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EMPLOYMENT MATTERS

WHEN DOES THE CCMA HAVE JURISDICTION TO DETERMINE DISPUTES ABOUT EMPLOYEE BENEFITS?

In *Apollo Tyres SA (Pty) Ltd v CCMA & Others (unreported case DA1111 [2013] ZALAC)* a benefit was said to be any advantage or privilege to which an employee was entitled or offered, in terms of an existing policy or practice, and which was granted at the employer's discretion.

The Labour Appeal Court rejected the contention that a 'benefit' as contemplated in s186(2) of the Labour Relations Act, No 66 of 1995 (LRA) is limited to only an entitlement which arises ex contractu or ex lege and accordingly dismissed the proposition that the Commission for Conciliation, Mediation and Arbitration (CCMA) did not have jurisdiction to determine the dispute.

The definition of an 'unfair labour practice' given at s186(2) of the LRA includes any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the provision of benefits to an employee, and such a claim may be referred to the CCMA or a bargaining council for adjudication. Any discretion exercised by an employer in respect of the provision of benefits, as this term is so broadly interpreted in Apollo, is subject to the scrutiny of the CCMA or a bargaining council under the unfair labour practice jurisdiction.

The judgment in Apollo has recently been applied by the Labour Court in *SARS v Ntshintshi & Others (unreported case (C546/12) [2013] ZALCCT 17)* where the court held that the provision of a discretionary travel allowance in terms of the employer's travel allowance policy amounted to a benefit.

The Apollo decision, which initially appeared to bring some clarity on what constitutes a benefit, will undoubtedly open the flood gates for any disgruntled employee to refer a dispute to the CCMA relating to privileges and advantages awarded by an employer. Previously, disputes relating to privileges or advantages which were not founded in contract or statute were addressed or resolved through industrial action.

On consideration of the principles established in Apollo, it is clear that not only would the decision not to grant a benefit fall within the ambit of s186(2), so too would the decision not to offer a certain privilege or benefit to particular employees. In Apollo an offer was made to employees between the ages of 46 and 59 to apply for early retirement which would be granted at the employer's discretion. The employee in that case satisfied the requirements prescribed by the employer, but was nevertheless refused entry into the scheme by the employer who maintained that it was simply exercising its discretion.

Is the inevitable result of Apollo that a practice or policy which does not make provision for a particular benefit or advantage to a certain group of employees is adjudicable by the CCMA?

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Using the facts in the Apollo case, would the 49 year old employee have been entitled to refer an unfair labour practice dispute to the CCMA even in the event that the employer's policy had provided that eligibility to enter the scheme was dependent on employees having attained the age of 50? Apollo states that a benefit includes an existing advantage or privilege which an employee is granted in terms of a policy or practice subject to the employer's discretion. In the aforementioned scenario, there is an existing policy which provides for an advantage to certain employees and the employer has exercised its discretion in granting the benefit to only select employees at the exclusion of others. It therefore seems that an employee in these circumstances would therefore be entitled to refer an unfair labour practice dispute to the CCMA.

It was held in *Protekon (Pty) Ltd v Commission for Conciliation Mediation and Arbitration & Others [2005] 7 BLLR 703(LC)* that unfair labour practice jurisdiction 'cannot be used to assert an entitlement to new benefits, to new forms of remuneration or to new policies not previously provided by the employer. To permit that would allow an employee to use the unfair labour practice jurisdiction to establish new contractual terms; something the LRA clearly contemplates should be left to a process of bargaining between the parties.' This is cold comfort to an employer who, for example, wishes to grant performance bonuses on a discretionary basis and has a policy or practice in place regulating such bonuses. The decision not to grant such a bonus could be the subject of an unfair labour practice claim in the CCMA. This is true even where the decision not to do so is based on a pre-determined performance management system. The employer will nevertheless have to prove the fairness of its conduct in exercising the discretion.

We therefore anticipate countless disputes being referred to the CCMA and bargaining councils which relate to the provision of "benefits", as this term is defined in *Apollo*.

Mandlakazi Ngumbela

CO-OPERATIVES – IS IT REALLY NECESSARY TO CHANGE THE LAW?

The Co-operatives Amendment Bill (Bil") endorsed by the National Council of Provinces during May 2013 and referred to the President for assent seeks to remove from the Co operatives Act (Act) a provision (exclusion) that currently excludes labour legislation in respect of a member of a worker co-operative as follows:

"A member of a worker co-operative is not an employee as defined in terms of the Labour Relations Act, 1995 (Act No. 66 of 1995), and the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997)."

The Bill also provides for the setting up of a Co-operatives Tribunal and Co-operatives Advisory Council (CDA) and introduces certain administrative and governance aspects. The stated purpose of these amendments is to "ensure that Co-operatives take their rightful place and contribute effectively to the Country's economy as they have the capacity to create jobs and eradicate poverty".

The amendment to item 6 of Part 2 of Schedule 1 to the principal Act reads as follows:

"Application of labour legislation

1. An employee of a worker co-operative is any member or non-member of a co-operative who satisfies the definition of 'employee' as defined in the Labour Relations Act, 1995 (Act No. 66 of 1995).
2. All worker co-operatives must comply with labour legislation.
3. Despite subsection (1), a co-operative may apply to a bargaining council with jurisdiction over the sector within which the co-operative operates or, where there is no such bargaining council, to the Minister of Labour for full or partial exemption from the need to comply with applicable labour legislation in respect of employees of the co-operative.
4. The bargaining council or the Minister of Labour, as the case may be, may only grant an exemption in terms of sub-section (3) if reasonably satisfied that there are good grounds for doing so.
5. The Minister must, in consultation with the Minister of Labour, within six months from the date of commencement of the Co-operatives Amendment Act, 2012, and thereafter from time to time, make regulations determining what constitutes good grounds for the purposes of subsection (4)."

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In terms of the proposed amendment, not only will the exclusion be removed, but any member of a worker co-operative will now become an employee and worker co-operatives are now compelled to comply with the relevant labour legislation unless an exemption has been granted.

The proposed amendment has been criticised in that it "would heap onerous requirements on co-ops and would probably kill them". Is that fair comment? And what effect will the amendment removing the exclusion have on members of worker co-operatives?

A co-operative is defined as "an autonomous association of persons united voluntarily to meet their common economic and social needs and aspirations through a jointly owned and democratically controlled enterprise organised and operated on co-operative principles."

The Act distinguishes between various defined co-operatives. For purposes of this discussion the following two are important: (1) a 'marketing and supply co-operative' which means a co-operative that engages in the supply of production inputs to members and markets or processes their products, and also includes an agricultural marketing and supply co-operative, and (b) a 'worker co-operative' which means a co-operative whose main objectives are to provide employment to its members.

A worker cooperative has the characteristic that the majority of its workforce owns shares and the majority of shares are owned by the workforce. Membership is not always compulsory for employees, but generally only employees can become members either directly (as shareholders) or indirectly through membership of a trust that owns the company.

In South Africa in many instances persons received farms from the Government in the form of a co-operative with ten or more people and when the start-up capital was depleted it collapsed. Fairly recently, especially in the South African textile industry, mostly flailing businesses have been turned into co-operatives.

The main reasons for the failure of co-operatives in the informal sector identified by the Department of Labour is a lack of know-how on how to run a co-operative and lack of training in this regard.

In 2012 the Department of Labour reported that it was aware of a hundred bogus co-operatives up from seven in 2007, mostly in the textile sector. SACTWU said the move to co-operatives in this sector was to avoid having to abide by labour legislation in that the company would retain the machinery and equipment and "effectively outsourc(ing) work" to the employees in the guise of a co-operative.

The Amendment Bill seeks to address lack of training and knowledge by the introduction of the CDA to provide support and services to (especially small) co-operatives.

It is the deeming of a member of a co-operative to be an employee, if the member (or non-member) satisfies the definition of 'employee' in law, which may be superfluous as the Labour Court has already adopted a wide interpretation to the definition of an 'employee'.

In *UPUSA obo Mpanza / Spectra Creations Worker Co-operative Limited [2010] 6 BALR 608 (NBCCMI)* the commissioner noted the exclusion in the Co-op Act but applied S200A of the LRA (the so called 'substance over form provision' and held the members to be 'employees' despite the fact that the members had signed a formed which acknowledged their membership of the co-operative. It was held that it was desirable to establish the true nature and identity of the employer and it was held that the employer was a 'worker co-operative' in name only and the sole motive for its formation was to evade its obligations under labour legislation.

It is accepted that it was necessary to remove the explicit exclusion. It is however questionable as to whether or not the proposed amendment to make of members employees is really necessary in view of the existing mechanisms available to members of worker co-operatives. Furthermore, the additional administrative requirements may well put a damper on the running of co-operatives.

Faan Coetzee

WHEN ARE EMPLOYEES GUILTY "BY ASSOCIATION"? THE PRINCIPLE OF DERIVATIVE MISCONDUCT

Corporate entities with labour intensive environments are often the victims of significant stock losses or malicious acts which result in significant and repeated financial loss to the employer.

Due to the large work force and / or closely associated employees it becomes difficult to identify and discipline the culprits. To make matters worse, those involved generally conceal one another's identities either out of intimidation or to derive further secret profits.

What is an employer to do? The answer lies in collective disciplinary action on the basis of 'derivative misconduct'.

The Labour Appeal Court in *Chauke & Others v Lee Service Centre t/a Leeson Motors 1998 19 ILJ 1441 (LAC)* defined derivative or residual misconduct as, "the situation where employees possess information that would enable the employer to identify wrongdoers, and that those employees who fail to come forward when asked to do so, violate the trust upon which the employment relationship is founded."

Briefly the facts of the case were that the employer operated a panel beater shop and his client's vehicles had become the subject of malicious acts of sabotage due to underlying and on-going labour issues with his employees. Management continuously engaged with its employees after each incident of damage, but none of the employees ever came forward as to who was causing to the damage.

Eventually management issued a final ultimatum which was headed "Sabotage Ultimatum". The letter detailed the following main points:

> "Sabotage to vehicles is detrimental to the interest of the business and is detrimental to you own interest."
>
> "Management has tried everything in its power to identify the culprits, but to no avail."
>
> "You are now advised that any further sabotage to any vehicle where the culprit cannot be identified will result in your instant dismissal."
>
> "This ultimatum is a final ultimatum in all earnest."

After a further incident of sabotage took place, the employees were provided with an opportunity to submit the names of the culprits to the employer, however no names were forthcoming. The employer accordingly took disciplinary action against the entire group of employees and they were all dismissed.

The group of employees alleged that their dismissals were unfair and the matter was finally adjudicated in the Labour Appeal Court (LAC). The LAC set out the substantive and procedural requirements in order to succeed with a dismissal based on derivative misconduct.

Substantive fairness

The court held that, where a company suffers from major stock losses / acts of sabotage, perpetrated by a collective group of employees, that such misconduct will be recognised as a substantive ground for disciplining and possibly even dismissing that group of employees.

An employer, in proving substantive fairness, needs to show that the employees were warned and knew of the relevant rule and that, if the sabotage / theft continued unabated, that they would be held collectively responsible.

The rationale for collective disciplinary action is based on the principle that the employees have all associated themselves with an act of misconduct and accordingly all act with a 'common purpose'. It has been held that derivative misconduct has as its core, the employee's silence when called upon to disclose theft/damage from within a collective unit and that this justified an inference that the employee/s participated in or supported the particular misconduct which was not disclosed to the employer.

The courts have adopted the approach that if the employees have an innocent explanation that they should tender such an explanation and that their failure to do so weighs in the balance against them. As for the burden on proof, the courts have held that the burden is on the employee to rebut the facts and allegations of sabotage/theft and that their failure to do so elevates the employers *prima facie* case to one of conclusive evidence.

Procedural fairness

The second leg required to prove that a dismissal as fair is that of procedural fairness. The general rule is that the employer must afford an employee an opportunity to be heard (the *audi alteram partem* rule) which usually comes in the form a disciplinary hearing, and this process must precede any disciplinary action taken against the employee/s for such action and / or dismissal to be procedurally fair.

It has been held that a dismissal for derivative misconduct will be procedurally fair provided that the employer has observed the *audi alteram partem* principle, namely that the employer gives the employee/s an opportunity to state their respective cases and in doing ensures that the employees are made aware of the charges against them.

The LAC has held that to satisfy the requirements for procedural fairness in cases of derivative misconduct, an additional requirement would need to be satisfied, namely the issuing out of an ultimatum.

The ultimatum should include an invitation to employees to come forward and disclose to the employer any information pertaining to the collective misconduct and those involved. The LAC has held that the failure to assist an employer in bringing the guilty employees to book violates the duty of trust and confidence and may in itself justify dismissal.

Accordingly, an employee can only be held liable for acts of misconduct committed by members of a group to which he/she is a member in three circumstances:

1. If the employee is one of the persons in the group who actually committed the acts of misconduct;
2. If the employee did not actually commit the misconduct, but associated himself with the acts of misconduct or associated himself with the common goal of the group concerned (common purpose); or
3. the employee's guilt is based on the fact that the employee did not co-operate with the employer in that the employee failed to identify those employee/s who were guilty of the "primary misconduct" in circumstances where he/she was able to do so.

It is imperative to note that when employees are charged with derivative misconduct, they should each be charged with their own individual act of misconduct, be it either failing to disclose, taking part, or being an accomplice to the theft or damage.

A failure to charge the employee/s in this manner may have an impact on the substantive fairness of their dismissals.

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