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EMPLOYMENT ALERT

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A CHANGE IN THE TERMS AND CONDITIONS OF EMPLOYMENT OR A MERE WORKPLACE PRACTICE?

In the case of *Cele and Others v Eskom Holdings SOC Ltd LC (JS1086/12) [2015] ZALCJHB 271*, the Labour Court looked at whether an erroneous payment made by an employer to its employees for over ten years could lead to the payments forming part of the employees' terms and conditions of employment.

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The main issue of the case was thus whether the erroneous payments made to the employees for over ten years formed part of their terms and conditions of employment.

The court emphasised that for there to be a change in the employees' terms and conditions of employment, there would have to be a change in the employees' contractual rights.

In the case of *Cele and Others v Eskom Holdings SOC Ltd LC (JS1086/12) [2015] ZALCJHB 271*, the Labour Court looked at whether an erroneous payment made by an employer to its employees for over ten years could lead to the payments forming part of the employees' terms and conditions of employment.

In 1999, Eskom introduced two new shift systems in respect of which it paid its employees a shift allowance. In 2002, Eskom discontinued the shift system but continued to pay the shift allowance. At some point, Eskom began to refer to the payment, on an employee's salary slip, as being a 'fixed monthly payment'. When an audit was done in 2011, it came to the auditor's attention that the employees were being paid a shift allowance even though the shift system was no longer in place. Eskom then had a meeting with the employees, informing them that the shift allowance payments were being phased out.

NUMSA, on behalf of the employees, argued that the withdrawal of the fixed monthly payments was a unilateral change in the terms and conditions of employment as, due to the longevity of the payments, they now formed part of the employees' employment contracts. The union argued that the employer had a legal obligation to make the payments and that once the payments were labelled differently, these payments were legitimately due to the employees.

The main issue of the case was thus whether the erroneous payments made to the employees for over ten years formed part of their terms and conditions of employment.

The court went on to state that terms and conditions of employment are mostly established in a written contract but that these terms and conditions may be supplemented by implied terms which arise due to the parties' conduct, or common expectation or assumption. Such implied terms may arise as a result of custom which, the court explained, "is essentially a practice that has developed over a period of time or by arrangement that has never been specifically agreed between the employer and the employee, but can be argued to have formed part of the terms and conditions of employment". In other situations, terms and conditions of employment may be governed by collective agreements.

The court emphasised that for there to be a change in the employees' terms and conditions of employment, there would have to be a change in the employees' contractual rights.

On this basis, the court found that the change to the shift system was merely a change to Eskom's work practice as it did not result in the employees having a contractual right to work these shifts. Due to there being no such contractual right, they had no vested right to the continued payments. These payments were not legally due to them but were merely gratuitous payments in exchange for them rendering their services. The mere fact

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The fact that it took the employer over ten years to rectify the error did not create any legal obligation to continue making the payments.



that the employees tailored their lifestyles around the receipt of the payments does not result in it becoming a term and condition of employment. Furthermore, the fact that it took the employer over ten years to rectify the error did not create any legal obligation to continue making the payments. Eskom was thus entitled to stop the payments at any time.

It should thus be noted that if an employer introduces something new into the workplace it will only result in a change to the terms and conditions of employment if it results in a change to the employees' contractual rights, even if the act in question has occurred for a long period of time.

Anli Bezuidenhout and Batool Hayath

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