EMPLOYMENT

IN THIS ISSUE

THE HOT POTATO: WHO IS LIABLE FOR WORKMAN'S COMPENSATION?

In terms of s22 of the Compensation for Occupational Diseases Act, No 130 of 1993 (COIDA) all employees have the right to compensation where, as a result of a workplace accident or work-related disease, they are injured, disabled or become ill.

An occupational disease is a disease arising out of and contracted in the course of an employee's employment and which is listed in Schedule 3 of COIDA.

The definition of an employee in broad terms is anyone who has entered into a contract of service with an employer. The position however, differs in the case of independent contractors. Section 89(1)(a) of COIDA provides as follows:

- if a person (the mandator) in the course of or for the purpose of his business enters into an agreement with any other person (the contractor) for the execution by or under the supervision of the contractor of the whole or any part of any work undertaken by the mandator, the contractor shall, in respect of his employees employed in the execution of the work concerned, register as an employer in accordance with the provisions of this Act and pay the necessary assessments.

Section 89(1)(b) of COIDA provides that if the contractor fails to meet its obligations in terms of COIDA, the employees shall be deemed to be employees of the mandator, and the mandator shall pay the assessments in respect of the employees in question.

Section 89(2) of COIDA provides that in the event that a mandator has paid an assessment or compensation for which he would not have been liable to pay had the contractor complied with its obligations under COIDA, such mandator may recover that assessment or compensation from the contractor. Such amount may also be set off by the mandator against any debt due to the contractor.

In determining which party would be liable for the compensation, one would first have to ascertain who the employer is. If it is determined that the employer is the independent contractor, s89 of COIDA would apply.

In respect of public liability, the general rule of our law is that although an employer may be held vicariously liable for the wrongdoing of his employee, an employer is not responsible for the negligence or the wrongdoing of an independent contractor, mandated to perform certain tasks for such employer. This view was held by the Supreme Court of Appeal (SCA) in the case of *Chartaprops 16 (Pty) Ltd and another v Silberman 2009 (1) SA 265 (SCA)*. The SCA explained that the correct approach to the liability of a principal (employer) for the negligence or wrongdoing of an independent contractor is to apply the fundamental rule that obliges everyone to exercise the degree of care that the circumstances demand. The employer is not obliged to take any further steps than reasonable to guard against foreseeable harm to the public.

The SCA found that, by engaging a competent contractor, the employer took the necessary care incumbent on it and there would have been no way for the employer to have known that the contractor's work would be defective and result in harm to the public. Accordingly, the SCA found that the harm to the public was caused solely by the wrongdoing of the contractor and absolved the employer from liability.

An employer is therefore not responsible for the negligence or the wrongdoing of an independent contractor, mandated to perform certain tasks for such employer. An employer is only required to exercise the degree of care demanded by the circumstances and is not obliged to take further steps than is reasonably required to guard against foreseeable harm to the public.

Katlego Letlonkane

TO BE BOUND OR NOT BE BOUND – ATTORNEY UNDERTAKINGS

In the recent decision of *Eskom Holdings SOC Limited v Wilhelm Jeremiah Smith,* J234/15 which was handed down on 11 February 2015, the court was faced with an urgent application to stay the enforcement of an arbitration award, pending the finalisation of review proceedings.

The matter was complicated by the following facts:

- The employee's attorney had previously provided the employers attorneys with a written undertaking that their client would not enforce the arbitration award until such time as the review application had been finalised.
- Despite this undertaking, the employee sent a subsequent email demanding that employer's attorneys apply for an urgent set down date and do so within one week, failing which the employee would proceed with enforcement proceedings.

The Labour Court was faced with determining whether the employee was bound by the written undertaking provided by his attorney, notwithstanding his later correspondence to the contrary.

From a laymen's perspective, an undertaking is understood to be a pledge, promise or a guarantee, however from a legal standpoint the definition is more stringent being, an unequivocal declaration of intention given by one party to another, the latter of whom places reasonable reliance thereon.

In deciding the matter, the Labour Court held that "undertakings given by attorneys in the course of their practice are more than mere contractual arrangements and a failure to honour those undertakings can constitute professional misconduct". Furthermore, the court held that attorneys are not legally obliged to give undertakings to colleagues, but that when they do so, the undertakings must be honoured.

In light of the above, undertakings that are given and then relied upon must be honoured not only from a contractual standpoint but, when given between legal practitioners, the rules of professional conduct amplify this contractual obligation.

Accordingly, the court held that the employee was bound by his attorneys undertaking to stay the enforcement proceedings as, after all, the attorney was the employee's chosen representative.

This decision sheds light on the importance of attorney undertakings and confirms that litigants will be bound by the decisions and representations of their attorneys, representatives and/or trade unions.

It should also be remembered that as of 1 January 2015, under the recent amendments to the Labour Relations Act, No 66 of 1995, the filing of a review application will only automatically stay the enforcement of an arbitration award if the applicant furnishes security to the satisfaction of the court. The form of security is, however, something which is yet to be determined by the courts.

Nicholas Preston and Karabo Ndhlovu

NEWSFLASH: GREATER UNION LIABILITY MAY BE COMING TO A STRIKE NEAR YOU

On Wednesday 18 February 2015, further proposed amendments to the Labour Relations Act, No 66 of 1995 were introduced and referred to the Portfolio Committee on Labour.

These further amendments seek to heighten the accountability of trade unions in the event of violence, destruction to property and intimidation by union members during a protected strike.

The amendments will also empower the Labour Court to declare the cessation of a protected strike or to refer the protected strike for arbitration in the event of riot damage.

Given the large incidences of violence and intimidation which have plagued strikes over recent years, these further amendments are to be welcomed.

Nicholas Preston

RETRENCHMENTS: WITH WHOM MUST AN EMPLOYER CONSULT?

When an employer contemplates retrenching one or more of its employees it is obliged in terms of s189(1) of the Labour Relations Act, 66 of 1995 (LRA) to consult with:

- any person whom the employer is required to consult in terms of a collective agreement;
- if there is no collective agreement that requires consultation -
  - a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and
  - any registered trade union whose members are likely to be affected by the proposed dismissals.
- if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or
- if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

In the recent decision of *Ketse v Telkom SA SOC Limited (P400/14) [2014] ZALCPE 38 (5 December 2014)* the Labour Court was called upon to interpret s189(1) of the LRA and determine the extent of the employer's obligation to consult with an individual employee affected by a retrenchment in circumstances in which the employer had concluded a collective agreement with four trade unions dictating that the employer consult with the four trade unions prior to retrenching employees.

In 2014 Telkom embarked on a restructuring exercise. At the time, Mr Ketse (Ketse) was employed as a senior manager of the call centres. During the restructuring exercise, Telkom consulted with the four trade unions which it was required to do in terms of the collective agreement. Telkom did not consult with Ketse. Ketse was issued with notice of his retrenchment. Following his dismissal, Ketse approached the Labour Court on an urgent basis seeking *inter alia* an order requiring Telkom to comply with s189 of the LRA and consult with him. In support of his application Ketse argued that in terms of s189(1) of the LRA, Telkom was obliged to consult with him as an affected employee who was not a member of a trade union, and not only the trade unions.

Telkom argued that Ketse was not a 'consulting party' as prescribed in s189(1) of the LRA and accordingly, it was not required to consult with him.

The Court distinguished the cases which Ketse relied upon in support of his argument and *inter alia* held that these cases involved instances in which the employer had elected, of its own accord, to consult with the individual non-unionised employees. As a result, the employer was bound by its election and had to conduct and complete a consultation process with the individual employees. This obligation was of the employers own making, and not a legal obligation in terms of s189(1).

In light of the above, Ketse was unsuccessful in his application. In dismissing Ketse's application, the Labour Court held that s189(1) has always been interpreted strictly by acknowledging the hierarchy governing the consultation process prior to retrenchment. Where the employer has concluded a collective agreement with a trade union which requires the employer to consult with that trade union prior to retrenchment, the employer has no obligation in law to consult with an individual employee who is not a trade union member.

Having regard to this judgment, an employer embarking on a retrenchment process involving employees who are members of a trade union (with which the employer has concluded a collective agreement as contemplated above) and employees who are not members of trade union, is not obliged to and should not, consult with, for example, senior employees who are not unionised. The employer has a legal obligation to consult with the trade union only, even if non-unionised employees may be affected by the retrenchment. If an employer elects to consult with a non-unionised individual in such circumstances then, despite having no legal obligation to do so in terms of s189(1), the employer would be obliged to see its decision through by holding proper consultation with that employee.

This judgment highlights the possible advantage to an employer of concluding a collective agreement with a trade union which requires the employer to consult with the trade union only, to the extent that it reduces the number of parties with which the employer is legally obliged to consult.

Gillian Lumb, Anli Bezuidenhout and Mari Bester

INVESTIGATING ALL POSSIBLE ALTERNATIVES: HOW FAR MUST THE EMPLOYER GO?

Employers are often faced with the situation where an employee can no longer fulfil their prescribed duties due to incapacity. The question then becomes whether or not such an employee can be dismissed on this basis, bearing in mind an employer's duty in these situations to consider all possible alternatives short of dismissal. Failure to comply with such a duty may result in the dismissal being procedurally and/or substantively unfair. The question is thus, how far and to what extent the employer must go to consider such alternatives.

The recent case of *General Motors (Pty) Ltd and NUMSA obo Ruiters [2015] ZALCPE 2 (22 January 2015)* provided some insight into this question. To briefly summarise, Ruiters (the employee) experienced pains in his left arm/wrist caused by an injury which occurred outside the workplace. This injury began to affect his work performance. In light of this, he was subsequently moved to another work area but soon after it became apparent that his work performance continued to suffer. An incapacity inquiry was held where he was declared to be permanently incapacitated and he was thus dismissed. The matter was referred to the CCMA for conciliation and then arbitration where the Commissioner ruled in favour of General Motor (employer). The National Union of Metalworkers of South Africa (Union) then took the matter on review to the Labour Court.

The main ground of review was that the commissioner failed to take into account that the employer had not made any effort to accommodate the employee into a position of a driver, a position for which he had received medical clearance to perform. The employer, however, alleged that everything possible had been done on its side to accommodate the employee's physical condition.

In reviewing the matter, the Labour Court paid specific attention to s10 (Incapacity: ill health or injury) and s11 (Guidelines in cases of dismissal arising from ill health or injury) of the Code of Good Practice: Dismissal for incapacity arising from ill health or injury (Code of Good Practice) as well as the 'Sick Absence Control Procedures' (SACP) of the employer. Section 10 and s11 prescribe the procedures and for employers to take into account in considering whether to dismiss an employee based on the above scenario. The court placed emphasis on the fact the SACP's objective was to recognise that non-compliance with the guidelines in s10 and s11 of the Code of Good Practice could potentially render the employee's termination of employment both procedurally and substantively unfair. Of crucial importance to the court was that the testimony of only one employee was used by the employer in reply to the main ground of review. The onus is always on the employer to satisfy the commissioner on a balance of probabilities that the dismissal of the employee for the reason of incapacity was fair. In this case the failure of the employer to lead sufficient witnesses on the main ground of review and refute the claims of the employee affected the credibility of the employer's case.

The fact that there was also 'talk' amongst management of him being offered an alternative position as a driver was enough to warrant the employer investigating the possibility. Therefore, it fell to the employer to call the required witnesses to rebut this allegation which the employer failed to do.

Furthermore, there was an email sent by the employer to various HR supervisors 'pleading for assistance' on the employee's situation. The majority of recipients were not afforded a reasonable opportunity to consider the matter and respond. The court stated that this was another indication that the employer did not want to investigate this matter fully.

The employer appealed the matter. The Labour Appeal Court (LAC) upheld the decision of the Labour Court, ruling that the commissioner failed to give appropriate consideration to the evidence regarding possible alternative placement of the employee as a driver. This issue was raised at both the incapacity inquiry and the arbitration in a manner that warranted and obligated the employer to fully investigate this option, which the employer failed to do.

Based on the LAC's decision, employers should be mindful of the requirements set out in s10 and s11 of the Code of Good Practice and how these requirements should be applied in dismissing an employee in the above type of scenario. In terms of the extent an employer needs to go to investigate suitable alternative positions, it appears that the requirement is onerous and requires a complete, holistic approach. In the above case the employee was already moved once and thus accommodated to some degree. However, when it transpired that his injury still prevented his working ability, the court required the employer to accommodate the employee further.

Employers should also be mindful that it is the employer's duty to call sufficient witnesses in order to rebut the aggrieved employee's allegations. The onus is always on the employer to satisfy the commissioner that the reasons for dismissal based on incapacity were fair and the employer must furnish the required supporting evidence in this regard. Employers should also be aware that there is a greater onus placed on them to accommodate an employee's injury if the injury is work-related.

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