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EMPLOYMENT ALERT

4 November 2013

DISTINGUISHING LEGITIMATE UNION ACTIVITY FROM INSUBORDINATION

In the recent decision of *National Union of Public Service and Allied Workers obo Mani and others v National Lotteries Board (576/12) (2013) ZACSA 63* the Supreme Court of Appeal considered the fairness of the dismissal of ten employees in circumstances where the employees alleged that the reason for their dismissal was their participation in lawful union activities.

The union, on behalf of the employees, alleged that the dismissal of its members was automatically unfair in that it was based on the employees' participation in lawful union activities namely, supporting the union's petition for the removal from office of the employer's Chief Executive Officer.

In March 2008, three of the union's shop stewards, using the union's letterhead, raised complaints about the leadership style and *modus operandi* of the newly-appointed CEO and advised the employer in writing that they were "no longer prepared to bear his style of leadership any longer". The letter further recorded that "We shall therefore not recognize the person appointed and further not give him or her any kind of cooperation and assistance in whatever way. We will isolate such person and ensure that he or she does not feel welcome until due processes are followed with the union involved."

On 3 June 2008, 41 of the employees including shop stewards addressed a petition to the employer in which they stated that they were submitting a 'vote of no confidence' in the CEO and urged the board of the employer "to ensure that June 30th, 2008 is the last day of his employment". The petition further stated that "we are no longer prepared to spend a day with Professor Ram in the same building with him at the helm of this organisation". A subsequent letter from the union threatened to disclose the contents of the correspondence to the public through the media.

On 17 June 2008, the employer issued the employees with a notice to attend a disciplinary enquiry. The employees were charged with, amongst other allegations, insubordination and disrespectful behaviour which rendered the continued employment relationship intolerable. The charges related to the employees' association with and support of the contents of the union's letter and subsequent petition, which the employer considered to constitute insubordination and of a threatening nature.

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It was the finding of the chairperson of the disciplinary enquiry that the conduct of the employees amounted to insubordination and that the appropriate sanction in the circumstances would be dismissal. The chairperson of the enquiry referred with approval to John Grogan's definition of 'insubordination' in *Dismissal, Discrimination and Unfair Labour Practices* as occurring "when an employee refuses to accept the authority of his or her employer or of a person in a position of authority over an employee." The chairperson found that the employees' statements relating to "ensure that June 30th, 2008 is the last day of his employment" and "we are no longer prepared to spend a day with Professor Ram in the same building with him at the helm of this organisation" made them guilty of insubordination and disrespectful behaviour.

The employees referred the matter to the Labour Court. The Labour Court had no difficulty in distinguishing lawful union activities envisaged in the Labour Relations Act, No 66 of 1995 and the Constitution from the conduct of the employees in the circumstances.

The union then referred the matter to the Supreme Court of Appeal. The Supreme Court of Appeal supported the decision of the chairperson of the disciplinary enquiry and the Labour Court. It found that the cause of the employees' dismissal was what they had said in the petition, rather than the mere fact that they had supported a petition at all. The Supreme Court of Appeal held "it was the communication of the offensive material that caused their dismissal, not the actual petition itself". The Court was not persuaded by the argument that the employees were merely exercising their rights and freedoms in terms of the Constitution and that the employees' conduct should be viewed as an exercising of the employees and trade unions entitlement to engage in robust exchanges with management. The Court concluded that "the law does not dissemble unlawful acts through the invocation of a constitutional banner" and that "a meeting of trade union officials and shop stewards cannot, for example, be convened to plot and plan the murder of a disagreeable employee at the work place or to burn down the buildings of the employer, no matter how justified the participants may believe such action to be."

Gillian Lumb and Mandlakazi Ngumbela

CAN AN EMPLOYEE HAVE TWO CLAIMS ON THE SAME SET OF FACTS?

The Labour Appeal Court in *Gauteng Shared Services Centre v Ditsamai (JA 44/09 of 7 December 2011)* found that it would be acceptable for an employee to lodge a claim for unfair dismissal based on discrimination in the Labour Court and lodge a claim for compensation in terms of the Employment Equity Act (EEA) on the same facts.

In this case the employer had advertised several posts including a post for Forensic Auditor, which the employee was interviewed for. The employee did not successful secure a permanent post and signed a contract for the Temporary Junior Forensic Auditor post for a limited period. The employee was dismissed by the employer following the employee lodging a grievance of victimisation, bias and unfair treatment after two fellow employees secured permanent employment.

The employee referred a claim of unfair dismissal to the General Public Service Sector Bargaining Council ("the bargaining council"), where he was awarded compensation for unfair dismissal in terms of section 186 of the LRA but the arbitrator held that reinstatement was not a competent remedy. The Respondent then referred another dispute to the CCMA for unfair discrimination in terms of section 10(1) of the EEA based on the appointment of the two fellow employees in permanent positions whilst he could only secure a temporary junior position.

The employer argued the principle of *res judicata* in that the same set of facts was relied on for both claims. This argument was dismissed in both the court a *quo* and the Labour Appeal Court where Judge Davis relied on *Sorghum Breweries Sorghum Breweries v International Liquor Distributors 2001 SA 232 (SCA)* where Judge Olivier described the requirements for successful reliance on *res judicata* as "demanding the same thing on the same grounds" or "on the same cause for the same relief". The employer failed to discharge this onus of proof and as a result the appeal was dismissed.

Cases like the above have created an untenable position whereby the effective resolution of matters in terms of the LRA is undermined and secondly, it poses a threat to employers who will remain fearful that they may be required to defend an issue on the same set of facts again after having resolved the issue on another forum. It is unfortunate that the Constitutional Court has not pronounced on the matter as yet. Academic writers Grant and Whitear-Nel[1] suggest intervention by the legislature to clear up the confusion in this area of law.

Aadil Patel and Sihle Masango

[1]Grant, B and Whitear-Nel, N "*Can An Employee Claim Damages As A Result Of Breach Of An Implied Contractual Term That He Will Not Be Unfairly Dismissed? South African Maritime Authority V McKenzie*" 130.2 2013 SALJ 309

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RETIREMENT VS AGE DISCRIMINATION

The issue of whether an employer can compel an employee to be placed on retirement was under the spotlight once again, when former National Commissioner of Correctional Services, Mr Tom Moyane, stated in the media that "he had been 'retired'". The facts as emerged from media reports appear to be that Mr Moyane was appointed on a five year fixed-term contract of employment in 2010, at the age of 57, which contract was only due to expire in 2015.

The Department of Correctional Services announced that Mr Moyane had reached the retirement age and it was for this reason that his services were being terminated. Mr Moyane had turned 60 in January 2013, which appears to be either the agreed or normal retirement age of the relevant department.

The question that arises in the above scenario, as with other employees/employer who may face a similar situation, is whether the termination of an employee's services at retirement constitutes a fair dismissal or discrimination on the grounds of age.

In terms of s187(1)(f) of the Labour Relations Act, 66 of 1995 (LRA), if the employee alleges that the reason for dismissal was because the employer unfairly discriminated against the employee based on age, this would constitute an automatically unfair dismissal. However, despite the above provision, s187(2)(b) of the LRA states that a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.

Therefore, given the above, an employer will be entitled to compel an employee to retire when he or she reaches a retirement age which was either agreed to, or when he or she reaches an age which is normally applicable as the retirement age for employees of that employer.

What would normally constitute an agreed retirement age is if the retirement age has been incorporated into the contract of employment. This will amount to an agreement once the employee has signed the contract of employment. An agreement can also be reached during the course of employment between the parties, as to what the agreed retirement age would be. However, it is suggested that this agreement should be reduced to writing to enable enforceability. It is this written agreement that will entitle the employer to terminate the employee's services upon retirement age and which will provide a defence to any claim of discrimination based upon age.

In the absence of an agreed retirement age, an employer will still be entitled to terminate an employee's services at the normal retirement age. A normal retirement age can be determined in various ways, ie an established practice applied consistently in the workplace over time, a policy in which the retirement age is stipulated and which policy has also been applied consistently, or a retirement age that is indicated in the rules of the pension / provident fund, which the employer accepts as the normal retirement age.

Would the employer be required to follow a fair procedure, prior to terminating an employee's services, on retirement? This issue was alluded to in the matter of *Schweitzer v Waco Distributors (A division of Voltex (Pty) Ltf [1999] 2 BLLR 188 (LC)*, where the court stated that whilst some procedure may be required even in certain types of dismissals not specifically mentioned in the LRA, the legislature specifically stipulates that a dismissal based on the fact that an employee had reached retirement age, was fair in itself. It can therefore be inferred that no procedure is required to be followed, although it may be good practice to notify an employee timeously of such termination.

Often employers agree or require employees who have reached retirement age to work beyond such age. It may also happen that employers inadvertently allow employees to continue employment, after having reached the retirement age. The question then arises as to whether the employer has waived its protection in terms of s187(2)(b) of the LRA, when it later seeks to terminate the employee's services based on the employees age.

This scenario was discussed in the matter of *Karan t/a Karan Beef Feedlot v Randall [2012] 11 BLLR 1093 (LAC)*. The facts, briefly, in this case were that the employee was informed that although he had reached the company's retirement age of 60 years, the respondent wished him to continue working, subject to the 'normal notice period', if he wished to retire. The employee was required by the employer to retire two years later and was given notice of such termination. The Labour Court had found the dismissal to be automatically unfair, on the grounds that the employer had failed to prove that the normal or agreed retirement age was 60 years and that the retirement date had been superseded by a fresh agreement, that the employee would be retained for an indefinite period.

The Labour Appeal Court on appeal, however, found on the facts of the case that a valid agreement had been concluded between the employer and the employee, on a new retirement age, which would be determined by the employer.

The court in this case identified two plausible arguments concerning the application of s187(2)(b). The first was that, where there is a normal or agreed retirement age and the

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employee has reached that age, the employer enjoys protection under s187(2)(b) from that date and is entitled to terminate the employment of the employee on the grounds of age at any time.

The second argument was that, when agreement had been reached between the employer and employee before the latter has reached the normal or agreed retirement age, the employer may determine a new retirement age and will still enjoy protection under s187(2)(b), should he decide to terminate the employment when the new agreed retirement date arrives.

In this case, the court found that the employee had received two letters in which the employer had reserved the right to decide when he should retire. In the case of Mr Moyane (based on information from media reports) it is believed that whilst the Department of Correctional Services would have been justified to terminate his services upon retirement, the entering into a fixed term contract of employment so close to retirement age, adds a different dynamic to those set of facts.

Employers are therefore advised that, if an employer allows or requires an employee to continue working past the retirement age, whether agreed or normal, an agreement should be reached in respect of a new retirement date or age and the subsequent termination would then enjoy the protection of the LRA.

In the absence of such agreement, the employer exposes itself to an automatically unfair dismissal, based on age discrimination. One of the ways in which to protect employers' rights would be to enter into a fixed term contract of employment, or a limited duration contract with the retiring employee, once the employee has reached the agreed or normal retirement age.

Similarly, where an employer does not have a normal or agreed retirement age, the termination of an employee's services at an advanced age, may attract a claim for an automatically unfair dismissal based on age discrimination.

Mohsina Chenia

PRE-DISMISSAL ARBITRATION / ENQUIRY BY ARBITRATION

Section 188A of the Labour Relations Act 66 of 1995 (LRA) provides for pre-dismissal arbitrations (PDA) which substitutes disciplinary enquiries with an arbitration before an independent arbitrator. The charges in a PDA are generally of a more serious nature and employees are in most cases suspended pending the outcome. A PDA in effect does away with the disciplinary process and may save the employer time and the costs of extensive litigation.

However, a PDA is a voluntary procedure and both the employer and employee must consent to this process. An employee who earns above the threshold set out in s6(3) of the Basic Conditions of Employment Act, No 75 of 1997 (currently R193 805.00 per month) can contractually consent to a PDA in terms of his or her contract of employment. Apart from obtaining an employee's consent, an employer is required to complete the prescribed form and pay the prescribed fee. Thereafter, the Commission for Conciliation, Mediation and Arbitration (CMMA) will appoint an independent arbitrator.

An independent arbitrator who conducts a PDA has identical powers to those conferred on a commissioner by s142 of the LRA. The independent arbitrator's PDA award is final and binding and has the same effect as a CCMA arbitration award. Therefore, an employee may not refer a dispute to the CCMA on allegations of unfair dismissal or unfair labour practices after a PDA award is handed down. In addition, the PDA award cannot be appealed and a dissatisfied party's only option is to have the PDA award reviewed and set aside in terms of s145 of the LRA.

A major obstacle to an employer who chooses to conduct a PDA is that if the employer is unsuccessful with the PDA, the employee will remain in its employ and the employer will have to continue paying the employee until the PDA award is reviewed and set aside. On the other hand, if an employee is dismissed before a dispute is referred to the CCMA then there is no obligation to pay the employee while the CCMA proceedings and the review application are pending.

With regard to the new amendments to the LRA, s188A of the Labour Relations Amendment Bill, 2012 (LRAB) provides that a PDA will now be referred to as an 'enquiry by arbitrator'. Furthermore, s188A(1) will enable parties to conclude collective agreements that make provision for an employer to conduct an 'enquiry by arbitrator'.

At first glance a PDA might seem fast-tracked and cost efficient, but to a large extent an employer loses control of the process and is dependent on the CMMA to appoint an independent arbitrator. The employer also runs the risk of having to pay an employee on suspension for the whole period it takes to finalise the review application.

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