

Reimbursement: What you can (or can't) claim under the BCEA

By [Aadil Patel](#) and [Dylan Bouchier](#)

5 Apr 2022

On 1 January 2019, section 73A of the Basic Conditions of Employment Act 75 of 1997 (BCEA) came into effect. This relatively new provision permits employees earning below the prescribed threshold to claim monies owing to them in terms of the National Minimum Wage Act, the BCEA, a collective agreement, a sectoral determination or a contract of employment at the Commission for Conciliation, Mediation and Arbitration (CCMA).



Image source: Tira Miroshnichenko from [Pexels](#)

In the CCMA matter of *Cousins v Bill Buchanan Association [2022]*, the disruptions occasioned by the Covid-19 pandemic and the civil unrest of July 2021 gave rise to questions as to who bears the cost of Covid-19 tests required by an employer, whether an employee who has exhausted leave entitlements may nevertheless claim compensation in respect of deductions for unpaid leave despite failing to report for duty, and whether the provisions of section 73A of the BCEA might lay the foundation for loss of earnings claims for an employee's private business.

Cousins relied on section 73A when she referred a claims dispute to the CCMA, alleging that her employer owed her monies for:

- deductions of unpaid sick leave in the amount of R6,783.11, and R4,034.94 of unpaid leave due to the unrest in KwaZulu-Natal, totalling R11,718.05 for the period between 30 April 2020 and 31 July 2021;
- R8,500 for 10 Covid-19 tests; and
- loss of income for her private business in the amount of R27,000.

Claims covered under section 73A of the BCEA

The employer in this matter submitted that the referral should be dismissed on the basis that the referred claims are not covered under section 73A of the BCEA. The issue that was to be decided was whether Cousins was entitled to such a

claims dispute in the circumstances.

Firstly, the employer submitted that the Directions for Health and Safety in the workplace, dated 4 June 2020, provide that if an employee's sick leave entitlement is exhausted, they must make an application for an illness benefit in terms of clause 4 of the directive issued on 25 March 2020 on the Covid-19 Temporary Employer Relief Scheme (TES Scheme). In terms of Cousins' employment contract, any sick leave in excess of 30 days in the relevant leave cycle may be unpaid.

The employer submitted that Cousins used the sick leave due to her excessively, and as a result of having exhausted her sick leave entitlements, should have directed her claim for unpaid sick leave to the Department of Employment and Labour in terms of section 20 of the Unemployment Insurance Fund, which expressly states that if an employee's sick leave entitlement is exhausted, they must make an application for an illness benefit.

Furthermore, the employer submitted that its business was operating at full capacity during the unrest. At no point in time did the employer instruct Cousins to stay off duty during the unrest. She, however, took a different view, stating that she was not informed that the employer would implement the 'no work, no pay' rule during the unrest. She also claimed that she was not informed that she needed to apply for the illness benefit under the TES Scheme.

Cousins also argued that her employer owed her for the loss of income for closing her nail business, which was operating under the respondent's business.

CCMA findings

In terms of the three claims by Cousins, the Commissioner found that:

- The money that Cousins claims she was owed in terms of her Covid-19 tests, and her loss of income for private businesses, fell outside what is expressly covered by section 73A of the BCEA.
- In terms of her exhausted sick leave, Cousins ought to apply for illness benefits in terms of the TES Scheme.
- As she had exhausted her sick leave and failed to tender her services during the unrest where the employer was fully operational, Cousins could not claim leave for the period of the unrest.

While the issue of compensation for the costs incurred by Cousins in respect of her Covid-19 tests fell outside of the scope of section 73A, the Commissioner remarked that item 27 of the Directions for Health and Safety in the workplace places a clear obligation on employers to implement health and safety measures to curb the spread of Covid-19, such as screening workers when they report for duty and requiring workers to be tested for the virus, when needed.

The Commissioner dismissed Cousins' case, finding that she was not owed any amount in terms of section 73A of the BCEA.

Employers can be comforted by the fact that any monetary claims that fall outside of the payments expressly indicated in section 73A of the BCEA will not be entertained by the CCMA, and employers should carefully scrutinise a monetary claim

by an employee when considering whether it should raise this jurisdictional point.

ABOUT THE AUTHOR

Aadil Patel is a Director and head of the Employment Law practice and Dylan Bouchier is an Associate at Cliffe Dekker Hofmeyr (CDH).

For more, visit: <https://www.bizcommunity.com>