Unlocking labour laws

In each edition *Labour Bulletin* takes queries from trade unionists. Here **Debbie Collier** answers questions on whether or not an unfair labour practice can be brought after 90 days and if the employer can pay wages in lieu of 48-hours notice in a lockout.

Is it possible to bring a case of unfair labour practice after the 90 day cut-off point if the practice has been going on for much longer than this but has only just come to the union's attention?

In 1998 the SABC upgraded the salary scale of three artisans. Four members of the Communications Workers Union (CWU) were not promoted or upgraded yet they performed the same or similar work and had similar or better qualifications.

Although the employees knew about the discrepancy in pay, the CWU only became aware of it seven years later, in August 2005, and a month later, in September 2005, it referred a dispute to the CCMA for conciliation on behalf of the employees.

The union sought a promotion/upgrading of the four employees' salaries as well as back pay. On the CCMA dispute referral form, where the CCMA requests the date when the dispute arose, the CWU indicated 'ongoing' because every month its members were treated unfairly as they were paid less.

The dispute was described as an 'unfair labour practice' under the Labour Relations Act, alternatively as unfair discrimination in terms of the Employment Equity Act (an employee is entitled to pursue compensation under both the LRA and the EEA).

Section 186(2)(a) of the LRA defines an 'unfair labour practice' as an unfair act or omission by the employer relating to, among other things, the promotion of an employee.

However, section 191(1)(b)(ii) of the LRA requires that the employee refer the dispute to the applicable bargaining council or to the CCMA within 90 days of the act or omission which constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act.

Section 193(4) of the LRA provides that an arbitrator may determine any unfair labour practice on terms that s/he feels is reasonable, which may include ordering reinstatement, re-employment or compensation. Although section 194(4) places a limit on compensation as the equivalent of 12 months remuneration, section 195 indicates that this amount is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law. A previous decision in *Equity Aviation Services v CCMA and others* [see *SALB* 33.1] confirms this. In this case the Constitutional Court ruled that back pay for reinstated employees should not be confused with compensation.

Section 6(1) of the EEA provides that 'no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.'

Section 10(2) of the EEA requires a party to refer the dispute in writing to the CCMA within six months after the act or omission that constitutes unfair discrimination. The EEA gives broad discretion to an adjudicator in respect of remedies from unfair discrimination.

The SABC argued that the CCMA did not have jurisdiction over the dispute because it had arisen in 1998. The argument was that the employees had been aware of the unfair act for seven years, while the LRA required a party to refer an

'unfair dismissal' dispute within 90 days and the EEA six months. SABC argued that CWU would have to apply for condonation (pardoning) for the late filing and that it had not done this.

CWU argued that because the dispute was ongoing, and it was prepared to limit the relief in terms of the period which fell within the CCMA jurisdiction, they did not need to apply for condonation. It also argued that the union had only recently gained knowledge of the discrimination.

The CCMA ruled that the CWU need not apply for condonation because it had only become aware of the unfair labour practice in August 2005 which fell within the prescribed 90-day period. Furthermore, the CCMA recorded that the parties would refer the matter to the Labour Court.

The SABC however launched an application to review the CCMA's award on the basis that the dispute was seven years old, that condonation had not been applied for, and that it was entitled to finality. Furthermore, at the time the dispute arose, the four employees were not members of the CWU. The Labour Court dismissed the review and condonation application and the SABC appealed to the Labour Appeal Court.

The SABC argued that the unfair labour practice/unfair discrimination consisted of a single act that took place seven years previously and that it was only the consequences that were ongoing and so the CCMA should require CWU to make a condonation application.

The LAC agreed with the SABC that the Commissioner's ruling was incorrect to the extent that 'it is not the knowledge [of the unfair practice] of the Union that is relevant but that of the "employee". Therefore if the dispute was a single act which occurred in 1998 the review application may succeed. However, an unfair labour practice/unfair discrimination may also be continuous…'

Therefore, the judge ruled that 'the date of dispute does not have to coincide with the date upon which the unfair labour practice/unfair discrimination commenced because it is not a single act of discrimination but one which is repeated monthly.' Ongoing was an accurate description and so the union did not need to apply for condonation. The SABC's review application was dismissed on 18 November 2009.

Given that the dispute was ongoing and on the strength of the *Equity Aviation* case the union need not limit its claim for relief to the 90-day period in which to refer an unfair labour practice or to the 12-month compensation limit in the LRA. The union was also entitled to pursue a remedy under the EEA.

In a recent strike the employer informed us that we had been locked out without giving us 48-hours notice. Is this legal?

In 2009 a dispute arose at KFC in Wolmaransstad (owned by Donco Investments) over the withdrawal of employees' meal benefits. On 30 March 2009 the employees engaged in a protected strike. On 15 April 2009 the union decided to end the strike and return to work.

The employer however had other plans. It informed employees that a shift roster was not prepared and they should return the next day, on the 16th. Then without giving notice of a lockout, the employer advised the union by letter that its members would be locked out from 16 April 2009, and that, 'Your members will not be required to tender their services during the notice period of the lockout. However, your members will be remunerated for the period of two days in lieu of the notice as required in terms of section 64(1)(c) of the Labour Relations Act.'

Section 64 of the LRA confirms the right of employees to strike and the right of employers to lockout. Section 64(1)(c) requires an employer to give 48 hours notice of a lockout.

In *Nasecgwu & others v Donco Investments* the question which the Labour Court had to answer was: is the lockout lawful? In other words, can an employer give notice pay instead of a notice period?

The Court looked at the purpose of the law requiring notice before lockout. The notice period gives the union and employees an opportunity to reflect on the proposed action and their response thereto. Once a lockout is instituted, the employer does not have to remunerate the locked-out employees. Thus decisions taken during the 48-hour notice period can have vital economic consequences for employees and they must have the chance to make decisions.

The Court therefore held that the lockout instituted on 16 April 2009 was unlawful and had to stop. The employer was ordered to remunerate employees for lost wages because of the lockout. LB

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