



LABOUR LAW UPDATE

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CASE 1

CASE SYNOPSIS:

Territorial discrimination

In **USA obo Horne & others / Atlantis Foundries (Pty) Ltd** (2011) 7 BALR 779 (MEIBC),

Atlantis Foundries provided subsidised transport between home and work for weekly-paid workers, which monthly paid employees could also use, if they so wished. The service was not of much use to monthly-paid employees because the taxis left on the return trip at the weekly-paid workers' knock-off time, which was an hour earlier than that of the monthly-paid employees. After representations from monthly-paid staff, Atlantis Foundries agreed to extend the transport scheme to all monthly-paid staff, with the exception of those who resided in the Malmesbury area. Those employees cried foul, and referred a dispute to the Metal and Engineering Industries Bargaining Council.

The company accepted that subsidised transport constitutes a "benefit" as contemplated in section 186(2)(a) of the LRA, but argued that this particular matter involved a "dispute of interest", and accordingly fell outside the Bargaining Council's jurisdiction. The Commissioner dismissed that argument, as well as the company's defense on the merits.

To deny a benefit to a select group of employees is unfair unless the differentiation can be justified. In this case, denying the benefit only to the Malmesbury employees was unfair because the company had extended the subsidised transport to all its monthly employees except them. Malmesbury may have been relatively far from the workplace but the company's claim that it could not afford to extend the subsidy was not compelling, because it would have added a tiny fraction to the amount it already paid for travel subsidies for its staff. In any case, if costs were a factor, the fair solution would have been to proportionally decrease the subsidies for other routes. Atlantis Foundries was ordered to extend subsidised transport to the Malmesbury employees.

WHAT THIS MEANS FOR YOU:

When differentiating between staff, ensure that the differentiation is justifiable. If there is a way to avoid unnecessary differentiation, especially if based on arbitrary grounds, you are advised not to differentiate.





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CASE 2

CASE SYNOPSIS:

Striking award

In **Network Filed Marketing (Pty) Ltd v Mngezana NO & others** (2011) 7 BLLR 669 (LC)

In this case the Labour Court indicated to CCMA commissioners a lesson in how not to analyse evidence.

The employee, a Regional Manager and Marketing Representative, attempted to sell batteries marketed by his employer, which were normally used for free distribution to its own clients.

The person approached by the employee was suspicious, and reported the matter to the company. The client in turn complained to Network Field Marketing, and the employee was dismissed. The Commissioner found that the company had failed to discharge the onus of proving the dismissal fair, and reinstated the employee with retrospective effect. The company contended that the Commissioner misdirected himself by making adverse credibility findings against its witnesses by rejecting their testimony, by accepting the employee's uncorroborated evidence, and by making a finding which had no foundation in the evidence.

The Labour Court concluded that after the Commissioner regurgitated the evidence in the densely printed 12-page award, he jumped to the conclusions that one of the company witnesses was "totally unreliable", that the evidence did not prove that the employee had committed misconduct, and that the employee's scheme would have benefited the company, rather than the employee himself. The Labour Court concluded that regurgitating evidence does not indicate that a Commissioner has analysed it.

The few instances where the Commissioner had revealed his reasons were far from convincing, and the bold conclusion that the witnesses were unreliable was based on one minor contradiction between the evidence of two witnesses. In particular, the commissioner did not explain why it was necessary to resort to credibility findings when the balance of probabilities so clearly favoured the employer.

A minor contradiction between witnesses is insufficient to impugn the reliability of their evidence in total. By excluding the company's evidence on this unwarranted basis, the Commissioner had denied it a fair hearing. The award was set aside and remitted to the CCMA, which was directed to appoint a senior Commissioner to decide the matter on the existing record, together with such additional evidence as the parties might wish to present.

WHAT THIS MEANS FOR YOU:

Another good exposition of how an award should be set out. All these will be clarified once the new arbitration guidelines are effective. This case can also be used in guiding chairpersons in their outcomes. Merely regurgitating evidence does not show a proper analysis, especially if the conclusions the chairperson arrives at are not grounded in fact.

Clearly set out the relevant factors in arriving at the outcome and ensure that there is a link between the evidence and your conclusion.

