration of the strike. The striking employees were also concerned that the non-strikers benefitted from the increase in wages attained as a result of the strike action, and therefore argued that the employer had discriminated against them by not equally paying them the "token".

The court held that the payment of the "token" amounted to unfair discrimination as the striking employees were prejudiced for their participation in the lawful activities of their trade union and for the exercise of their right to strike.

The court did not order the employer to pay the same "token" to the striking workers as it found that to grant such relief would condone or compound the illegitimate conduct of the employer. The court deemed a declaratory order prohibiting the repeat of similar conduct as appropriate.

REWARDING NON-STRIKING EMPLOYEES?

CONTINUED

This case also raises the question of what kinds of payments, in addition to their normal salaries, may be legally made to non-striking employees for work performed during a protected strike.



This case is important as it confirms the previous decisions of the courts under the new LRA that payment of rewards to non-striking employees constitutes discrimination. It may also amount to a direct, or even an indirect, interference with their right to associate in the collective bargaining process, which includes striking as provided for in the LRA.

It also appears from this case, as well as other decisions of the courts that payment of rewards may be prohibited even where there is a practice of paying them, they are included in the employment contract as a term and condition, or they are paid during or after the strike.

Courts have not expressed a view, however, whether the payment of "tokens" of appreciation would still be unlawful if they were paid during or after an *unprotected* strike. However, it is unlikely that the court would prohibit payment of "tokens" for work done during an unprotected strike, given the fact that there is no lawful right to strike that requires protection.

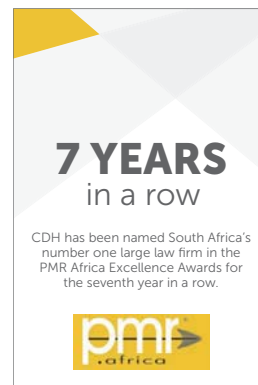
This case also raises the question of what kinds of payments, in addition to their normal salaries, may be legally made to non-striking employees for work performed during a protected strike.

Employers are permitted by section 10 of the Basic Conditions of Employment Act, No 75 of 1997 to require or permit employees to work overtime, provided employers have agreed on this with employees and the amount of hours worked does not exceed the maximum hours permitted by the section. Non-striking employees may thus be allowed to work overtime and perform the work of striking employees provided that the non-striking employees volunteer and are in no manner compelled or coerced into doing so.

Employers may of course also hire replacement labour during a strike, subject to certain limitations.

In light of this case, employers should be wary of rewarding non-striking employees by paying them "tokens". The employer may, however, pay non-striking employees overtime for work performed during the strike (provided that employees consent and the hours do not exceed the maximum prescribed by the BCEA) and/or use replacement labour, within the limits provided for in the LRA, if it wishes to continue production. Such remedies have the effect of softening the blow to the employer.

Hugo Pienaar and Prinoleen Naidoo



Employment STRIKE GUIDELINE

Our Employment practice's new
EMPLOYMENT STRIKE GUIDELINE
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Topics discussed include strikes, lock-outs and picketing.

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