

The LRA and Unfair Labour Practices



The Labour Relations Act (LRA) does not define the meaning of “unfair” but describes “Unfair labour Practice” as “any unfair act or omission that arises between an employer and an employee involving- unfair conduct by the employer relating to the promotion, demotion, probation (excluding dismissals of probationers) or training of an employee or relating to the provision of benefits to an employee); the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee; a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 on account of the employee having made a protected disclosure defined in that Act.”

The word “unfair” is mentioned several times in the above definition. For example, under part (b) of the definition the section mentions “...any other **unfair** disciplinary action...” However, without an explanation of what ‘unfair’ means the entire definition of an unfair labour practice is meaningless. For example, there are many fair actions relating to discipline and many unfair ones. How do we distinguish between these? In addition to the definition of ‘unfair’ that I proposed above it is useful to examine the way in which arbitrators attempting to resolve labour disputes decide whether an act of an employer is fair or unfair.

The question as to what does and does not constitute an unfair labour practice is so complex that arbitrators and judges are sometimes unable to agree with each other as to what actions do and do not fall under this definition.

In the case of SAPU obo Louw vs SAPS (2005, 1 BALR 22) the arbitrator found that failure to pay the

employee a merit award did fall within the definition of an unfair practice. This is despite the decision of another arbitrator made at the same forum a little earlier that payments of merit awards do not fall into the definition of unfair labour practices.

In *Solidarity obo Kern vs Mudau & others* (2007, 6 BLLR 566) the employee, a senior personnel officer was moved to the post of committee officer after the incorporation of one municipality into another. The employee alleged that he had, via this move, been unfairly demoted. The arbitrator decided that the action of the employer did not constitute demotion. When the employee took the matter on review the Labour Court found that the employee had in fact been demoted because the position of committee officer was lower than that of a senior personnel officer. The Court said that the arbitrator did not understand the concept of demotion. Also, the job that the employee had been doing was equivalent to that of a HR Manager. The Court therefore ordered the employer to pay the employee the difference between the annual salary he had been paid and the annual salary of a HR Manager.

Another question is how the arbitrator rectifies an unfair labour practice. It appears that arbitrators are required to try to put the employee back in the same position he/she would have been in had the unfair labour practice not occurred. For example, in *Kwepile vs Department of Foreign Affairs* (2005, 12 BALR 1225) the employee was unfairly recalled from overseas duty before his term of duty had expired. The arbitrator ordered the employer to pay the employee for those benefits he would have received between the date of premature recall and the scheduled end date of his term at the overseas office.

At the root of many 'unfair' practices is the employer's attempt to gain something. There is nothing wrong per se with an employer gaining something, as long as the employee does not lose out unfairly as a result. Thus, an employer is entitled to protect its interests or save money by disciplining an employee or changing the employee's benefits provided that the discipline is merited or the loss to the employee is justified.

The problems that employers face when deciding whether the actions they wish to take will or will not be shot down by the CCMA, bargaining councils and courts include:

What one person considers to be unfair another will consider to be fair

The courts and arbitrators disagree on this amongst themselves

The employer has no control over which arbitrator will preside over the case.

It is thus a serious and dangerous challenge for the employer is to judge when its actions are merited and justified and whether an arbitrator would find them to constitute an unfair labour practice. Due to the complexity of the law such judgement cannot be done via guesswork. Every employer must therefore obtain comprehensive and in-depth expertise in labour law via the use of a reputable labour law expert and via training of all levels of management in the application of labour law.

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