DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT ALERT

11 November 2013

TAKE IT OR 'LEAVE" IT…

Employers are well advised to ensure that leave is taken and that employees enforce their right to take leave. In the recent case of *Ludick v Rural Maintenance (Pty) Ltd*[1] the Labour Court revisited the effect of the annual leave provisions of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA). The employee forfeited untaken leave and the employer was ordered to pay the employee in respect of part of the accrued leave.

The former employee, upon termination of his employment, claimed payment in respect of the value of accrued statutory annual leave. He was employed from 5 January 2004 to 1 April 2006 and never took any leave.

He relied on s28 (read with s40) of the BCEA to claim payment of the value of the accrued leave that was accrued in respect of the two leave cycles - the first from 5 January 2004 to 4 January 2005, and the second cycle from 5 January 2005 to 4 January 2006.

The employer relied upon the same sections and argued that, in terms of the employee's contract of employment, he had no claim as the contract specified that any leave not taken within 30 days of the financial year end would lapse. The company's year-end was 28 February and, because the employee left more than 30 days later, he forfeited any and all accrued leave.

The court referred to the *Jardine v Tongaat-Hulett Sugar* judgement where it was held that leave not taken within six months after the end of a leave cycle is not automatically forfeited nor is any right to payment in respect of that leave. A different view was expressed in *Jooste v Kohler Packaging* where it was held that s40 of the BCEA contemplates payment only in respect of the leave cycle immediately preceding the uncompleted leave cycle during which the termination takes place. The rationale of this judgement was permitting payment in respect of prior leave cycles would allow both the employer and the employee to circumvent the Act.

The court preferred the *Jooste* reasoning which it followed. On a proper interpretation of the Act, the former employee was entitled to payment of the value of accrued leave pro rata in respect of the leave cycle from 5 January 2006 to 1 April 2006 and the prior leave cycle from 5 January 2005 to 4 January 2006, but not the first leave cycle.

The court held that the BCEA contemplates an agreement between the parties regulating when annual leave should be taken. But a provision in a contract that deprives an employee of accrued leave in the current and immediately preceding leave cycles is less favourable than the provisions of the Act and invalid.

This judgement only affects statutory leave and may well impact on existing leave policies and contracts of employment and signals to employees to take their leave or suffer the consequences.

Faan Coetzee

[1] Unreported JS 633/07 dated 30 Oct 2013

IN THIS ISSUE

UNFAIR DISMISSAL BY A LABOUR BROKER: WHEN IS THE CLIENT OF A LABOUR BROKER LIABLE?

In the recent case of NUMSA v Abancedisi Labour Services [2013] ZASCA 143 (30 September 2013), the Supreme Court of Appeal took to task a Temporary Employment Service (TES), - labour broker, - that had left its employees' employment in abeyance (similar to a lay-off or time-off until production increases) for over ten years.

During 2001, Kitsanker (Pty) Ltd (Kitsanker) concluded an agreement with a TES by the name of Abancedisi Labour Services (Abancedisi) to provide it with employees. The employees who were employed directly by Kitsanker entered into voluntary retrenchments and were immediately re-employed by Abancedisi on a limited duration contract for which their services would be at Kitsanker's disposals but the location and terms and conditions of employment remained precisely as before.

After a work stoppage during July 2001, Kitsanker required employees to sign a code of conduct to regulate industrial action. Kitsanker refused to allow any employee onto its premises who did not sign the code of conduct. Upon enquiry from the Union of Metalworkers of SA (NUMSA), Abancedisi confirmed Kitsanker's position and stated that the employees would not be paid any wages since they were only paid for work performed.

An unfair dismissal dispute was referred to the Bargaining Council in which Abancedisi claimed that the employees had not been dismissed but in fact remained on their payroll. Thereafter, the dispute was referred to the Labour Court where the same point *in limine* was raised and upheld.

On appeal to the Labour Appeal Court (LAC), although the cost order was found to be unfair and reversed, the LAC maintained the view that the employment relationship had continued and that the employees' situation had merely amounted to an indefinite suspension.

The employees thereafter appealed to the Supreme Court of Appeal (SCA). In reference to the employment contract, the SCA found that it was specifically linked to the Kitsanker project. As Abancedisi had made no effort to secure alternative work for the employees after the expulsion of employees by Kitsanker, and Kitsanker filled the employees' posts, the contract of employment had been terminated.

The SCA further found that Abancedisi had not paid the employees any wages, and there was nothing "even slightly resembling the characteristics of an employment relationship remaining between the parties beyond the illusory retention of employees on Abancedisi's payroll". The effect of Abancedisi's conduct was that there was material breach of the employment contract that entitled the employees to cancel it.

The LAC's view that the employees were on an indefinite suspension was found to be unsupported by the evidence. The SCA ordered that the dismissal was unfair, and Abancedisi was ordered to pay the employees twelve months' compensation each and costs.

This judgment has come hot on the heels of the amendments to the Labour Relations Act, No 66 of 1995 (LRA). In terms of s198A(3)(a) and (b) of the Labour Relations Amendments Bill (LRAB), an employee who performs a temporary service and who is the employee of the TES in terms of s198 (2), or is not performing such temporary services for the client, is deemed to be the employee of that client and the client is deemed to be the employer.

In terms of s198(4A) of the LRAB, the client of a TES is jointly and severally liable in terms of the current s198(4) of the LRA, or if they are deemed to be the employer in terms of s198A(3)(b). The employee may then institute proceedings against either the TES or the client, or both. In addition, in terms of s198(4A)(c) any order or award that is made against a TES or client may be enforced against either.

Had this case been determined on the provisions of the LRAB, the employees could have cited both Abancedisi as well as Kitsanker. Even if they had not cited Kitsanker they could have chosen to enforce the order against either Abancedisi or Kitsanker. The LRAB accordingly requires both the TES as well as the client, to follow fair labour practices in all circumstances going forward, including the impact on employees at the end of a contract.

Andrea Taylor

EMPLOYEES CANNOT CONTRACT OUT OF RIGHT TO DISCLOSE SALARY INFORMATION

Employees are often contractually prohibited from disclosing the details of their remuneration to any person, including colleagues. A clause to this effect is often found in employment contracts. In some instances, employers flag such a disclosure as a disciplinary offence. The rationale for such prohibition is understandable in that employers do not want to upset the employee relations climate by having the details of their employees' salary information floating about in the workplace.

However, s78(1)(b) of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) provides that *"[e]very employee has the right to discuss his or her conditions of employment with his or her fellow employees, his or her employer or any other person."* In this regard, the Labour Court recognised in *Schoeman & another v Samsung Electronics SA (Pty) Ltd* (1997) 18 ILJ 1098 (LC) that *"[r]emuneration is always a term and condition of the employment contact."*

That established, the question begs whether an employer can require an employee to contract out of her right to discuss her conditions of employment. Section 79 of the BCEA provides the answer to this question. Section 79(2) states that *"… no person may do, or threaten to do, any of the following –*

a) require an employee not to exercise a right conferred by this Part;

b) prevent an employee from exercising a right conferred by this Part; or

c) prejudice an employee because of a past, present or anticipated –

i. failure or refusal to do anything that an employer may not lawfully permit or require an employee to do;

ii. disclosure of information that the employee is lawfully entitled or required to give to another person; or

iii. exercise of a right conferred by this Part."

The effect of this section is that employers are precluded from (i) requiring an employee not to disclose the details of their remuneration to any person; (ii) preventing an employee from disclosing the details of their remuneration to any person; or (iii) prejudicing an employee because of a past, present or anticipated disclosure of such details.

In addition, s79(2) provides that no person may discriminate against an employee for exercising a right conferred by this Part. Section 79(3) provides further that no person may favour, or promise to favour, an employee in exchange for the employee not exercising a right conferred by this Part.

As consequence of s79, a provision in a contract of employment prohibiting an employee from exercising her right to disclose his or her remuneration will be unenforceable. Further, any disciplinary action taken against an employee for exercising such a right will, most likely, be held to be unfair. In *Maneche & others v CCMA* (2007) 28 ILJ 2594 (LC) at 2598 it was noted that s79 buttresses the protections provided by sections 4 and 5 of the Act. The workers' refusal to work beyond the daily overtime limit, the court found, was "an exercise of their statutory rights, and they may not be prejudiced, whether in the form of a dismissal or otherwise, for doing so." (emphasis own).

This section should not be seen as permitting employees to discuss the remuneration of other employees. Employers may prohibit employees from discussing or disclosing salary information of other employees. Thus, should the remuneration details of an employee come to the attention of another employee, the latter employee cannot rely s78 and 79 to avoid disciplinary action where his conduct contravenes a workplace rule. Employers should consider whether their current workplace rules adequately address this situation.

Lauren Salt

DLA CLIFFE DEKKER HOFMEYR

CONTACT US

For more information about our Employment practice and services, please contact:

Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@dlacdh.com

Gillian Lumb
Cape Town Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@dlacdh.com

Johan Botes
Director
T +27 (0)11 562 1124
E johan.botes@dlacdh.com

Mohsina Chenia
Director
T +27 (0)11 562 1299
E mohsina.chenia@dlacdh.com

Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@dlacdh.com

Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@dlacdh.com

Gavin Stansfield
Director
T +27 (0)21 481 6314
E gavin.stansfield@dlacdh.com

Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@dlacdh.com

Faan Coetzee
Consultant
T +27 (0)11 562 1600
E faan.coetzee@dlacdh.com

Nicholas Preston
Senior Associate
T +27 (0)11 562 1788
E nicholas.preston@dlacdh.com

Mabasa Sibanda
Senior Associate
T +27 (0)11 562 1182
E mabasa.sibanda@dlacdh.com

Kirsten Caddy
Associate
T +27 (0)11 562 1412
E kirsten.caddy@dlacdh.com

Mark Meyerowitz
Associate
T +27 (0)11 562 1125
E mark.meyerowitz@dlacdh.com

Inez Moosa
Associate
T +27 (0)11 562 1420
E inez.moosa@dlacdh.com

Mandlakazi Ngumbela
Associate
T +27 (0)21 481 6460
E mandlakazi.ngumbela@dlacdh.com

Zinhle Ngwenya
Associate
T +27 (0)11 562 1119
E zinhle.ngwenya@dlacdh.com

Lauren Salt
Associate
T +27 (0)11 562 1378
E lauren.salt@dlacdh.com

Andrea Taylor
Associate
T +27 (0)11 562 1687
E andrea.taylor@dlacdh.com

Ndumiso Zwane
Associate
T +27 (0)11 562 1231
E ndumiso.zwane@dlacdh.com

Cliffe Dekker Hofmeyr's Employment practice supports **Movember**

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg

T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town

T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com

www.cliffedekkerhofmeyr.com