

## **Which demands are union members entitled to strike over?**

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*NUMSA & Others v Edelweiss Glass & Aluminium (Pty) Ltd* (Labour Court JS795/03, 5 June 2009 per Todd AJ) involved an application by the union (NUMSA) on behalf of its members ('the employees') that they had been unfairly dismissed for participating in strike action.

After the employer had proved unwilling to grant all of the organizational rights which NUMSA sought, NUMSA referred a dispute to the CCMA. Several letters were thereafter exchanged between the parties in which NUMSA sought organizational rights, as well as making demands in respect of sick leave, overtime, a 13th cheque etc. While the employer was willing to resolve the organizational rights dispute, it was reluctant to conclude an agreement on terms and conditions of employment. As an outcome of the first attempt at conciliation NUMSA sent the employer a consolidated list of demands, dealing with organizational rights as well demands relating to conditions of employment.



The parties were unable to conclude an agreement before the conciliation proceedings reconvened on 7 August 2003. On that date the commissioner issued a certificate of non-resolution of the dispute that had been referred to it, being the organizational rights dispute. On the same day NUMSA gave notice to strike to the employer. The employer communicated to the employees its view, namely that the strike action was permissible only in support of NUMSA's organizational rights demands, and employees were not entitled to strike over demands in support of substantive matters.

On the day the strike commenced the shop stewards informed the employer *“Don’t worry about the organizational rights issue. Just pay us a 13th cheque.”* The employer was of the opinion that the employees had therefore abandoned their organizational rights issues, and were now only striking over a substantive issue. The employer thereafter informed the employees that the strike was unlawful from that point onwards and the shop stewards were suspended and dismissed. On 18 August 2003 the employer issued ultimatums to the striking employees calling upon them to return to work. Later the same morning a final ultimatum was issued which stated that *“Employees persisting in the unprotected strike may be dismissed as a group due to the fact that it would not be advisable to have disciplinary hearings for all striking employees as a result of the urgency of this matter and the amount of employees involved.”* After failing to return to work, the employees were dismissed.

The court held that an important procedural requirement that had to be complied with if a strike was to be protected in terms of the LRA, was that the issue in dispute must have been referred to a council or the CCMA. In determining whether or not an issue in dispute had been referred as such, the court had a duty to ascertain the true nature of the dispute between the parties.

To this extent the court had to look at the substance of the dispute and not merely the form in which it was presented. Although as a general proposition the issue in dispute over which a strike could be called had to be the issue that had been referred to the CCMA, this was not a rule *“to be applied in the literal sense”*. Parties might readily modify or develop their demands in the course of a collective bargaining dispute, whether during or after the conciliation process. That did not however mean that a trade union could call a strike ostensibly in support of one demand when the true demand was one over which no strike was permissible.

As to procedural fairness, fairness required that a hearing had to be held before ultimatums were issued. This requirement might be satisfied where an employer engaged with the trade union to discuss the course of action the employer intended to adopt prior to the issuing of an ultimatum. In addition, fairness might also require that a further hearing was held (whether before or after workers had been dismissed) in order to ascertain whether the employees complied with or attempted to comply with the ultimatum.

The course of action the employer adopted in the present matter was premised on its view that the employees were precluded from pressing a demand for a 13th cheque and if they did, the strike then became unprotected. The court held that none of these views were correct, and as such the strike had been protected for the reasons to follow. The evidence did not support the employer’s contention that the employees had abandoned their organizational rights demands. Even if the employer was correct that the demand for a 13th cheque could not have been pressed during the strike, the strike itself was not rendered unprotected merely by reason of the employees articulating this demand.

However, according to the court the employees were indeed entitled to press a demand for a 13th cheque in the present circumstances. In this matter the demand over a 13th cheque had in fact already been the subject of negotiations between the parties. It would be unrealistic in the context of a strike to insist that in any engagement between the parties to try and resolve the strike the parties were limited to pressing only those demands that were specifically formulated in the run-up to the strike. As the strike was protected the dismissal of the employees was automatically unfair. As far as procedure was concerned, the failure to engage the union prior to issuing the ultimatums, the unreasonably short period provided to the employees to react to the ultimatums and the failure of the employer to provide a realistic opportunity to NUMSA or the employees to make representations either prior to or following the termination rendered the dismissal procedurally unfair as well.

As to relief the court held that most of the dismissed employees had since their dismissal secured alternative employment. The employees however indicated that they sought reinstatement. In the result, the employer was ordered to reinstate the employees retrospectively, subject to the proviso that those who indicated that they would rather accept compensation were entitled to 24 months' remuneration, with costs.

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