DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT ALERT

March 2013

IN THIS ISSUE

FEBRUARY NEWS HIGHLIGHTS

Labour Law Amendments

The Parliamentary Portfolio Committee on Labour recently announced that the proposed amendments to the Basic Conditions of Employment Act, No 75 of 1997, the Labour Relations Act, No 66 of 1995 and the Employment Equity Act, No 55 of 1998 will be finalised by the end of the year. Among the many changes, the amendments propose tighter regulation of labour brokers, greater restrictions on employers who make use of labour brokers, stricter enforcement of employment equity targets and a new kind of unfair discrimination, namely a failure to provide equal pay for equal work.

Parliament is also considering the newly tabled Public Employment Services Bill, which will establish a public 'employment services agency', and will also provide for the regulation and registration of private employment services agencies. These agencies are not labour brokers but institutions that will provide job seekers with certain services such as registering job-seekers, matching job-seekers with available work opportunities and facilitating other employment opportunities.

The Bill will also set up a nationwide database to monitor employment and assist with government's goal of creating more jobs, decent work and sustainable livelihoods.

Teachers' Striking

The ANC's national executive committee recently announced its intention to declare teaching an essential service and hence deny teacher's the right to strike. In the Labour Relations Act, No 66 of 1995 (LRA) an essential service is defined as the Parliamentary Service, the South African Police Service, and any service "the interruption of which endangers the life, personal safety or health of the whole or any part of the population".

The LRA provides for an Essential Services Committee (ESC) that has the task of deciding which services fall within the above definition. The employees of a declared essential may not go out on strike. If a dispute arises in these services that would normally be resolved through collective bargaining and/or industrial action, the parties may refer the matter to the CCMA to be adjudicated through arbitration.

If government follows through on its proposal it will have to apply to the ESC for teaching to be declared an essential service. We anticipate that the government will find significant resistance to this application on the form of trade unions. Furthermore, it will be difficult to argue in law why a service previously considered 'non-essential' has now changed its status. Nevertheless, the topic will no doubt be the subject of lively debate.

Unprotected Strikes

An unusually large number of unprotected strikes (wildcat strikes) have taken place over the last six months and employers should be aware of their rights when faced with these situations.

Before embarking on a strike, the LRA requires employees (or their representative trade unions) to declare a dispute with their employer, and if negotiations fail, to refer the dispute to the CCMA. If the CCMA fails to successfully mediate the dispute, or a period of 30 days has passed, only then are the employees allowed to come out on strike on 48 hours' notice to the employer.

continued

It is important to remember that when an employee participates in an unprotected strike this constitutes misconduct (and is usually grounds for dismissal). The issue becomes complicated when some employees claim that they are unable to work because of intimidation. There is also the practical difficulty of being faced with the situation where an entire workforce is involved in misconduct. However, these problems can be managed and it is our experience that workers who flout the protection afforded them by the LRA do so at their own peril.

INTERESTING NEW JUDGMENTS

Retrenchment

In the recent decision of *(Lombard v ABC Resources (Pty) Ltd (unreported case no. JS75/10))*, the Labour Court was asked to consider the fairness of a retrenchment where the retrenched employee was a senior manager.

The employee in question, Lombard, (employee) was intimately involved in the financial affairs of the company and was fully cognisant of the fact that the business was on the verge of financial collapse. Lombard had also previously participated in retrenchment consultations with other employees on behalf of the company.

Following the retrenchment of almost its entire staff complement, the company re-appointed the employee as a sales manager. When it became apparent that the sales manager position did not provide the employee with enough work she was re-appointed as an HR Manager.

Shortly afterwards the owner and MD of the Company phoned the employee and asked her to meet with him at a coffee shop on a Saturday. At this meeting the MD informed the employee that the company was going to be 'shelved' and that she would be informed of her retrenchment by letter over the weekend. It was common cause that, apart from the owner, the employee was 'the last man standing'.

Section 189 of the LRA requires employers contemplating retrenchment to issue a notice stating, among other things, the reasons for the proposed retrenchments, the alternatives considered before proposing retrenchment and proposed severance pay. More importantly, the employer and employee must engage in a 'meaningful joint consensus-seeking process' and attempt to reach consensus on, among others things, appropriate measures to avoid retrenchment.

In the present matter the company argued that it would have been a farce to have gone through a mechanistic procedure to retrench somebody when she were the last person standing after having been involved in other retrenchments beforehand. Everybody had left the company and the employee knew that there was only one outcome, and that was that the company was going to have to retrench her too.

The court held that it did not matter that the employee was involved in previous retrenchments and was aware of the financial situation of the company. The consultation process envisaged by s189 had value even if the fate of the employee was somewhat pre-determined. It was imperative for the company to meaningfully engage with the employee and not simply advise her of the decision that had been made.

The court went on to say that, even if the outcome was known, the employee should still have been invited to consult and make whatever representations she might have had (even if those representations would have been rejected by the company at the end). Furthermore, the employee was entitled to be furnished with the reasons why her suggestions were rejected.

Interestingly, the court held that the retrenchment itself was substantively fair even though, from a procedural point of view, it was grossly unfair. The Labour Appeal Court has in the past stated that failure to follow the s189 procedure may sometimes be so unfair as to render the retrenchment itself substantively unfair. In this case the judge declined to follow this route stating that the commercial rationale for the retrenchment was indeed justifiable. The employee was therefore awarded a lesser amount of compensation for unfair dismissal.

Non-unionised employees who go on strike

In the decision of *SATAWU v Moloto & Others [2012] 12 BLLR 1193 (CC)* the Constitutional Court overturned a decision by the Supreme Court of Appeal (SCA) where it was held that non-unionised employees must provide separate notice of their intention to strike, and cannot rely on notice given by a union of which they are not members.

Section 64 of the LRA states that once the CCMA has failed to successfully mediate a dispute of mutual interest (such as a wage dispute) the employees may embark on a protected strike on 48

continued

hours' notice to the employer. The SCA held that this requirement exists to enable employers to anticipate the extent of the intended industrial action, and plan accordingly. Non-unionised employees (or their representatives) must therefore furnish separate strike notices, and those who choose to go on strike without providing notice may be dismissed for misconduct.

The Constitutional Court disagreed with the SCA. It held that the importance of the constitutional right to embark on protected industrial action must be given primacy when considering the plain language of s64 of the LRA. Section 64 merely states that 'notice must be given' and does not state exactly who should give such notice. The Constitutional Court held that, because the union in question had previously negotiated on behalf of the non-unionised employees, and the employees had an interest in the outcome of the strike, it was not necessary for every employee to give notice of his or her intention to strike.

This ruling means that non-unionised employees may be entitled, depending on the circumstances, to join in on protected industrial action instituted by a trade union.

HELPFUL HINTS FOR EMPLOYERS

Employers should ensure that their contingency plans for handling industrial action are constantly updated. The beginning of the year is a good time to dust off the old plans, ensure contacts details of key parties are still correct, that the plan contains pro forma notices, letters to the trade union and ultimatums that could be used on short notice. Ensure that the plan still conforms to the changing guidelines handed down by our courts from time to time.

Retrenchment of senior employees still requires fair consultation. Employers considering restructuring that could lead to redundancies should ensure that consultations are conducted in accordance with the provisions of s189 of the LRA, even where the only parties affected are senior employees. Care taken in drafting the notice required in terms of s189(3) normally paves the way for proper consultations that touch on the salient items for consultation.

INTERNATIONAL NEWS

China – According to the latest ILO Global Wage Report from the International Labour Organisation (ILO), China's position as a country that produces cheap goods as a result of cheap labour may be changing.

According to the report, wages in China have increased by more than 300% in the last 10 years. The figures relate mainly to state-owned enterprises but separate surveys have also shown that wages are rising in the private sector. Generally the public sector still pays higher wages than the private sector (with the notable exception of the financial sector), although this might be about to change.

Johan Botes and Mark Meyerowitz

DLA CLIFFE DEKKER HOFMEYR

CONTACT US

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

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

Gillian Lumb
Director
Regional Practice Head
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

Melanie Hart
Director
T + 27 (0)11 562 1179
E melanie.hart@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

Lerato Phashe
Associate
T + 27 (0)11 562 1202
E lerato.phashe@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

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