1 APRIL 2019

EMPLOYMENT ALERT

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QUID PRO QUO IN A STRIKE CONTEXT

In *National Union of Mineworkers obo Members v Cullinan Diamond Mine A Division of Petra Diamond (Pty) Ltd* (JS102/14) [2019] (handed down 1 March 2019) the Labour Court dealt with a matter wherein a trade union alleged that by paying a bonus to non-striking employees, the employer has unfairly discriminated against the striking employees. This alert sets out the Court's rationale for finding against the trade union.

LOAD SHEDDING AND OBLIGATIONS TO PAY: SHEDDING SOME LIGHT ON AN EMPLOYER'S OBLIGATIONS DURING LOAD SHEDDING

It is no secret that the intensified load shedding has had a devastating economic effect on many companies. Without electricity, many businesses cannot function, and in those instances, employees are unable to work.

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QUID PRO QUO IN A STRIKE CONTEXT

The applicant alleged that by paying a bonus to non-striking employees, the respondent has unfairly discriminated the striking employees.

In *National Union of Mineworkers obo Members v Cullinan Diamond Mine A Division of Petra Diamond (Pty) Ltd* (JS102/14) [2019] (handed down 1 March 2019) the Labour Court dealt with a referral in terms of s10(6)(a) of the Employment Equity Act, No 55 of 1998 (EEA) read with s10(4) of the Labour Relations Act, No 66 of 1995 (LRA). The applicant alleged that by paying a bonus to non-striking employees, the respondent has unfairly discriminated against the striking employees. Further, the applicant alleged that such conduct offends the provisions of s5 of the LRA.

The trade union therefore failed to show a causal link between the payment of a bonus and the participation in an industrial action.

The employer and the trade union were engaged in wage negotiations. After a month the trade union called its members to a protected strike action, however, some members did not participate and production at a reduced rate continued. To avert participation in the looming strike action, management advised employees that the annual production bonus may not be paid as a result of the strike action which would impact on production. Ultimately, the annual production bonus was cancelled, and nobody was paid an annual performance bonus. The employer did however, design a new and different exceptional performance bonus which was paid to the employees who attended to production during the strike action. The trade union alleged that this bonus was actually a contrived ruse and was nothing but the ordinary annual performance bonus.

Moshoana J held that the trade union's case was pegged on two legs. Firstly, it related to the application and interpretation of s5 of the LRA and secondly, it related to alleged unfair discrimination, in terms of s6 of the EEA. The Court made it clear that the right to strike is a separate and distinct right that accrues to a worker by virtue of s23(2) of the Constitution. In considering s5(1) of the LRA which protects an employee from discrimination for exercising any right conferred on by the LRA, the Court held that this discrimination as referred to in s5(1) of the LRA is not the unfair discrimination as referred to in the EEA and the Constitution. The Court furthermore referred to and disagreed with the judgment in *FAWU v Pets Products (Pty) Ltd* (2000) 21 ILJ 1100 (LC), which held that where there is discrimination for exercising the right to strike, the unfairness of that discrimination is presumed, and that the discrimination is analogous to discrimination on one of the grounds specified in the Constitution. The Court further held that there is no need to read in unfairness into s5(1).

Section 5(1) furthermore requires a causal link between any differentiation and the exercise of the right. In this matter, the Court held that because the annual performance bonus was cancelled for all employees, there was no basis to differentiate. It was also not the trade union's case that the bonus was cancelled because they participated in strike action. The trade union therefore failed to show a causal link between the payment of a bonus and the participation in an industrial action. The evidence clearly showed that even employees who participated in the strike but then deserted it and participated in production were paid the exceptional performance bonus which showed that there was no link between the participation in the strike and the payment of the performance bonus.

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QUID PRO QUO IN A STRIKE CONTEXT

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The Court also held that in relation to s5(3), the exceptional performance bonuses did not amount to any advantage or promise in exchange for employees not exercising any right.

The trade union further alleged breach of s5(2)(c)(vi) which prohibits prejudice because of past, present or anticipated exercise of a right conferred on by the LRA. The Court held that the evidence showed that the annual performance bonus is discretionary in nature and that employees do not have a right to such payment and as such, by denying them these bonuses the employer did not disregard any right they have. With regard to the new exceptional performance bonus, the applicant employees clearly did not qualify for such bonus because they did not perform as the other employees did. The Court also held that in relation to s5(3), the exceptional performance bonuses did not amount to any advantage or promise in exchange for employees not exercising any right. It is important to note Moshoana J's comments in which he states that "payment made to the employees who worked, was for the achievements and the exceptional performance. The Applicant's members did not contribute to the achievement nor did they perform exceptionally. Differentiating them on those basis does not amount to an unfair discrimination, nor could it be said, that the differentiation is not endowed with reason or is illogical." Therefore, paying non-strikers any money does not per se infringe s5 of the LRA.

In analysing s6 of EEA which prohibits unfair discrimination, Moshoana J held that there was no contravention and furthermore held that not being paid a bonus does not impair an employee's dignity which is the type of discrimination that the EEA seeks to protect. The differentiation as required by s6, was made on the basis of achievements and exceptional performance and did therefore in no way amount to unfair discrimination nor was the differentiation illogical.

This case therefore serves to prove that whilst employees may exercise their fundamental right to strike, this does not mean that an employer cannot reward those employees who voluntary contribute to production in order to keep the business afloat during the strike period.

Michael Yeates and Kirstin Swanepoel

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LOAD SHEDDING AND OBLIGATIONS TO PAY: SHEDDING SOME LIGHT ON AN EMPLOYER'S OBLIGATIONS DURING LOAD SHEDDING

Without electricity, many businesses cannot function, and in those instances, employees are unable to work.

There is a duty on the employer to plan accordingly to protect the company and the livelihood of the employee.

It is no secret that the intensified load shedding has had a devastating economic effect on many companies. Without electricity, many businesses cannot function, and in those instances, employees are unable to work.

Employers might be under the impression that in instances where employees are unable to work, that the 'no work no pay' principle applies. However, when hours are lost as a result of power outages, the fact that employees are unable to work is due to no fault of the employer, nor the employee. Therefore, the no work, no pay principle would not apply.

In accordance with common law and the Basic Conditions of Employment Act, No 75 of 1997 (BCEA), an employment contract is a reciprocal contract in which the employee agrees to work for the employer who will remunerate the employee at an agreed rate. Therefore, if the employee arrives at the work premises to tender services and the employer, for any reason, cannot provide work for the employee, or the employee's work relies on various tools and equipment that require electricity, the employer must still pay the employee.

Unfortunately, this can be financially crippling for a company who is obligated to pay employees while simultaneously not making any revenue during those hours of non-activity.

Since an employment contract is reciprocal by nature, a possible solution to minimise the effects of load shedding would be to negotiate with the employees or unions an agreement which adjusts the hours of work to avoid facing hours of non-activity. However, it is crucial to note that to make the changes legally binding, the employees need to agree to all proposals. If no agreement can be reached, then the risk and prospect of restructuring in terms of the Labour Relations Act, No 66 of 1995 becomes a reality.

However, there are some industries that have already considered the dire effects of load shedding and entered into agreements on procedures for such situations. For example, the Metal and Engineering Industries Bargaining Council Main Agreement for 2017 – 2020 states in s7, that 'short time' is, "the implementation of reduced working time, ie fewer number of hours per day ... owing to ... circumstances beyond the control of the employer". In situations where an employer elects to send the employees home or alternatively, requires them to return to work where work can be resumed, employees shall receive no less than four hours work or pay in lieu thereof.

Load shedding has introduced countless challenges which threaten the financial stability of many companies across the country. However, it is crucial that employers do not risk breaching labour legislation to avoid financial losses. Rather, there is a duty on the employer to plan accordingly to protect the company and the livelihood of the employee.

Aadil Patel and Dylan Bouchier

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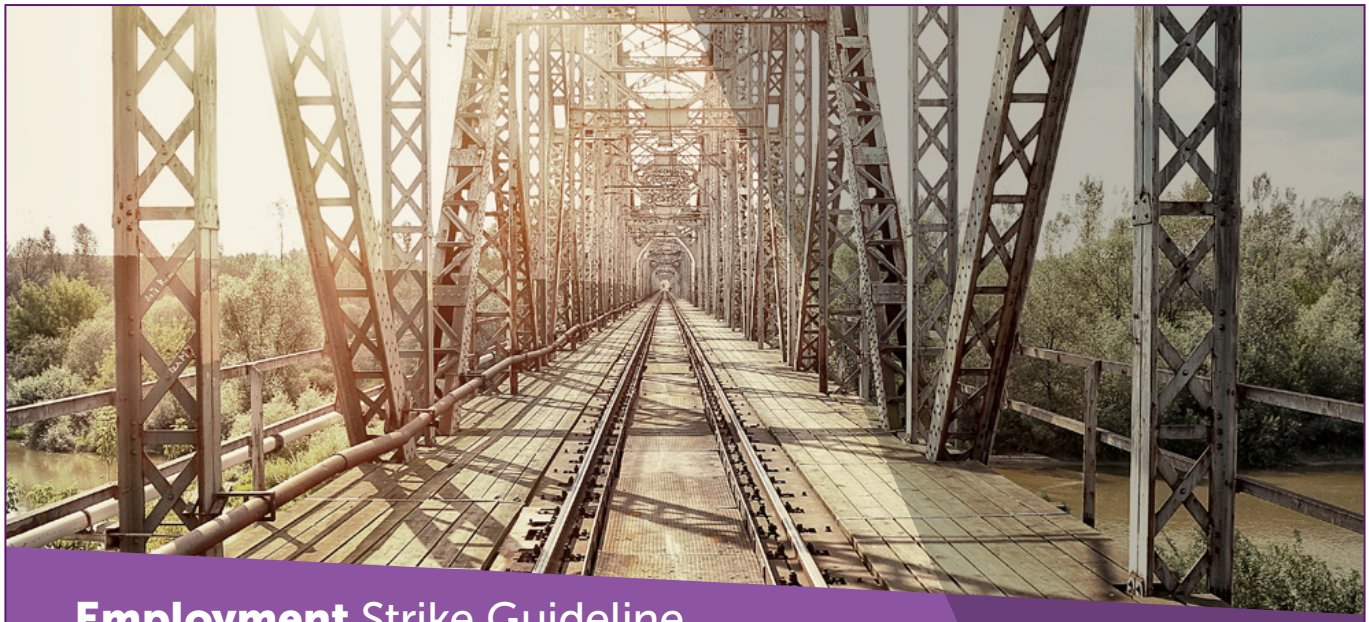

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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