JUTA AND COMPANY (PTY) LTD

Juta Covid-19

Talking Points

Issue 4

LABOUR AND EMPLOYMENT

John Grogan and Avinash Govindjee

NEHAWU obo Members Providing Essential Services v Minister of Health and Others **(Labour Court case no J423-20 dated 11 April 2020 (Whitcher J)) was the first case after the lockdown in which a trade union tried to challenge the authorities on behalf of its members in the Labour Court.**

Heard via Skype in accordance with the court's state of disaster directives, the case dealt with initial concerns about the safety of healthcare workers. Having prepared a lengthy founding affidavit, NEHAWU gave the respondents (including the Minister of Health as first respondent, followed by the Department of Health, Minister of Employment and Labour and the MECs for Health in all nine provinces as further respondents) two days to file an answer. NEHAWU systematically covered situations in hospitals throughout the country, alleging that stocks of personal protective equipment (PPE) were woefully short.

Based on that summation, the union sought orders directing the Minister of Health to consult it over the provision of PPE to its members. NEHAWU didn't stop there: it also sought orders declaring unlawful any disciplinary action against members for refusing to work without PPE and directing the Minister of Employment and Labour to ban work that endangered the safety of health workers.

The Minister of Health filed a comprehensive answering affidavit in the brief time allowed. He pointed out that that the government was using its powers under the Disaster Management Act 57 of 2002 to curb the spread of the Coronavirus. He provided statistics which showed that there were adequate stocks of PPE. The Minister also maintained that organised labour had been consulted.

A union official could hardly rebut this detailed response. On the eve of the hearing of the matter, NEHAWU tried to do a U-turn – it informed the court that it had decided to withdraw the application. Neither the respondents nor the judge would give the union such an easy way out. The court agreed that it was in the public interest to determine whether the union's allegations were true.

The judge was aware that the application raised complex moral, financial and logistical issues. But, as she pointed out, her job was to determine the legal merits of the case. As NEHAWU must by then have realised, there were none on the facts or the law. The judge systematically compared the concerns expressed by the union about the state of affairs at dozens of hospitals with the Minister's unchallenged responses and concluded that NEHAWU had overstated its case, where it had any case at all. The Minister had assured health workers that they were not expected to treat COVID-19 patients without PPE and that if stocks were short, more would be drawn from reserves. NEHAWU had also inflated statistics regarding infections. In some hospitals, non-clinical workers were demanding protective gear. The Minister also said that his department had already

taken unions into its confidence on the situation. All this meant NEHAWU had not made out a case.

The Minister of Employment and Labour pointed out that he could enforce the health and safety measures under the Occupational Health and Safety Act 85 of 1993 (OHSA) only if he received complaints from his department. Thus far, he had received no complaints from health workers about inadequate PPE. There was also a compelling legal reason against an order requiring the Minister to enforce the OHSA – the Labour Court lacks jurisdiction to enforce that Act as a court of first instance. Finally, the Department of Employment and Labour can exercise its discretion under the OHSA to compel employers to minimise the risk faced by health workers only if it has failed to take reasonable steps to achieve that end. As the court had found, the Department of Health had taken reasonable steps.

The remaining issue was whether the court should prohibit disciplinary steps against health workers who refused to work without adequate PPE. The short answer was that NEHAWU had not cited a single instance of any health workers being disciplined for this reason. Obviously, no court could issue a global ruling prohibiting disciplinary action that as yet remained hypothetical.

The court expressed its displeasure when it came to costs. Usually, the Labour Court is loath to grant costs orders against recognised unions which litigate unsuccessfully. The judge accepted that the matter had raised matters of life and death. But unfortunately for NEHAWU, its case had proved to lack factual foundation. The respondents had been forced to use time which would have been better spent dealing with the pandemic. Moreover, NEHAWU had puffed up its own importance by insisting that the Minister of Health should consult it directly. The court felt it necessary to send a message to NEHAWU by adjusting the standard of what constitutes frivolous and vexatious litigation to legal grandstanding. The application was dismissed and NEHAWU was ordered to pay the Minister's costs.

Apart from showing the court's displeasure at NEHAWU's premature application, the judgment does not indicate how cases in which health or other workers disciplined for declining to expose themselves to a real threat of contracting COVID-19 without adequate protective gear may be treated. Such cases are bound to arise in the near future. Meanwhile, NEHAWU has expressed outrage at the judgment and claimed that the information and assurances the Minister had provided in the answering affidavit was all that it required. The union also gave notice that it would appeal against the judge's refusal to allow it to withdraw the matter. Whether and when this will be heard remains to be seen.

John Grogan is an advocate and well-known author on labour law. He has published various titles with Juta, including *Workplace Law* and *Collective Labour Law* to name a few.

Avinash Govindjee is Dean of Law, Nelson Mandela University and consultant to Cliffe Dekker Hofmeyr Inc.