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EMPLOYMENT

MATTERS

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AFFIRMATIVE ACTION – THE "BBBEE" ALL AND END-ALL?

The use of affirmative action as a selection criterion in the employment industry is a somewhat controversial topic and a verdict on this question is currently lacking in finality.

Where an employer wishes to retrench employees for reason of operational requirements, the employer could motivate that such retrenchment would be in compliance with its Broad-Based Black Economic Empowerment (BBBEE) requirements and Employment Equity. However, an employer should caution in doing so as the law pertaining to this has not yet been settled.

Affirmative Action as a selection criterion

Item 9 of the Code of Good Practice on Operational Requirements provides for the 'last-in first-out' principle (LIFO) as the required objective criterion with which to effect retrenchments. However, it also provides that the LIFO principle should not operate so as to undermine an agreed affirmative action programme.

This Code can therefore be said to hint toward an argument that may be made to justify taking race into account in a retrenchment exercise. Should an employer intend on making this argument, the employer's employment equity plan would need to specify this as an affirmative action measure. Furthermore, the employer would need to show that any targets in this regard which have been set in its employment equity plan would be jeopardised or undermined if these considerations are not made during its retrenchment exercise.

Possible case of discrimination?

Section 15(4) of the Employment Equity Act, No. 55 of 1998 (EEA) provides that there is no obligation on an employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups. This makes it clear that the EEA does not require employers to dismiss white male employees in favour of affirmative action appointments.

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Furthermore, s6 of the EEA prohibits discrimination on the grounds of race or gender, despite s6(2)(a) which provides that "affirmative action measures" which are "consistent with the purposes of this Act" do not amount to unfair discrimination.

The Court in the *Robinson and Others v PWC* (2006) 27 ILJ 836 (LC) case held in passing that "affirmative action is not, and never has been, a legitimate ground for retrenchment". This is in line with international case law.

When implementing a retrenchment exercise, employers ought to be cautious when considering its selection criteria. Failure to do so may result in potential recourse available to a dismissed employee.

Although this may be a very controversial topic to which a clear answer has not yet been established, an employer should ensure that affirmative action measures have in fact been specified in its employment equity plan to avoid a clear-cut case of unfair discrimination on the part of the employer against a disgruntled employee.

In addition to this, an employer is encouraged to show evidence of its specific employment equity targets. An employer should also show that a retrenchment exercise which is not based on affirmative action measures would be detrimental to the operations and success of its business.

Hugo Pienaar and Antonia Pereira

POLYGRAPHS: ARE INFERENCES FROM PINOCCHIO'S NOSE WORTH THE PROCEDURE?

Many employers labour under the misapprehension that polygraph results are easily admissible as evidence in disciplinary proceedings. Others believe that polygraph results are strictly inadmissible and unusable. In truth, the answer lies somewhere in-between. Employers should be asking what steps should be followed to allow polygraph evidence in disciplinary proceedings.

Such a question recently came before the Labour Appeal Court (LAC) in the case of *DHL Supply Chain (Pty) Ltd v De Beer NO and others (DA4/2013)*. In essence, this case involved an employer who noticed stock had gone missing. The employer's employees were subjected to a polygraph test. The two employees who failed were dismissed as a result. The employer was unsuccessful at the Commission for Conciliation, Mediation and Arbitration (CCMA) and took the case on review. The employer was unsuccessful on review and took the matter on appeal to the LAC, claiming that proper weight was not afforded to the polygraph tests.

In its judgement, the LAC quoted the arbitrator's award: "Polygraph evidence, when coupled with other circumstantial evidence, can be sufficient to discharge the *onus* in labour disputes" and circumstantial evidence is "indirect evidence which creates an inference from which a main fact can be inferred". The LAC went further to ask "what was polygraph evidence worth in the context of all the facts?" The answer was that, in isolation, it was not worth much.

Clutching at straws, the employer then claimed that even if the claim of theft was unproven, "the taint of suspicion has undermined the requisite degree of confidence which is an operational necessity". While trust is a vital factor in the employment relationship, the LAC found that suspicion alone could not be enough to break the trust relationship.

Ways in which employers can make use of polygraph tests

The Courts' primary objection to polygraph tests is that they are not an exact science. They are seen to be subjective interpretations of sets of data. In fact, in the case of *FAWU obo Kapesi and Others v Premier Foods t/a Blue Ribbon Salt River (2012) 33 ILJ 1779 (LAC)*, Basson J stated that "at best a polygraph could be used as part of the investigative process to determine whether or not a further investigation into the conduct of a particular individual is warranted".

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To supplement the polygraph results and make them useful as evidence, an employer would need to introduce expert evidence to 'establish the technical integrity of the process'. This does not mean that any person who conducts a polygraph test is qualified to testify in this regard. The expert evidence needs to be led by somebody who has the requisite independence and appropriate credentials in this regard.

Employers are encouraged to avoid sole reliance on the results of polygraph tests when dealing with investigations and disciplinary proceedings. If, however, the only method of reaching a conclusive end is by way of a polygraph test, then employers should ensure both that it is conclusive and that the circumstantial polygraph results are supplemented with the requisite expert evidence.

Lauren Salt and Richard Chemaly

EMPLOYER'S DUTY TO REPORT ON VACANCIES

The Employment Services Act, No. 4 of 2014 (ESA) was assented to by the President on 3 April 2014 and promulgated in the Government Gazette as legislation on 7 April 2014. The Act will come into operation on a date to be proclaimed by the President in the Government Gazette.

In terms of s10 of the ESA, the Minister of Labour may make regulations requiring employers to notify the Department of Labour of any vacancy or new position within their establishments.

Many employers have raised an eyebrow at the onerous reporting obligation this provision has 'introduced'. However, the obligation to report vacancies to the State is already currently contained in s23(3) of the Skills Development Act, No. 97 of 1998 (SDA).

S23(3) of the SDA provides that the Minister of Labour may require each employer to notify a labour centre (which centres were to be established in terms of the SDA) of any vacancy that may exist within that employer's organisation.

Therefore, the ESA does not fundamentally change the current legal position regarding an employer's duty to report on vacancies as outlined in the SDA. However, the reason why employers are not at present required to report vacancies to the State is because the Minister of Labour has not issued the requisite notice and/or regulations under the SDA requiring employers to do so and to facilitate the reporting process.

The ESA therefore simply moves the reporting obligation from the SDA to the ESA. Consequently, the ESA has not introduced anything new in this regard.

Kirsten Caddy and Silindokuhle Malaza

RECENT JUDGEMENTS DEALING WITH S EXUAL HARASSMENT IN THE WORKPLACE

In the unreported case of *SA Metal Group (Pty) Ltd v CCMA and Others* (CC50/13) handed down on 15 April 2014, the Labour Court (LC) found an arbitration award made in the absence of considering the Code of Good Practice on Handling S exual Harassment Cases (Code) reviewable.

In this case, the employee was found to have engaged in, amongst others, inappropriate verbal banter with the complainant. The employee told the complainant that he "can't wait for summer to see you strut your stuff" and asked her whether she was "offering to play with me?"

The Commission for Conciliation, Mediation and Arbitration (CCMA) commissioner found that these comments did not constitute s exual harassment because the comments did not contain any explicit s exual connotations. The commissioner further held that it was not s exual harassment because the complainant did not make the employee aware that the verbal banter was unwelcome.

However, the LC came to the contrary conclusion after taking cognisance of the Code (something the commissioner failed to do). Specifically, the LC found that the employee's comments fell squarely within the definition of verbal s exual harassment contained in the Code in that it amounted to "unwelcome innuendo, suggestions and hints".

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The Code does not require verbal communication to contain 'explicit s exual connotation' for it to qualify as s exual harassment. In relation to the impact of the complainant's conduct in response to the employee's verbal banter, the LC found that "although the complainant may present as ambivalent, or even momentarily flattered by the attention, it is no excuse. The fact that the complainant showed signals of discomfort shows that the conduct is unwelcome".

The LC stated that, despite the Code indicating that a complaint of s exual harassment should be reported 'immediately', reporting the incident 'as soon as is reasonably possible in the circumstance' will suffice. The LC emphasised the importance of taking into account the power imbalances between the employee and the complainant.

In another recent case, *Simmers v Campbell Scientific Africa (C751/13)*, handed down on 9 May 2014, the employee asked the complainant whether she wanted "a lover tonight?" The LC held that it is necessary to distinguish between s exual attention and s exual harassment. The guidelines for making this determination are set out in item 4 of the Code.

In the Simmers case, the LC found that the employee's conduct did not amount to s exual harassment because the employee did not persist in the behaviour after the complainant told him that his overtures were unwelcome.

These cases illustrate the importance of considering the Code in handling s exual harassment cases in the workplace. The Code should at all times be used as the principal guide in assessing the nature and gravity of the conduct alleged to constitute s exual harassment.

Kirsten Caddy and Tricia Tsoeu

BEAURAIN V MARTIN N.O. AND OTHERS: THE UNREASONABLE WHISTLE-BLOWER

In *Beaurain v Martin N.O. and Others* (C16/2012) [2014] ZALCCT 16 (16 April 2014), the Labour Court (LC) applied the criteria in the Protected Disclosures Act, No. 26 of 2000 (PDA) to a self-described whistle-blower and found him wanting.

Mr Beaurain, an electrician at Groote Schuur Hospital, was dismissed for gross insubordination. Beaurain had taken it upon himself to publicise on Facebook the details of what he erroneously believed were health hazards in the hospital and had disobeyed management's instructions to desist. Beaurain challenged the fairness of his dismissal on the basis that his actions constituted disclosures in terms of the PDA. The Court disagreed, finding that Beaurain's conduct fell outside the PDA's definition of 'disclosure' and that, in any event, Beaurain had failed to follow the statutory procedure.

The PDA defines 'disclosure' as "any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following…". In applying the definition, the court had regard to the reasonableness of the publication and the notoriety of the information publicised.

Unreasonableness

First, the Court found that Beaurain's publication of the information, while *bona fide*, did not meet the reasonableness requirement. Beaurain had acted in the erroneous belief that the air in the hospital had been contaminated by the unsanitary condition of certain hospital toilets, thus posing a health hazard to staff and patients. After Beaurain first publicised the information, the hospital's management explained to him that there was no medical basis for his allegations and instructed him to desist. The Court found that Beaurain's persistence in the face of the explanation rendered his actions unreasonable.

Notoriety

Second, the information was notorious because the hospital's employees were all aware of the unsanitary condition of the toilets in question. The court held that notorious information cannot form the subject of a protected disclosure.

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Failure to follow statutory procedure

S9(2)(c) of the PDA requires that the employee making the disclosure must previously have made the same disclosure and that no action had been taken to address the previous disclosure. Unbeknownst to Beaurain, the hospital had already taken action before he persisted in publicising the information.

S2(1)(c) states that one of the objects of the PDA is "to provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer". The Court placed special emphasis on the element of responsibility and found that Beaurain had acted irresponsibly by publicising the information on Facebook, remarking that publication on the internet is inherently unfair because the internet is not subject to any editorial policy.

Employers should take comfort in the court's view that the internet is not a suitable forum for disclosures of this nature. Employers should also bear in mind the value of addressing an employee's unreasonable allegations at the first available opportunity and thereby depriving an aspiring whistle-blower of the vaunted 'reasonableness' element.

Lauren Salt and William Woolcott

PUTTING THE LAWFULNESS OF A TRADE UNION'S DEMAND UNDER THE MICROSCOPE

The Constitutional Court (CC) recently decided the lawfulness of a trade union's demand in the context of a dismissal in the decision of *National Union of Public Service & Allied Workers Union obo Mani and Nine Others v National Lotteries Board [2014] ZACC 10.*

The matter arose when the employees of the National Lotteries Board (NLB), through their shop stewards, wrote a letter to the NLB raising grievances and "urging" the removal of the CEO. This letter thereafter made its way to the press and was published in the Mail and Guardian.

The published letter expressed a vote of no confidence in the CEO and carefully worded the employees' demands to *inter alia* the following:-

"... We, as the employees are no longer prepared to bear with him anymore (referring to the CEO) and in light of the above, we urge the Board to request Prof X to resign and further look at a suitable settlement for him as deemed fit by the Board. Failing which, Prof X must be relieved of his duties..."

"We further urge the Board to take this matter seriously as we are no longer prepared to spend a day with Prof X in the same building with him at the helm of this organisation. We further urge the Board to ensure that June 30th 2008 is the last day of his employment."

The NLB thereafter charged the employees for insubordination, based on the their published 'threat' not to work as contained in the letter as well as on the basis that the published letter brought the company and the CEO's name into disrepute. The NLB also viewed the demand for the CEO's removal as unlawful.

The employees were given an opportunity to apologise for their misconduct and undertake in writing to disassociate themselves from such conduct.

Those of the employees who acknowledged their wrongdoing and disassociated themselves from the conduct in question were given written warnings, but the ten who refused were dismissed pursuant to a disciplinary hearing.

The matter first came before the Labour Court, where it was found that although a union may vigorously pursue the rights of its members, the right to freedom of expression does not afford a union and its members the right to engage in freedom of expression without consequence. Therefore the dismissals were found to be fair.

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Both the Labour Court as well as the Labour Appeal Court refused the employees leave to appeal and the employees thereafter petitioned the Supreme Court of Appeal (SCA).

The SCA held that in the present case the threat to defy the NLB's request for an undertaking and consequent demand regarding its CEO constituted insubordination. Furthermore, the cause of their dismissal was the offensive content the employees had communicated in the petition, not the act of petitioning itself. The appeal to the SCA was therefore unsuccessful.

The CC was thereafter called upon to ultimately determine the fairness of the dismissals and found same to be automatically unfair. The CC's finding was that the statements made by the employees were made in the pursuit of the on-going statutory conciliation process before the Commission for Conciliation, Mediation and Arbitration (CCMA) and was in the exercise and pursuance of their rights to participate in collective bargaining.

Furthermore, the CC held that there was nothing wrong with the published letter as the employees were entitled to associate themselves with same. The Court further took a 'form over substance' approach and by placing emphasis on the use of the word 'urge' contained in the petition and in doing so found that the employees had not made an unlawful demand.

As a general rule and as pointed out by the CC, petitioning an employer to dismiss another employee is not a lawful union activity protected under the Labour Relations Act, No. 66 of 1995, however, the court found that the use of the word "urge" did not amount to a demand but rather to a strong recommendation.

In amplification thereof, the conduct of the employees and the publication of the letter was said to amount to an exercise of the right to freedom of expression, which falls within the ambit of s16 of the Constitution.

Employers should therefore be cautious in examining the wording contained in letters of demand which are received from trade unions, as the union could try to escape the consequences occasioned by what on the face of it appears to be an unlawful demand through the simple and careful wording thereof.

This case will come as cause for concern for many employers.

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