DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT

ALERT

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SEVERANCE TAX BENEFITS – THRESHOLD INCREASE

Tax on severance is an important aspect of the law for employers and employees to understand. The Basic Conditions of Employment Act, No. 75 of 1997 (BCEA) provides that an employer who dismisses an employee for 'operational requirements' must pay severance of one week's remuneration for every completed year of service. However, this does not prohibit an employer from providing more than the statutory minimum in terms of a contract of employment, company policy, collective agreement or an agreement reached in terms of s189 of the Labour Relations Act, No. 66 of 1995 (LRA).

The Minister of Finance has increased the tax-free threshold from R315 000 to R500 000, applicable from 1 March 2014. However, this amount remains a lifetime exemption. Therefore, should an employee have the misfortune of being retrenched more than once in their working life, this person may continue to claim the tax exemption on the severance component, but only up to a ceiling of R500 000, after which tax will be payable. According to the South African Revenue Service (SARS), it is the responsibility of the employer to apply for a tax directive should such severance be payable.

It must be noted however that this benefit does not apply to *pro-rata* bonus, severance notice and leave as the aforementioned remain subject to tax. Therefore, the circumstances under which one will be entitled to this severance benefit must comply with the definition of a 'severance benefit' as defined in the Income Tax Act, No 58 of 1962 (Income Tax Act). The Income Tax Act provides that a severance benefit means any lump sum amount received from an employer in respect of the relinquishment, termination, loss or repudiation of office or employment or of the person's appointment or a right or claim to be appointed to an office, provided one of the following requirements are met:

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- The person is 55 years or older.
- The person is incapable of holding employment due to sickness, injury or incapacity.
- The termination or loss is due to one of the following:
  - The person's employer having ceased to carry on or intending to cease carrying on the trade in respect of which the person was appointed; or
  - The person having become redundant in consequence of a general reduction in personnel or a reduction in personnel of a particular class by the person's employer (ie retrenchment or due to general operational requirements).

In light of the above, it would seem that on a plain reading of the definition, it suggests that should a 55-year-old employee's employment be terminated for whatever reason, the severance benefit will apply.

Accordingly, there may be argument and it seems as though that should a 55-year-old employee's employment be terminated (for no reason related to operational requirements as required in the BCEA), severance benefits (ie the tax-free threshold) may find application.

In conclusion, this threshold affects a broad category of employees should their employment be terminated and it is therefore important for employers and employees to note that the severance benefit will be tax free up to the first R500 000 payable and thereafter the benefit will be taxable.

Gavin Stansfield and Abdul Allie

DISMISSING 'WITHOUT PREJUDICE' AND NOT TO BE REMINDED AGAIN

Employers, and sometimes employees, initiate discussions with a view to going separate ways. Employers sometimes initiate discussions to avoid going through a disciplinary process or a retrenchment procedure and sometimes just to get rid of an employee for what is perceived to be in the best interest of the company where the employer has no permissible legal ground to terminate employment.

Employers are sometimes hesitant to initiate any separation discussions because they are afraid that by doing so they may convey to the employee that they do not have a case, while they believe that they would be successful with a disciplinary or other process. They may also be concerned that the unsuccessful discussions may be used against them in later proceedings to establish an improper motive for the proceedings that follow.

Protection for the employer party (and the employee who wishes to initiate the discussions) is to be found in the 'without prejudice' rule.

'Without prejudice' is called a privilege. However, in reality, it is not a privilege but a right to make certain admissions that are inadmissible in later proceedings. The rationale for the 'without prejudice' rule is that the law encourages parties to settle disputes prior to formal legal action with its accompanying legal expenses, delays, hostility and inconvenience by having a full and frank discussion in a climate where parties can negotiate openly without the fear that what was communicated will later be used against them (see *Naidoo v Marine and Trade Insurance Co Ltd 1978 3 SA 666 (A) 667*).

In South Africa, the protection applies regardless of whether or not 'without prejudice' is written on the correspondence. The Courts will consider the contents of the communication to determine whether the communication is protected or not (see *Jili v SA Eagle Insurance Co Ltd 1995 (3) 269 (N) at 275*).

The primary criterion for protection is that the parties must negotiate in good faith to resolve a dispute. Threats of litigation do not impede on the protected nature of the communication, although if a threat is made that indicates that the offer was not made in good faith then it stands to reason that the communication will later be permissible as evidence.

The case of Naidoo set the standard in South Africa to the effect that without prejudice protection will apply to communications or statements that are not wholly unconnected to the negotiations. If the statement is irrelevant but in some way connected to the negotiations it is still protected.

The second important point is that there must be a dispute that the parties are attempting to resolve.

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There is no doubt that the rule will find application when the employer and employee enter into negotiations after the employee has been informed of pending disciplinary or retrenchment proceedings as those proceedings will create a dispute between the parties to be resolved through an appropriate process. Attempts to settle these disputes will invoke the rule provided the negotiations are in good faith.

But what if the employer enters into discussions where no formal processes are invoked or contemplated?

In the United Kingdom case of *BNP Paribas v Mezzotera [2004] IRLR 508 EAT*, the employee raised a maternity leave related grievance. In a subsequent meeting, the employer suggested that they terminate the employment by mutual consent and offered a settlement package. She launched claims of sex discrimination and victimisation. While the meeting was referred to as 'without prejudice', the Employment Appeal Tribunal found that the principle did not apply as there was no dispute but merely a discussion regarding the grievance.

In the more recent British case of *Portnykh v Nomura International (UKEAT/0448/13/LA*), however, it was stated that the principle could be applied to discussions which even relate to a 'potential dispute'. In this instance, an employee was dismissed for misconduct while the employee contended in later proceedings that it should have been by reason of redundancy. This has not been tested by our law.

Communications during general mediation proceedings are protected (see *Waste-Tech (Pty) Ltd v Van Zyl and Glanville NNO 2002 1 SA 841 (E)*). Mediation proceedings in their nature attempt to resolve an existing dispute through negotiations under the auspices of a third party.

Employers are well advised to enter into discussions of this nature only where there is a dispute. In the absence of a dispute, the communications are not protected against disclosure and may be used in subsequent proceedings.

Faan Coetzee and Richard Chemaly

EMPLOYMENT SERVICES ACT

The Employment Services Act, No. 4 of 2004 (Act) was passed by the National Assembly on Tuesday 4 March 2014. The Act is currently in line to be assented to by the President. It is envisaged it will be assented to together with the amendments to the Labour Relations Act, No. 66 of 1995 (LRA).

The Act repeals the Employment Services Provisions contained in the Skills Development Act, No. 97 of 1998. The purpose of the Act is to establish productivity within South Africa, decrease levels of unemployment in South Africa and provide for the training of unskilled workers.

While the Act has various mechanisms for improving unemployment levels in South Africa and training the workforce, only time will tell if these mechanisms will be successful.

One of the more publicised provisions of the Act is that it provides for the registration of private employment agencies, which includes recruitment agencies and temporary employment services, more commonly known as labour brokers.

The Act further provides for the creation of a public employment service which will be established and managed by the state. The rationale behind the creation of the public employment service is to provide state assistance to unemployed job seekers.

The public employment service will register job seekers and placement opportunities. The job seekers would then be matched to services and placement opportunities. Provision will be made for training of unskilled job seekers and career information.

Employers in certain industries may be required to register vacancies and specific categories of work with the Public Employment Service. Employers may also be required to interview individuals recommended by the public employment agency. Employers may also be required to pay license fees to assist in funding the Public Employment Service.

Naturally, as with all other employers and employment agencies, the Public Employment Service will have to comply with the Protection of Personal Information Act (POPI). One of the implications of POPI is that employers will be required to obtain consent from employees and prospective employees to process their personal information. The Public Employment Service will therefore be required to obtain such consent from prospective employees

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when assisting them in applying for positions with employers. Where the Public Employment Service has not obtained the consent or has obtained consent with insufficient scope, the employer would have to obtain the consent itself. This could be onerous on employers.

The Act also empowers the Minister of Labour to introduce regulations relating to the employment of foreign nationals. The purpose of the provision would be to protect the employment of South African citizens and permanent residents. The provision states that foreign nationals may not be employed without a valid work permit. A foreign national, in terms of the Act, may not be employed to do work which they are not authorised to perform in terms of their work permit. The Act states that the Minister of Labour may make regulations setting out processes to be followed by employers prior to employing a foreign national.

The Act further provides for Supported Employment Services for persons with disabilities. This would entail providing training to people with disabilities to promote their access to formal and self-employment.

The Act is a genuine attempt by the legislature to address unemployment levels. Whether the Act will be successful in its purpose will be dependent on the implementation of the provisions of the Act.

Inez Moosa

SKYPING AT AN ARBITRATION PROCEEDING – A CLEVER WAY TO ALLOW A WITNESS TO TESTIFY OR AN INFRINGEMENT OF THE RIGHT TO A FAIR TRIAL?

Simmers v Campbell Scientific Africa sets the record straight.

Mr Simmers was called to attend a disciplinary hearing by his employer, CSA, on allegations of sexual harassment, unprofessional conduct and bringing the name and image of the company into disrepute. He was dismissed and subsequently referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

Ms Markides, the victim of the alleged sexual harassment and CSA's witness in the arbitration proceedings, was resident in Australia at the time of the arbitration and did not testify in person.

The arbitrator allowed her to testify via Skype. However, a video link could not be established and Markides thus testified and was cross-examined telephonically by Skype link.

Simmers was unhappy and complained that he was prejudiced that Markides did not testify in person at the arbitration. He alleged that the arbitrator committed a reviewable irregularity by allowing Markides to testify by long-distance telephone link.

Specifically, Simmers argued that Markides had the benefit of delays, pauses, broken connections, time to compose herself, to think of her answers, to reconsider the questions, and that she did not have to face the man that she accused.

Furthermore, the arbitrator could not test her demeanour (an important factor in sexual harassment cases).

It is trite law that arbitration proceedings are designed to be informal and conducted with the minimum of legal formalities. The Judge held that the arbitrator allowed Markides' evidence in a manner that reflected this.

The arbitrator was held to have conducted the arbitration in a manner that he considered appropriate to determine the dispute fairly and quickly. The Judge noted that Markides was in Australia and that it would have been unacceptably costly and time-consuming for her to be flown back to South Africa to give evidence.

Judge Steenkamp held that while it was not an ideal situation to allow a witness to testify via Skype or a long-distance telephone link, it was nevertheless a scenario envisaged by the Labour Relations Act, No. 66 of 1995.

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The fact that Markides testified in the manner that she did did not prevent Simmers from having a fair hearing and it did not constitute a reviewable irregularity.

This is good news for both employers and employees. By allowing evidence to be led via Skype or long-distance telephone link, there are likely to be fewer postponements during arbitration proceedings due to the unavailability of witnesses.

In addition, costs associated with transporting and accommodating witnesses in order for them to testify at arbitration proceedings can be kept to a minimum in instances where witnesses are abroad or live far away.

Lauren Salt and Tracy Robbins

TERRITORIAL APPLICATION OF THE LRA: SOUTH AFRICAN TOURISM V TEBOGO BRIAN MONARE

The Labour Court recently determined a review application, not on the grounds of review pleaded, but on the issue of territorial application of the Labour Relations Act, No. 66 of 1996 (LRA). The Judge stated that this was permissible even though such aspect was never raised prior to the review application on the basis that the issue of jurisdiction can be raised at any time.

In the case of *South African Tourism v Tebogo Brian Monare & Others* (Reportable Judgement – JR2298/11) (SA Tourism case), the Judge directed, after hearing the parties on the grounds of review, to address him on the extra-territorial application of the LRA. The reason for doing so related to the employment relationship and whether the Commission for Conciliation, Mediation & Arbitration (CCMA) had jurisdiction to adjudicate an alleged unfair dismissal claim where the employee was employed at the employer's London office on a fixed-term contract.

The Judge assessed the facts of the matter in reference to various case law and the following factors:

- The place the employee rendered his services;
- The place payment is made;
- The location of the parties;
- The method of calculating remuneration and the currency used; and
- The place in which the relationship was entered into.

More specifically, the Judge relied on the Labour Appeal Court decision of *Astral Operations Ltd v Parry* (2008) 29 ILJ 2668 (LAC) whereby the court determined that the territorial application of the LRA is to be determined ultimately by the locality of the undertaking carried on by the employer.

The Judge also referred to judgements which determined that the LRA did find application. However, they were not applicable to the facts in the SA Tourism case as they related to a secondment agreement and a labour broker relationship.

When arriving at his conclusion, the Judge assessed the following facts:

- The employer operated an undertaking from within South Africa and entered into a specific contract of employment with the employee to work outside of South Africa;
- The employee worked at the employer's London office, which had its own information technology systems, control, time management, staff and premises; and was subject to a separate audit;
- The employee was paid in pound sterling in London;
- The employee was recruited overseas;
- The contract of employment was concluded outside of South Africa;
- The employee was obliged to work overseas with no right to return to South Africa and continue employment; and
- The employee committed acts of misconduct in London and was disciplined and dismissed in the London.

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Based on the facts of the case above, and the assessment required by the previous case law, the court held that the LRA has no territorial application and that the CCMA had no right to adjudicate the matter.

In the recent Labour Court decision of *Redis Construction Afrika (Pty) Ltd v CCMA & others (Reportable Judgement S1118/12)* (Redis Case), a construction administration company appointed an employee in South Africa to work in the Democratic Republic of Congo (DRC). The employee was charged with misconduct in the DRC and repatriated to South Africa to attend a disciplinary hearing, and was subsequently dismissed.

The Court held that the CCMA had jurisdiction to adjudicate the dismissal dispute on the following basis:

- The contract was concluded in South Africa;
- When the employee returned to South Africa, he was promised further employment, but not in the DRC;
- The dismissal took place in Durban;
- The company employs persons for extra-territorial work and it may be inferred that it performs the services of a labour broker; and
- The company had no business interests in the DRC aside from the administration which could be performed in South Africa.

The Court essentially upheld the locality of the undertaking test and found that, in this case, it was in South Africa.

The Redis judgment was premised on a similar matter of *MECS Africa (Pty) Ltd v CCMA & Others (2014) 35 ILJ 745 (LC)* (MECS) whereby the court held that a labour broker's locality of undertaking was where the company recruits and procures the labour and not the place where the client has operations.

The MECS decision further confirmed that the principles of private international law and choice of law did not apply, ie even if an agreement confers jurisdiction on the parties, the correct test is that of the locality of the undertaking test.

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