Does sudden exclusion from a commission scheme constitute unfair labour practice?

By Bradley Workman-Davies

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In a recent case the Commission for Conciliation, Mediation and Arbitration (CCMA) had to examine whether an employer, by excluding employees from a scheme which allows employees to earn commission had committed an unfair labour practice (ULP).

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The issue arose when the employer stopped paying commission to the sales team's support staff after introducing a new sales commission policy which excluded the employees from earning commission.

This was the issue to be decided in the recent case of *Broadcasting, Electronic, Media & Allied Workers Union obo Van Der Ross and others v South African Broadcasting Corporation (SOC) Ltd [2023]* (CCMA).

This matter concerned several employees who are employed as support staff (the employees) to the sales team of the employer. These employees occupied different positions and earned different salaries (being their basic salary plus commission).

Prior to the introduction of the new policy in April 2022, the support staff had been receiving commission since 2001, followed by the introduction of a formal policy which regulated payment of commission in July 2003 known as the economic added value policy (EVA policy). The EVA policy allowed for the employees to receive commission but was due to terminate after a three-year period of its implementation.

Change of policy

The dispute arose when the employer introduced a new policy which excluded support staff from earning commission. The employer contended that the support staff were consulted before the decision to exclude them from earning commission

had been taken. The employer also contended that employee participation in any scheme had always been subject to management's discretion and accordingly that this could be withdrawn at any time.

In its determination, the CCMA considered the Labour Appeal Court in *Hospersa and another v Northern Cape Provincial Administration [2002]* (LAC), where the Court held that employees may enforce existing rights to benefits through the dispute process relating to unfair labour practices. The Court defined the word 'benefit' to mean rights that an employee is entitled to arising *ex contractu*, *ex lege* or from a collective agreement. In this respect, the CCMA found that the employer's commission scheme constituted a benefit.

The CCMA highlighted the fact that the employer excised its discretion to include employees from benefiting from the commission scheme for over 20 years. The CCMA held that even if the new policy came into effect immediately after terminating the EVA policy, an employer cannot, after 20 years, choose to use its discretion to exclude participants (ie. employees) from benefiting in the commission scheme without providing valid reasons for doing so.

The CCMA highlighted the following factors which an employer must consider before using their discretion to exclude employees from a benefit provision of which they had been subject/participants of for a long period:

- the employer's discretion is subject to CCMA scrutiny in terms of section 186 (2) of the Labour Relation Act 66 of 1995, which regulates unfair labour practice;
- the employer must exercise its discretion in a fair manner; and
- the employer's reasons for excluding employees from a benefit provision (in this case earning commission) must be clear, especially in circumstances where employees had been allowed to participate in a benefiting provision for a long period (ie. 20 years).

The CMMA found that the employer, in this case, had committed an unfair labour practice by unfairly excluding certain employees from participating in the commission scheme in which they had been participants for several years.

The CCMA ruling highlights the important points that when employers make a decision to introduce a new policy which excludes certain employees from a benefit of which they had been participants of for an extended/long period, it is critical for employers to consult with employees prior to its introduction and implementation.

Furthermore, even if an employer's policy provides that the policy is subject to management's discretion to include or exclude participants to a benefit provision, employers must be cautious when exercising their discretion to exclude employees in circumstances where the benefit had been received for a long period of time. Lastly, that failure on part of the employer to exercise this discretion in a fair manner will amount to unfair labour practice.

On the other hand, this ruling is also useful to demonstrate that a benefit does not necessarily constitute a term and condition of employment which can never be unilaterally amended by the employer, or without the employee's consent. Rather, provided that the issue is consulted on, and there is a rational justification for why the benefit should be ended or amended, and the discretion of the employer is exercised fairly, benefit schemes may be adjusted by an employer, even in

the face of employee objections.

ABOUT THE AUTHOR

Bradley Workman-Davies, Director at Werksmans Attorneys