



Payment of employer's contribution to benefit schemes when employee is on unpaid leave

SAMWU v City of Cape Town & Others (Labour Court C472/08, Date of Judgment 27 August 2009 per Cele J) was an application to review the award issued by the third respondent ('the commissioner'), in terms of which it was held that the first respondent ('the employer') had not committed an unfair labour practice.

As part of their conditions of employment the members of the applicant ('SAMWU') were entitled to employer contributions to various benefit schemes such as medical aid, pension fund, housing subsidy and group life insurance. As at 2004 the employer did not have a consistent practice on how to handle cases of employees who went on unpaid leave. During 2004 the Human Resources directorate of the employer prepared a report pertaining to the creation of a standard and uniform unpaid leave policy for presentation to the City Manager. The report proposed that, in principle, pro rating had to apply to all benefit and benefit schemes during a period of unpaid leave. Engagements were entered into between the employee and various unions regarding the proposed "no work, no pay, and no benefits" policy. During 2005 some employees belonging to SAMWU embarked on a 3 day strike. The employer did not pay the employer contributions to the different schemes referred to previously for these employees, pro-rated to the number of days that the employees were on strike. It regarded the three day strike as unpaid leave and required the striking employees to pay both the employer and the employee contributions in respect of the benefits for that period. A dispute arose due to this which was subsequently referred for conciliation to the second respondent ('the bargaining council') as an unfair labour practice. At arbitration, by agreement between the parties, no oral evidence was led. Documents were handed in by both parties. The commissioner held that the dispute, although having elements of both remuneration and benefits, was more a dispute around benefits and as such the bargaining council had jurisdiction to consider the dispute. SAMWU therefore had to show that the conduct of the employer was unfair and unreasonable. The commissioner held that while there might have been subjective perception of unfairness, SAMWU failed to prove unfair conduct on the part of the employer on a group basis. As such the commissioner held that the employer had committed no unfair labour practice. The employer's argument was that it had not acted unfairly as it had applied the provisions of the BCEA due to the fact that the collective agreements between the parties did not deal with unpaid leave.

The court held that it was difficult to understand why the parties had decided not to lead any oral evidence at the arbitration. The consequence was that no evidence was led to show how the employer had committed an unfair labour practice against the employees. The court held that it found it difficult to construe a rationale for the prejudicial effect if the employer withheld the pro rata share contributions in respect of benefits, which was different to the withholding of remuneration. The court as such agreed with the commissioner that NUMSA had failed to show how the employer committed an unfair labour practice. NUMSA had not shown anything which made it an unfair labour practice for the employer to rely on the provisions of the BCEA either.

In the result, the application for review was dismissed, with no order as to costs.

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