Unlocking labour laws

A sex worker who works near our offices asked if we could help with her dismissal. Can sex workers claim protection against unfair dismissal?

In *"Kylie" v CCMA & others* [2008] a sex worker who had been employed in a massage parlour to perform sexual services claimed that she had been unfairly dismissed for misconduct. She referred a dispute over the fairness of the dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA). The commissioner ruled that the CCMA did not have jurisdiction to resolve the dispute. The matter was then taken on review to the Labour Court.

The Labour Court held that the case involved difficult issues of law and public policy. In the end it found that sex workers are employees as defined by the Labour Relations Act (LRA), but that the statutory right not to be unfairly dismissed does not apply to them. Their employment contracts are illegal and therefore invalid. This follows from the fact that organised prostitution is prohibited by the Sexual Offences Act 23 of 1957.

The court held that there is a fundamental principle in our law that courts ought not to sanction or encourage illegal activity.

Furthermore, the court said that the exclusion of sex workers from the protection afforded by the LRA is not unconstitutional, as the Constitutional Court has previously ruled that the prohibition of prostitution does not infringe their right to economic activity or unjustifiably infringe their right to privacy (see *S v Jordan & others* 2002). Therefore, a sex worker's claim to the statutory right to fair dismissal in the LRA is unenforceable.

The Labour Court also found that the protection under the fundamental labour rights provision of the Constitution (section 23) is not available to sex workers and brothel keepers.

Finally, the court made it clear that its judgment does not mean that sex workers are not entitled to protection under *other* labour laws of the country. The court said its judgment in *Kylie* " ... does not decide that a sex worker is not entitled to the protections under the BCEA, occupational health legislation, workers' compensation or unemployment insurance. Their entitlement to these rights and benefits has to be determined on a statute by statute analysis in order to determine whether by enforcing the right or granting the benefit under the particular statute the courts or the decision maker will be sanctioning or encouraging the prohibited activity of organised prostitution."

How far does the protection of strikers who participate in a protected strike go? Can an employer pay non-striking employees who performed the work of strikers a daily allowance and/or amounts for additional overtime work?

In the Labour Court judgment of *NUM v Namakwa Sands – a division of Anglo Operations Ltd* [2008] the employer faced a protected strike which lasted for two weeks. Eight days into the strike the employer took measures to keep production going. These measures included deploying non-strikers to do the work of striking employees, and to pay the non-strikers a daily allowance of R300 per day for doing so.

In addition, the employer let several of the non-strikers work overtime in excess of the statutory maximum of 10 hours per week, without the permission of the

Department of Labour (the determination permits four employees to work additional overtime).

Furthermore, the employer gave free meals to these non-strikers for "going the extra mile".

Huge amounts were spent on these items. The total cost of allowances paid exceeded R1m. Almost R270 000 was also spent on food and beverages for non-strikers, and the wage bill for over-time work almost doubled during the period of the strike. In the month of the strike the over-time bill amounted to almost R900 000.

These excessive payments and advantages were not a written term and condition of employment, nor were they regulated by a collective agreement. In fact, the practice to pay a redeployment allowance during strike action was not discussed with the union (NUM), and was shrouded in secrecy and hidden from the union.

The reason for this, so the court found, is obvious. The employer knew that it could not force the non-striking employees to do the work of the strikers. Section 187 of the LRA explicitly prevents an employer from dismissing employees who refuse or indicate their intention to refuse, to do any work normally done by an employee taking part in a protected strike, unless the work was necessary to prevent danger to life, personal safety or health.

According to the court, this places an indirect prohibition on an employer to ask non-striking employees to do the work of striking employees during a protected strike. Since the employer knew it could not force the non-strikers to do the work of strikers, it therefore came up with a policy to incentivise non-striking employees to do the work of striking colleagues.

The court set out the legal protection that protected strikers are entitled to in terms of the provisions of the LRA in the following terms: "The right to strike is a right enshrined in the Constitution of the Republic of South Africa, 1996. The right to strike is an important right that employees have acquired after years of struggle in the workplace. The LRA has placed certain limitations on the right to strike. Section 4(2) of the LRA grants every member of a trade union the right subject to the constitution of that trade union to participate in lawful activities of that trade union. The right to strike is one such right. Section 5 of the LRA grants employees certain protections. Section 5(1) outlaws discrimination and states that no person may discriminate against an employee for exercising any right conferred by the LRA. In terms of section 5(3), no person may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by the LRA or not participating in any proceedings in terms of the LRA. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute."

The court accordingly held that the employer's conduct in paying the non-striking employees the redeployment allowances, the provision of free meals and the excessive overtime worked fell foul of the LRA. It amounted to an infringement of the right to strike of those who participated in the protected strike, and was therefore discrimination.

The employer failed to prove that its conduct did not infringe these provisions of the LRA.

The union requested the court to order the employer to pay strikers in the protected strike the same allowance that the company paid to non-strikers. It found that it could not do this, partly because the strikers should not benefit out of an unlawful conduct by the employer, and partly because it would be impossible to quantify such a claim.

In this regard the court referred to an earlier judgment of the Labour Court in *FAWU & others v Pets Products (Pty) Ltd* [2000] where the court had refused, under similar circumstances, to order compensation or damages.

In the *Pets Products* case the Labour Court ruled that the payment of a bonus (shopping vouchers for Christmas) to non-strikers for extra work performed during a strike constitutes unfair discrimination and an infringement on the freedom of association provisions of the LRA section 5(1).

While not granting an order for compensation or damages, the court in the *Namakwa Sands* matter eventually made two orders. Firstly, the employer is prohibited from engaging in such conduct in the future and secondly, a copy of the judgment should be brought to the attention of the director-general of the Department of Labour to deal with the excessive overtime worked by the employees in clear breach of the minister's determination. LB

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