

Unlocking labour laws

No pay increase in 8 years!

QUESTION:

'I am employed as a cleaner and work for a news organisation. I earn R1,700 per month and my salary has not increased since 2005. What legal action can I take against my employer?'

ANSWER:

Unless an employer has agreed to pay a salary increase, the general principle is that an employee does not have a right to a salary increase. Although there are mechanisms in place to assist the employee to negotiate for a salary increase, and depending on the nature of the business, there may also be a minimum wage or minimum increase prescribed by a sectoral determination. Although South Africa does not have a general minimum wage in place, there are a number of sectoral determinations which do dictate minimum wages and salary increases which must be paid by employers that operate within the applicable sector.

Whether or not the employer in this particular case is obliged to pay an annual salary increase will therefore depend on a number of factors, and the employee concerned should consider the following questions:

1. Is there a collective agreement in place which regulates the employee's salary?

A collective agreement is one which is negotiated and concluded in a bargaining council, by the parties to a bargaining council, or it is negotiated and concluded between an employer and a union representing employees at an organisation.

If there is a collective agreement that regulates salary and annual increases, the employee should follow the dispute procedure set out in the collective agreement and may refer a dispute about the interpretation



or application of a collective agreement to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation or arbitration.

If the employee is a member of a trade union, the employee should approach the trade union for assistance, although it appears as if the employee does not belong to a union.

2. Is there a contract of employment between the employer and employee which makes provision for an annual increase to be paid?

If the answer is 'yes' and there is such a contract and a contractual provision for an increase, then the employer may be in breach of contract. This type of dispute is called a rights dispute (because the employee has a 'right' to an increase). If the employer refuses to abide by the terms of the contract of employment, the employee has a number of options to choose from. Firstly, the employee could approach the Labour Court as the Labour Court has jurisdiction over matters concerning contracts of employment.

Although the CCMA and bargaining councils have jurisdiction over some rights disputes, they do not have general jurisdiction over all contractual terms. The employee could possibly request private arbitration or could also pursue the matter as a breach of contract claim in the Small Claims Court and would not need an attorney for this or in the Magistrate's Court, but

this would require an attorney. In my view, if the employer refuses to abide by the contract the Labour Court, which is better placed to consider employment-related disputes, is probably the best route for the employee to pursue. The employee could approach the Pro Bono programme offered in the Labour Courts by South African Society for Labour Law for assistance.

However, before approaching the Labour Court, the employee should approach the employer to discuss the breach of contract. The employee should also request for an agreement on the payment of the increase in the future, and on payment of back-pay in respect of the years in which an increase was not received, notwithstanding the terms of the contract.

Again, if the employee is a member of a trade union, he or she may approach the trade union for assistance, although it appears as if the employee does not belong to a union.

3. Is there a sectoral determination which governs the employment relationship?

Although there is no general minimum wage in South Africa, the Basic Conditions of Employment Act (BCEA) permits the minister of Labour to prescribe certain minimum terms and conditions of employment, including minimum wages. The minister does so by way of sectoral determinations, which are periodically revised, particularly in the sectors in which vulnerable workers are employed including, for example, the domestic sector, the private security sector, the farm worker sector and the wholesale and retail sector.

The employee in this particular case states that he or she is 'a cleaner and works for a news organisation'. It may be therefore that one of the following sectoral determinations will apply:

Domestic Sector Determination

This determination typically applies to workers who are employed in residential rather than commercial workplaces and it is therefore possible that the employee would not be covered by the determination. The minimum wages determined for this sector vary from R1,491.86 to R1,746.00, depending on the geographical location of the workplace.

Contract Cleaning Sector Determination

This sector involves cleaners on a fixed-term contract. It would appear from the facts that the employee concerned is on an indeterminate contract. However, if the employee is employed on a fixed-term contract and the determination applies, the minimum wages for this sector vary from R13.09 to R14.45 per hour, depending on the geographical location of the workplace.

Wholesale and Retail Sector Determination

This determination applies to categories of workers in the wholesale and retail sector, including a 'general assistant', the definition of which includes a person responsible for cleaning in a wholesale or retail business. The minimum wage for a general assistant varies from R2,177.98 to R2,922.83, depending on the geographical location of the workplace.

If there is a sectoral determination that is applicable to this employment relationship, and if the employer is in breach of the terms of the sectoral determination, the employee may request the assistance of a labour inspector from the Department of Labour in terms of chapter 10 of the BCEA.

As stated above, if the employee is a member of a trade union, the employee may approach the trade union for assistance, although as mentioned before, it would appear as if the employee does not belong to a union.

Finally, if there is no collective agreement, no contract of employment and no sectoral determination which can assist the employee, the question then arises whether the employee can rely on the mechanisms established to resolve disputes of interest.

4. Is there a dispute of interest which the employee may be entitled to act on?

Whereas a dispute of right (for example a breach of contract dispute) involves an existing right, a dispute of interest on the other hand involves the formulation of new rights such as higher wages (that the employer has not yet agreed to). A dispute of interest is usually resolved by means of negotiation and industrial action (strikes) if necessary.

In this case, if there is no contractual right to a salary increase, or a collective agreement governing wages, or a sectoral determination establishing a minimum wage, then it may be that treating the salary increase as a matter of mutual interest is the route which the employee should pursue. As previously highlighted, if the employee is a member of a trade union, the employee may approach the trade union for assistance, although it would appear from the facts that the employee does not belong to a union.

Further, the employee may want to ascertain if there are other workers at the workplace who have not received annual increases and who would like to pursue the matter. Engaging in industrial action such as a go-slow or a full-blown strike is considered to be 'collective' action requiring more than one worker. To proceed on strike legally requires the dispute first to be referred to the CCMA for conciliation. If conciliation fails, the employees must give notice of their intention to strike.