

Employees participating in an unprotected strike – Employers should communicate with their employees

In *SACTWU & Others v Mediterranean Textiles Mills (Pty) Ltd* the applicant's members ('the employees') claimed that they had been unfairly dismissed on the basis of their participation in an unprotected strike.

On 29 November 2007 the employer held a meeting with the union during which the latter was informed that the employer would not be paying any annual bonus for 2007, which was due to be paid two weeks later. The employer also informed the union that it would apply to the relevant bargaining council for an exemption from its obligation to pay bonuses in terms of the main agreement of the bargaining council.

After the meeting, on the same day, the employer placed a notice on the company's notice board confirming and advising employees of the non-payment of bonuses and the fact that it would apply for an exemption. On 4 December, just before 07h00, employees gathered at the company's premises and requested to speak to management.

The employer's position was that there was no need to meet with employees as the notice issued on 29 November was clear and needed no explanation. At 07h30 written warnings were handed to the employees. At the same time the shop stewards were handed a letter, which was also sent to the union, asking why a final ultimatum should not be issued to the employees.

The shop stewards informed the employer that they were unable to persuade the employees to return to work and the employees were requesting that management speak to them directly. At 09h30 an ultimatum was handed to employees warning them that if they did not return to work by 11h00 they would face dismissal. The ultimatum was read aloud, but the employees refused to accept copies thereof. The employees were dismissed at 11h15.

The court held that the determination of whether participation in an unprotected strike constituted a fair reason for dismissal required a weighing up of all facts, with particular regard to the cause, nature, objectives and extent of the strike; its timing and duration; the conduct of the employees; and the consequences of the strike.



It was however trite that participation in an unprotected strike might constitute a fair reason for dismissal. Item 6 of the *Code of Good Practice: Dismissal* provides that the fairness of any dismissal pursuant to an unprotected strike has to be determined in light of the facts of each case, including, whether or not the strike was in response to unjustified conduct by the employer.

The court noted that it was important that an employer did not act in an overhasty manner. It has to give a fair warning or ultimatum that it intends to dismiss employees, so that the employees involved are offered a proper opportunity of obtaining advice and taking a rational decision as to what course to follow. Both parties must have sufficient time to cool off so that the effect of anger on their decisions was eliminated or limited. On the evidence the court was convinced that the employer had known long before November 2007 that it would face difficulties in paying employees their bonuses for 2007. It was reckless of the employer to have done nothing about the bonuses until almost at the end of 2007, which was unfair to the employees.

The employer was therefore partly to blame for the strike. Merely referring the employees to the notice on the notice board was irresponsible under the circumstances. Had management attended a meeting as the employees had requested, the potential was there that the strike could have been resolved. While the strike might have been unlawful, its objectives were not. The employer had acted with unnecessary haste in dismissing the employees. When weighing up all the factors the court was of the view that the participation of the employees in the strike did not constitute a fair reason for dismissal. In the result, the employer was ordered to re-instate the employees with no loss of income and benefits, no order as to costs.

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