

Is The Labour Law reasonable?



The concept of reasonableness has a strong subjective element. For instance, a salary increase of 50 % might seem reasonable to me if I have been earning a lot less than my colleagues. However, if my employer does not want to set a precedent of giving 50% increases then a demand for such a big increase will not be reasonable to him.

The term 'reasonable' is used in labour law and industrial relations not only to describe pay demands but in many other areas. For example, this concept comes up when the following questions are asked:

Can the employer prove that the employee, accused of insubordination, refused to obey a 'reasonable' instruction? Why was it a reasonable instruction? What made it unreasonable to the employee?

Was the trade union's decision to embark on an unprocedural strike reasonable?

Is it reasonable for an employer to hire armed security guards to evict strikers from the premises?

Can the Labour Court, in considering the review application of a CCMA arbitration award, decide whether the arbitrator reasonably applied his/her mind to the facts of the case? Was the arbitrator's decision to disallow certain evidence a reasonable one?

Was the employer's decision to dismiss an alcoholic employee fair and reasonable under the circumstances or would a 'reasonable' employer have sent the employee for treatment?

Was it reasonable for the employee involved in retrenchment consultations to refuse the employer's offer of a transfer to another branch?

Another place in labour law where the elusive term, 'reasonable' appears is in section 186(1)(b) of the Labour Relations Act (LRA) which says that the meaning of dismissal includes the situation where, "an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it."

What is most important however, is how the courts interpret the term "reasonable", a very important

term in labour law.

In the case of Fidelity Cash Management Services (Pty) Ltd vs Muvhango NO & others (2005, 8 BLLR 783) the employee was dismissed for alleged leave application fraud. He took his case to the CCMA where he won reinstatement. The employer applied to the Labour Court for review complaining that part of the CCMA proceedings were not tape recorded. Both parties attempted to reconstruct the arbitration hearing record. The employer asked the Labour Court to order a new CCMA hearing because the record was incomplete.

However, the Court found that the employer had not, in the Court's view, made a reasonable effort to reconstruct the record. The Court further found that, based on the section of the arbitration hearing record that had been salvaged, the employer's version of events was self contradictory. For the above two reasons the review application was dismissed.

The employer lost this case largely because of the Labour Court's interpretation of the word 'reasonable'. In the case of SACTWU and another VS Cadema Industries (Pty Ltd) (2008, 8 BLLR 790) the employee had been employed on a long succession of short fixed-term contracts that had been renewed on an ongoing basis for four years. Thereafter the employer informed the employee that it would not be renewing the contract again. The Labour Court found that this constituted an unfair dismissal because the employee's expectation of further renewal was reasonable. This was due to the fact that so many short fixed-term contracts had previously been renewed and there was plenty of work for the employee to do.

The challenge for the employer is, before taking any action relating to employees, to consider very carefully whether the courts will adjudge as reasonable the employer's action and the employee's potential reaction. What the courts and CCMA find to be fair and reasonable has changed over the years and is still changing constantly. Keeping up with these interpretations of what is reasonable is thus extremely difficult for the lay employer. Thus the employer needs to get from a reputable and experienced labour law specialist expert advice on:

Whether the employer's action will be deemed reasonable

Anticipating the employee's potential reaction

Whether the Courts would see the employee's reaction as reasonable.

To Book for our 6 March 2013 Seminar in Johannesburg on DEFEATING THE DANGERS OF DISMISSAL please contact Ronni via 0845217492 or ronni@labourlawadvice.co.za.

BY Ivan Israelstam, Chief Executive of Labour Law Management Consulting. He may be contacted on (011) 888-7944 or 0828522973 or on e-mail address: ivan@labourlawadvice.co.za. Go to: www.labourlawadvice.co.za.