EMPLOYEE REPRESENTATION IN GRIEVANCE HANDLING

Introduction

The ability of the parties to the employment relationship to regulate their respective rights and duties vis-à-vis each other by independent agreement has been progressively whittled down by statutory intervention. The employment relation which is primarily based on the common law contract of employment, emphasised the freedom of contract within only the broad limits of legality and the boni mores. This statutory intervention brought about a third party into the employment relations and thus made it a tripartite relationship. The individual employment relationship seldom would specify the extent of the employee’s duties, however, to a certain degree the obligation may be regarded as “standard term” of the common law contract of employment.

Such “standard terms” would include duties of obedience, care and fidelity, or the content of the employer’s duty of care towards the employee. In the employment environment, there is imbalance of power between the employer and the employees. Because of the power imbalance in which the employer has the upper hand, employees unite in order to be able to advance their interest with the employer. They do so by joining trade unions and pay subscription to the trade union.

In terms section 23(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution), employees have a “right to form and join trade union”. It should therefore be noted that employees when joining or forming a trade union are exercising their fundamental constitutional right. The Labour Relations Act, 1995 (the LRA) provides for the conditions for the establishment of trade unions, and the manner in which employees affiliated to trade unions must pay the union subscriptions (Chapter vi, Trade Unions and Employer’s Organisations).

According to the LRA, a trade union is viewed as “an association of employees whose principal purpose is to regulate relations between employees and employers, including employer’s organisations”. A trade union’s primary responsibility is to advance employees’ interest by engaging the employer on matters of mutual interest and further

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1 Workplace Law 9th Edition by John Grogan (page 1, par 1)
2 Boni mores means good morals
3 A guide to South African Labour Law by A Rycroft and B Jordaan (Page 39 par.2)
representing employees during disciplinary hearings and grievance resolution. Employees when confronted with unfair treatment or unfair labour practice have recourse to lodge a grievance against the employer. In terms of the Public Service Grievance Rules, 2003, a grievance means a dissatisfaction regarding an official act or omission by the employer, which adversely affects an employee in the employment relationship, excluding an alleged unfair dismissal. There are many reasons why a grievance can be raised and also many ways to go about dealing with it.

According to Swanepoel, workplaces that have trade union representation often file a grievance with an employer on behalf of an individual employee who so requests. Given that the primary purpose of trade unions is to restore and maintain some sort of balance or equity in employment relations, one can derive many different generalised objectives of trade unions:

- They try to improve the working conditions of their members as well as their terms of employment;
- They want to ensure that workers are treated fairly at work;
- They strive to improve the social security of their members;
- They strive towards ensuring that workers get a fair share of the wealth generated by organisations; and
- They aim in particular at getting greater control over the management of employment relationships within organisations.

Background

There are plenty of roles to be played by trade unions including those mentioned by Swanepoel. This article will focus on employee representation in the Public Service, and is informed by the number of grievances received by the Public Service Commission (PSC) for consideration.

It would appear from a number of grievances received by the PSC, that employees when lodging grievances do that without engaging or being assisted by their trade union representatives or employee representatives since there is, in most cases, no mention of representative details on the grievance forms.

The Grievance Form in the public service provides for employees to indicate the name of the representative at Part A. However, it appears that in most cases, either the employees do not wish to involve representatives or they are not aware that employee representatives may be nominated and appointed to assist them throughout with the resolution of their grievances. Employees do not consider the employee representation when lodging grievances as opposed to when they are charged with misconduct and have to face the disciplinary hearing.

It is for this purpose that an overview and importance of the role of employee representation by trade unions and fellow employees when dealing with grievances is addressed.

Overview of employee representation in labour relations

Employee representatives are:

a) Employees of an undertaking or establishment who have been formally designated employee representatives for that undertaking or establishment by a trade union in accordance with the rules of that trade union and any employer/trade union agreement which relates to the appointment of such representatives in that undertaking or establishment; and

b) Parties or employees who normally participate in negotiations about terms and conditions of employment for all or a section of the workforce and who are involved in the procedures for the settlement of any

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4 Rules for Dealing with the Grievances of Employees in the Public Service
5 “Dealing with grievances at work – Citizens Advice”

disputes or grievances which may arise in that undertaking or establishment.\textsuperscript{7}

The role of employee representatives on grievance resolution process

Swanepoel indicates the following as some of the functions of employee representatives in the workplace:\textsuperscript{8}

- Assisting and representing workers in grievance and disciplinary proceedings;
- Monitoring the employer’s compliance with the relevant provisions of the Labour Relations Act;
- Reporting any contraventions of workplace-related provisions of the Act to the employer, to the union, or to the responsible authorities, usually the Department of Labour;
- Representing members fairly and effectively in relation to matters which concern employment and conditions of employment;
- Participating in negotiation and grievance as provided for in employer/trade union agreements or in accordance with recognised custom and practice in the undertaking or establishment in which they work;
- Acting in accordance with existing laws and regulations, the rules of the union and good labour relations practice, liaising with and seeking advice and assistance from the appropriate full time trade union official;
- Co-operating with the management of the organisation in ensuring the proper implementation and observance of employer/trade union agreements, the use of agreed dispute and grievance procedures and the avoidance of any action, especially unofficial action, which would be contrary to such agreements or procedures and which would affect the continuity of operations or services;
- Having regard at all times to the safe and efficient operation of the organisation;
- Ensuring conformance to the same job performance standards, company rules, disciplinary conditions and other conditions of employment as comparable employees in the organisation in which they work; and
- Performing any other functions agreed to between the union and the employer.

Consequence for non- or under-utilisation of trade union representatives

Among all the roles indicated by Swanepoel above, public servants seem to underutilize employee representation when lodging grievances with the employer. Consequently, some grievances that are referred to the PSC sometimes do not conform to the procedure required in terms of the Grievance Rules applicable to different levels of employees. This results in such grievances being classified as “not properly referred” and ultimately being closed due to non-compliance with grievance procedures. This could be avoided if employees engaged with employee representatives in their departments when lodging grievances, as they would assist them in complying with the grievance procedures.

Employee representatives are expected to be more conversant with labour relations matters and grievances are part of labour relations; it is not only disciplinary matters that fall within labour relations. By utilising the employee representatives, grievances would be efficiently resolved in that they would play a better role to make members understand their grievances and further assist them to propose and formulate implementable solutions. In many instances failure to engage with employee representatives result in aggrieved employees proposing solutions that do not address their grievances. Trade union representatives would also assist aggrieved

\textsuperscript{7} The Labour Relations Commission: Code of Practice, page 2.
employees in understanding when there is no substance to the grievance. Similarly, where there is merit in the grievance, the representative would be able to assist the aggrieved in engaging the labour relations officer or the department in the discussion and resolution of the grievance. This is where the employee representatives would play a better role to ensure that members/colleagues have their grievances resolved to their satisfaction.

It should be noted that with specific reference to trade union representatives, their responsibility is derived further from their trade unions constitution. Due to such mandate, trade union representatives are accountable to the members of their trade unions, as discussed below.

Accountability: Employee representatives (Trade Unions) accountability for their failure to assist members of their respective unions

In some cases where aggrieved employees utilised trade union representatives when lodging grievances, it was found that the grievances were referred to the PSC without first consulting and agreeing with the aggrieved employee, and the aggrieved would indicate to the PSC that he or she never requested referral to the PSC.

Concerning trade union responsibility towards their members, the Constitutional Court judgement in FAWU v Ngcobo NO and Mkhize held that a trade union cannot avoid liability for its neglect to prosecute claims on behalf of its members merely because the union has a constitutional right to determine its own administration.⁹

In determining its own administration, in accordance with section 23(4)(a) of the Constitution, the union does not have the right to withdraw its representation of its members with impunity, it still has to act in a manner that does not cause prejudice to its members. This judgment represents a victory for members against negligent conduct by their trade union representatives. The Constitutional Court held that the trade union could not pursue its own interests, with impunity, when it has caused injury to members by failing to represent them properly. The union’s own constitution suggested that the union will take responsibility for the negligent action of those acting on its behalf.

The Court stated that even if the trade union was permitted to withdraw from a matter where it agreed to represent its members, it was still obliged to take such a decision in good faith and inform the members timeously. It was obliged to act in good faith and could only withdraw if the members could fulfil the mandate previously given to the trade union.

The judgement is an important reminder of the responsibility shouldered by trade unions in representing their members. The union attracts liability for its actions where it agrees to act on behalf of its members and fail to carry out that mandate diligently and in good faith. Trade unions should guard against negligent conduct by its employee representatives. Trade unions may be forced to obtain indemnity insurance against claims by members, as suggested during the proceedings in the High Court. J Botes commented that the judgement sends a clear signal that members are not without remedy when faced with negligent conduct by its labour representatives.¹¹

Relationship between employees, trade unions and labour relations sections / management

While employees are expected to be protected by their trade union representatives, it is the key role that both management / labour relation officers and trade unions must play in order to ensure labour peace in the

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⁹ Food & Allied Workers Union v Ngcobo NO and Another (353/12) [2013] ZASCA
¹¹ Johan Botes “Trade Union liable for neglecting to prosecute members' claims – Constitutional Court”
workplace. The labour relations officers play a vital role in creating a platform for a peaceful working environment for management and trade union representatives. It is expected that in the critical role they play in labour relations they should be able to—

- encourage employers and employees to resolve their conflict and disagreement through interaction without the intervention of third parties;
- build trust and confidence between employees, trade unions and managers in respect of grievance resolution; and
- encourage communication between the parties to the grievance to avoid unnecessary delays in addressing employees’ grievances.

However, due to the following reasons, labour relations officers’ role seem to be negatively affected:

- Due to the bureaucratic nature of government departments, labour relations officers’ advices are not easily accepted by management. Labour relations officers are seen as part of management due to the nature of their function, instead of objective providers of labour relations advice to both parties in resolving grievances. As a result, employees do not trust labour relations officers and do not readily accept their advice and the outcomes of grievances investigated by them. This may happen even with regard to the procedure to be followed in dealing with their grievance.

- Labour relations officers are also responsible for dealing with disciplinary matters. The impression created is that they tend to put more focus on and prioritise disciplinary matters than grievances. Most of the grievances referred to the PSC are referred by aggrieved employees after failure by labour relations officers to conclude investigations within stipulated timeframes. In cases where investigations are concluded and referred to the PSC, the manner in which the investigations are conducted is a matter of concern because no investigation reports and relevant documents like policies and correspondences are provided to the PSC when referring the case. It should be noted that such approach to grievances is the reason employees and trade union representatives adopt a militant approach when dealing with management and labour relations officers.

- Management’s attitude in grievances where employees are represented by trade unions is also a matter of concern because in such circumstances the element of fairness seem to be ignored just to prove positional power.

- Trade union representatives’ attitude towards management create the impression that focus may be more on frustrating management than on reasoning and ensuring that the grievance is resolved.

All these perceptions and conflicting behavioural patterns affect the effectiveness of labour relations officers in dealing with grievances at the earliest stages.

**Conclusion**

The primary responsibility of every trade union is to ensure that their members’ interests are well represented. It is however seen as conflicting responsibility to an employee representative who is also an employee. This could be seen as one of the reasons employees seems to institute grievance procedures without involving their employee representatives. In the normal work setting, an employee representative has employment contractual obligation to his employer which he is required to obey. They however accept their nomination to serve the employees within the Department, as such a balance between their work and that of trade union is required.
It is therefore important that employees when confronted with a particular treatment which they feel is unfair, they must first engage their trade union representatives who are best to advise whether the solution or route they require would yield proper results. In some instances they could be helpful in resolving the matter by just engaging with management to reconsider a particular action or treatment subjected to employees. This would require a positive attitude from management and labour relations officers, and from union representatives themselves, to engage with the intention to resolve issues and promote sound labour relations. It would also require labour relations officers to refrain from treating labour relations matters differently, by prioritising disciplinary cases over grievances. As such, as much as attention is given to misconduct cases, grievances require as much attention in order to promote labour peace in the Department which is the ultimate role of the labour relations officers.

THE CHALLENGING FUTURE OF TRADE UNIONS IN LABOUR RELATIONS IN THE PUBLIC SERVICE

Introduction

Employment relationships in South Africa, like elsewhere in the world, exist in a constantly changing environment. Basically the parties to the employment relationship consists of the employee and the employer, but this may include a third player in the form of a trade union. According to section 213 of the Labour Relations Act, 1995, (the LRA) a “trade union” means an association of employees whose principal purpose is to regulate relations between employees and employers.

In terms of section 23(1) of the Constitution of the Republic of South Africa, 1996, every worker has the right to form and join a trade union; to participate in the activities and programmes of a trade union; and to strike. Trade unions also play an important role in collective agreements, which are written agreements with the employer, concerning terms and conditions of employment or any other matter of mutual interest. So employees have a right to join a trade union, but do they still want or need to? Are trade unions still relevant?

These days employees are much more educated than a few years ago and know how to exercise their rights in the workplace. They know what they are entitled to and have a good understanding of the employment relationship, and what is allowed and what is not. They have access to clear legislation, prescripts, guides and codes of good practice to regulate the employment relationship. Employment conditions in the Public Service have improved and are much more accommodating of employees, and may see trade unions becoming more and more irrelevant to fight for employees’ rights.

The State has through the years improved as an employer. Employees no longer have to fight for each right and as a country we are revered for our extensive and progressive labour legislation. It is obvious that the improved conduct of the employer will make the continued existence of trade unions less important, while poor conduct by the employer will create a higher reliance on trade union assistance. While there will always be disagreements between employers and employees, a very small percentage of the more than 1 million public servants actually need to enforce their rights and even a smaller percentage need the assistance of a trade union to do so.

A large portion of the labour force has become sophisticated and the demand for some employee’s skills is so high that they can negotiate without a union. The membership of the trade unions is also getting older and younger employees do not automatically join a trade union when they start working. They first want to see what the trade unions will offer them. If older members exit the system and younger members do not see the benefit of joining a trade union, membership will shrink and eventually union numbers will become insignificant.
Never! I hear you say? What happened to typists in the Public Service? A few years ago no Public Service Department could function without a substantial typing pool, stocked with suitably qualified typists. However, technological changes and the ability of employees to type their own communications overtook the role of typists. Typists were no longer relevant and they inevitably became extinct.

Trade unions thrive on employee numbers and employee/employer conflict, which implies that the trade unions benefit from poor labour relations which strengthens their reason to exist. When employees are happy the importance of a trade union diminishes.

The quality of service rendered to trade union members will also determine their continued existence. If the trade unions do not add value, why keep them around? As will be demonstrated below, there have been instances where trade unions have actually acted against the best interests of their members and shop stewards’ knowledge on labour matters is also lacking.

In an article that appeared on 20 September 2018 in Business Live, it was reported that the Minister of Labour, Mildred Oliphant, indicated that trade unions are failing workers. She has called on Cosatu to get its house in order and train shop stewards on all labour laws.

According to the article, Cosatu has admitted in its discussion documents to its congress that its affiliates’ shop stewards lacked basic understanding of some of the country’s key labour legislations, including the LRA, as well as those of the companies where they organise. "The classical case is one collective agreement where the unions have agreed to give the employers at least 30 days’ notice instead of the 48-hours’ notice prescribed in the LRA of their intention to go out on strike," Oliphant said.

In a recent interview with the Business Day, the newly appointed Labour Registrar, Advocate Lehlohonolo Molefe said the majority of cases he was dealing with showed that most unions were not acting in line with the provided regulations.

If most unions are not acting in line with the provided regulations it means that they are losing their way and are seemingly no longer taking their members seriously. If this is true, they are no longer in a position to engage with the employer on any issues, including collective agreements. The Occupational Specific Dispensation (OSD) for Legally Qualified Personnel is one such example that has been causing a lot of problems for affected employees. PSCBC 1 of 2007 was a collective agreement between the employer and employees represented by the trade unions. The trade unions agreed to the OSD that has since 2007 been criticized strongly by a substantial number of legally qualified employees affected by it. It can be argued that the trade unions did not have the best interests of their members at heart when they agreed to it, or they did not have the knowledge and/or expertise to enter into a sensible agreement. Whatever the reason, any collective agreement may be amended at any time by the parties to it, but the trade unions have not reviewed or requested a review of the collective agreement with the employer to address the concerns of its members since 2007.

Trade unions may have a right to exist, but to belong to a trade union is no longer a given. The employer is more and more engaging with employees on an individual basis, without the need for a shop steward.

According to Chris F. Wright, Research Fellow, Faculty of Economics, University of Cambridge, the role of trade unions in Britain and elsewhere has changed significantly over the past 30 years. Global competition, a growing trend in outsourcing, legal constraints, and employer sponsored forms of employee participation have combined in precipitating a significant fall in union membership and the coverage of collective bargaining. The coming decade promises to be equally challenging for the trade union movement. How they respond to the
challenges and opportunities over the next few years will be crucial in determining their level of influence at work and beyond in the future.

It is therefore clear that the trade union which adapts to the changing circumstances will survive. Trade unions should add value to the members of the Public Service and organisational objectives, otherwise they will become obsolete.

As mentioned in section 213 of the Labour Relations Act the principal purpose of a trade union is to regulate relations between employees and employers and not to only react when things have gone wrong already. There is a perception that trade unions are keen on fighting the employer and having an adversarial role instead of helping their members to work with the employer to create a sound labour relations environment, where both the employer and the employee’s needs are balanced. Where members make themselves guilty of misconduct and destructive behaviour in the workplace, you will not see trade unions intervening to avoid disciplinary action against their members. They only become interested after an employee has been charged with misconduct. Trade unions should also be concerned with the productivity of their members, their training and their conduct in the workplace, if they really care about regulating relations between employees and employers. The three players in the employment relationship namely the employee, employer and the trade union should not be adversaries, but partners.

If the trade unions do not up their game to add more value to the employment relationship anymore, they will become redundant and disappear.
Sources

- ‘What is the role for trade unions in future workplace relations’ article by Chris F. Wright, Research Fellow, Faculty of Economics, University of Cambridge

THE PROTECTION FROM HARASSMENT ACT, 2011

Introduction

Employers are continuously faced with the frustration of having to deal with harassment in the workplace. So too are our courts that have to adjudicate on matters of harassment. Acts of harassment have become the order of the day both at the workplace and in society, and are continuing unabated.

Harassment may be experienced in a number of ways, for instance, being watched, followed, pursued or accosted by a person, bullying, unwanted verbal or written contact, and of course unwanted sexual attention also constitutes an act of harassment.

Section 195(1)(a) of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including, amongst others, “a high standard of professional ethics promoted and maintained.”

In expressing concern and commitment to dealing with the problem of harassment, and to uphold this and other democratic values and principles enshrined in the Constitution, the Protection from Harassment Act, 2011 (Act 17 of 2011) was developed and came into effect on 27 April 2013. In a nutshell, the purpose of this Act is to “address harassment and stalking behaviours which violate Constitutional provisions of right to privacy and dignity of individual persons.”

What is harassment under the Protection from Harassment Act?

In terms of section 1 of the Act, harassment include—

- engaging directly or indirectly in a conduct that may causes harm or that inspires the person complaining of harassment (“the complainant”) to reasonably believe that harm may be caused. According to the Act such conduct includes—
  (a) “watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be,
  (b) The Act further recognises engagement in verbal, electronic or any other communication, aimed at the complainant, as harassment. In this regard, several forms of engagement as capable of being contact for the purposes of harassment has been outlined, such as sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant.
  (c) Lastly, harassment includes sexual harassment, which means “any unwelcome sexual attention from a person who knows or who reasonably knows that such attention is unwelcome”.

The Act also mentions several unwelcome sexual attention, such as “unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated.”

The Act also regards promises of reward for sexual demands, and repercussions for not acceding to the sexual demands as sexual harassment.
What kind of harm does the Protection from Harassment Act articulates?

In defining the term “harassment,” the Act provides that the respondent should know or ought to know that the conduct “causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person. Harm in this context includes mental, psychological, physical and economic harm.

Who is protected under the Protection from Harassment Act?

The Protection from Harassment Act applies to anyone who has a reasonable belief that they have been harassed. The complainant can apply for protection order under this Act. A child under the age of 18 can also apply for protection order without the assistance of his/her parents in terms of the Act.

The Act further gives another person who has a real interest in stopping the harassment to apply for a protection order for the person experiencing the harassment. This is mainly important in the context of protecting people with certain disabilities and persons who are not in a position to take action on their own.

What protection is available under the Protection from Harassment Act?

The Act allows for a process where an initial court order is made immediately based only on the complainant’s side of the story, as long as the court is satisfied that there is prima facie evidence that the complainant is being or may be harassed and that harm is or may be suffered if the protection order is not granted immediately. It should be noted that a suspended warrant of arrest is automatically issued at the same time that the Protection Order is granted so that should the harassment continue after the Order is granted, the complainant may immediately have the warrant executed, and the offender arrested.

If the harassment has been done electronically over the internet or by email and the complainant is not aware who they are, the Act allows the court to request details of the harasser from the electronic communications service provider or may order an investigation by the police into the name and address of the harasser.

The protection order can be tailored to the needs of the complainant in his/her specific situation. In addition, non-compliance with a final Protection Order is a criminal offence, and can lead to the perpetrator being fined or imprisoned for a period not exceeding five years.

How does one apply for a protection order?

Anyone (including a child) who is subjected to harassment may apply for a Protection Order at the magistrates court nearest to where either the complainant or the harasser lives or works, or to where the harassment is taking place. The complainant does not need the assistance of an attorney in order to bring this application. The complainant needs just to complete the relevant application form, obtainable at the court, and provide the details of the harassment and the reasons why the protection sought is necessary.

Conclusion

The Protection from Harassment Act, 2011 is not specifically directed towards employers and employees but its ambit is wide enough to include them. Employers therefore need to be very careful of doing anything that might resemble harassment of employees.

References

- Protection from Harassment Act, No. 17 of 2011
- Mnyandu and Padayachi, Case No: AR 162/2014

Let’s talk labour relations

Send your inputs or topics of interest that you would like us to deal with to psclrtalk@opsc.gov.za