Unlocking labour laws

In each edition *Labour Bulletin* takes queries from workers, shop stewards and organisers on matters of labour law where information or clarification is needed. You are welcome to send in your queries and we will get our labour lawyer to give an opinion. We received these queries recently and *SALB's* lawyer, **Anton Roskam**, gives these answers.

In our company some employees are doing the same work, but are being paid different wages. How can we challenge this?

This is a large subject and the facts would need to be thoroughly investigated. I suggest that you consult your union's legal officer or an attorney about this matter.

The first thing to do is to find out from your employer why there are different wage rates. There may be a rational reason such as length of service.

If there is no rational reason, then there are three possible ways to challenge it. The first is to refer a dispute to the Labour Court claiming unfair discrimination. But this is difficult. You would have to establish that there is direct or indirect differentiation on the grounds of race, gender or one of the other grounds listed in section 6(1) of the Employment Equity Act.

If the differentiation is not based on one of these listed grounds, you can try to base it on analogous (similar) grounds. However, you would have to show that the analogous ground was one that related to the workers' personality and identity and that it was intrinsic to, and has the potential to impair human dignity. This is very difficult to do.

The second is to refer a dispute to the Labour Court basing your claim on the constitutional right to fair labour practices. You would have to argue that the labour statutes do not give statutory expression to a right in this context and that they should provide you with some kind of legal protection. This would be a difficult case to prove and is legally very controversial.

The third and perhaps easiest way would be to declare an interest dispute in which you demand that all employees doing equivalent work be paid the same. You could then strike in support of that demand. Once you have a collective agreement to this effect, and if the company continued to pay workers

different wages for the same work, you would be able to declare a dispute about the application of this agreement.

The workers at our factory want to go out on strike if the company does not agree to our wage demands. Some of the employees outside the bargaining unit say they are willing to strike as well. Can they do this and do they have to give the employer notice of their intention to strike?

Firstly, I understand the question to be referring to a *company* and not an industry strike. Employees outside the bargaining unit may strike provided your strike is protected. They don't have to give notice as well. They will not get anything themselves because your demands are only in relation to bargaining unit employees. Therefore the strike by non-bargaining unit employees in support of your demands will be solidarity strike action.

Let's assume that the union has followed the procedures for resolving your interest dispute so that the strike by the bargaining unit employees is protected. Let's also assume that the union has given the required 48-hour notice of your intention to strike. Your strike is therefore protected. What can the non-bargaining unit employees do? They can simply go on strike.

The strike by the non-bargaining unit employees is a solidarity strike. But it is not a secondary strike as defined in section 66 of the LRA because you all have the same employer. Their strike is therefore also governed by section 64 of the LRA and you have already complied with all the requirements of that section. Remember that section 64 of the LRA is not simply about primary strikes; it's about all strikes. Section 66 governs a particular kind of secondary strike and section 77 socio-economic strikes.

If your company kicks up a fuss refer them to the following two cases: CWIU v Plascon Decorative Paints (1999) 20 ILJ 321 (LAC) and SACTWU v Free State & Northern Cape Clothing Manufacturers' Association (2001) 22 ILJ 2636 (LAC).

The employer has been persecuting me. Can I resign and claim from him? How much could I get?

Your situation is commonly referred to as constructive dismissal. It is governed by section 186(1)(e) of the LRA which defines dismissal to include a situation where "an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee…".

In other words, the termination of employment is initiated by the employee, but is considered to be a dismissal because the conduct of the employer 'forced' the termination to take place.

My advice is 'Be careful!' There are many law reports of cases where employees have been unsuccessful with constructive dismissal claims. The main reason is that the courts have found their working conditions to be difficult, but not intolerable.

If you resign and claim constructive dismissal, you must prove that you were dismissed. This means that you must prove that your working conditions were in fact intolerable, and not simply difficult. Intolerable means 'objectively unbearable'.

In assessing this the courts adopt an objective test. It is not your view that establishes intolerability, but rather the conduct of the employer. Because the claim is for compensation only, the courts generally set a high standard. The act of resignation should be an act of final resort. There should be no alternative remedies.

The courts will consider your attempts to resolve the problematic working conditions. This means that you must raise your grievances on a number of occasions and the court will assess the responses of the employer. You must exhaust all possible remedies before resigning.

If you successfully prove that your working conditions were intolerable, thereby justifying your resignation, then you have proved that you have been dismissed. The employer may try to prove that, notwithstanding this, your dismissal was fair, but this would generally be difficult to do in these circumstances. You may then claim compensation.

The maximum compensation that you may claim is 12 months remuneration. The judge or commissioner has the discretion to award you less than 12 months. For this claim you would generally refer your dismissal arbitration to the CCMA or the relevant bargaining council, if there is one.

If you can show that your dismissal involved discrimination such as racism or sexism, then the maximum that could be awarded is 24 months remuneration. In this case you would have to refer your dispute to the Labour Court after conciliation at the CCMA or relevant bargaining council.

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