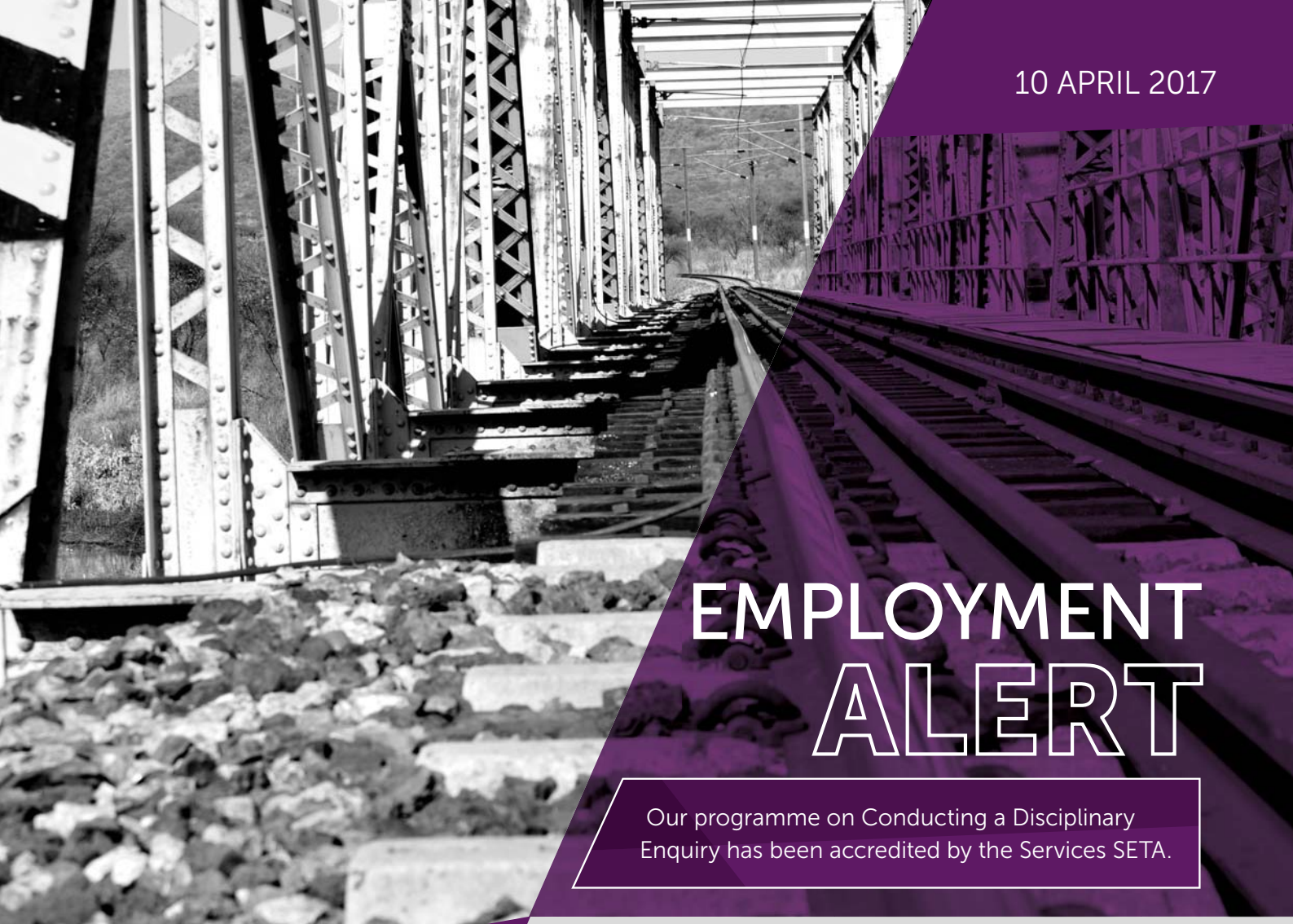

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EMPLOYMENT ALERT

Our programme on Conducting a Disciplinary Enquiry has been accredited by the Services SETA.

IN THIS **ISSUE**

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DISCRIMINATION ON "ARBITRARY GROUNDS". WHAT DOES THIS MEAN?

Does the reference to "any other arbitrary ground" in s6(1) refer to a new category of grounds of discrimination over and above the listed grounds and the grounds analogous to the listed grounds?

The employer informed the newly appointed section managers that in error they were appointed on the incorrect salary scale and as a result, their salaries would be reduced.

Section 6(1) of the Employment Equity Act 55 of 1998 (EEA) was amended to include the phrase "or on any other arbitrary ground".

The amended s6(1) provides that:

> No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnical social origin, colour, sexual orientation, age, disability, religion, HIV status, conscious, belief, political opinion, culture, language, birth or on any other arbitrary ground.

Does the reference to "any other arbitrary ground" in s6(1) refer to a new category of grounds of discrimination over and above the listed grounds and the grounds analogous to the listed grounds? This question was considered in *S Ndudula & 17 others v Metrorail – PRASA* (Western Cape) (C1012/2015) ZALAC.

In this case, the employer had appointed two employees as section managers. They were appointed on higher salaries than the applicants, who were also section managers. The applicants referred a dispute to the CCMA. The employer informed the newly appointed section managers that in error they were appointed on the incorrect salary scale and as a result, their salaries would be reduced.

The applicants argued that the employer's conduct constituted unfair discrimination on an arbitrary ground and sought relief in the form of lump-sum compensation from the employer. The employer denied the unfair discrimination.

The Labour Court pointed out that the applicants were required to identify a specific ground on which the employer had differentiated against them.

The applicants did not rely on a ground listed in s6(1) or on any ground analogous to the listed grounds. Instead, the applicants in essence argued that there was a differentiation, which was arbitrary, and because it was arbitrary it amounted to unfair discrimination and that it was not necessary to identify a particular arbitrary ground. The applicants argued that prior to the amendment to s6(1), unfair discrimination could be claimed in respect of a listed ground or any ground analogous to the listed ground. As a result of the amendment, an additional category of grounds was introduced which an employee could rely on to claim unfair discrimination. The applicants' case was that there are now three categories of grounds that could be relied on for a claim of unfair discrimination namely, (1) listed grounds (those set out in s6(1) of the EEA); (2) unlisted/analogous grounds; and (3) arbitrary grounds.

The employer, however, contended that the reference to "any other arbitrary ground" did not create another category of grounds but merely allowed the applicants to base their claim of unfair discrimination on a ground which was unlisted, but still analogous to one of the listed grounds. The employer argued that the applicants were required to, but failed to identify a specific ground.

The court was required to determine whether a third category of grounds was introduced by the amendment. The court held that the case turned upon "an interpretation of the amended provisions of the EEA."

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DISCRIMINATION ON "ARBITRARY GROUNDS". WHAT DOES THIS MEAN?

CONTINUED

The court held that the phrase "or on any other arbitrary ground" did not create a third category of unfair discrimination and the insertion of the phrase serves no other purpose than being synonymous with "one or more ground" or "unlisted grounds".

The court held that in one's approach to interpretation of a statute, one must seek the most sensible meaning of the provision, with due regard to the context and circumstances in which the provision was created. The court went on to consider the fact that the amended s11 of the EEA provides for the onus of proof and only caters for two grounds, being listed and unlisted grounds. Furthermore, the court considered the equality clause of the Constitution in which the word "including" has been interpreted to cover unlisted grounds meaning that the equality clause only provides for two categories of grounds.

The court referred to a number of reasons why s6 of the EEA "should be interpreted against the backdrop and in the context of the Constitution", especially the equality clause. These reasons included the similarity between the s6(1) of the EEA and the equality clause; that the EEA is legislation contemplated by the equality clause and gives effect thereto, and that the interpretation of the equality clause by the Constitutional Court and other courts provides clarification not only for the equality clause but also for s6 of the EEA.

The court also considered the explanatory memorandum relating to the amendment of s6(1) and stated that the memorandum explained that the inclusion of the phrase "or on any other arbitrary ground" was to bring s6(1) in line with s187(1)(f) of the Labour Relations Act, No 66 of 1995 (which provides that a dismissal is automatically unfair if the reason for it is discrimination on an "arbitrary ground"). In another case, "arbitrary ground" in s187(1)(f) was considered by the court to have the same meaning as an unlisted ground in the equality clause of the Constitution – that being an unlisted ground analogous to a listed ground. The court accordingly held that when drafting amendments to s6(1) of the EEA, Parliament must have been aware of this judgment as well as the duty to interpret it in line with the equality clause. Parliament must, therefore, have intended for the meanings of the two sections to be the same.

In conclusion, the court held that the phrase "or on any other arbitrary ground" did not create a third category of unfair discrimination and the insertion of the phrase serves no other purpose than being synonymous with "one or more ground" or "unlisted grounds". The court stated:

> "When applying the principles underlying the interpretation of a statute, it leads to the conclusion that Parliament did not purport to introduce a third category of grounds upon which an employee could challenge the conduct of an employer. The effect of the amendment is simply that discrimination on any arbitrary ground affecting human dignity constitutes unfair discrimination. In the event of the listed grounds discrimination is presumed and any other arbitrary ground that affects human dignity requires that the complainant must define the ground and has the burden of proof."

The applicant's failed to identify the ground upon which they rely. The application was dismissed.

Against the background of numerous recent judgments which have criticised the employer for failing to comply with s6 of the EEA, this judgment provides some solace to the employer. This comes in the form of reassurance that s6 of the EEA is not a one-size-fits-all, nor is the inclusion of "arbitrary ground" the introduction of a catch-all category of discrimination upon which an employee can rely. The judgment can also be appreciated for the much-needed guidance it provides with regards to the amendment.

JD van der Merwe and Michael Yeates

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SUSPENSIVE CONDITION – IS IT A WITHDRAWAL OF OFFER OR DISMISSAL?

The jurisdictional ruling held that the Applicant was not an Employee of the Respondent as a result of the Respondent's withdrawal of its offer of employment due to the fulfilment of a suspensive condition.

On 29 March 2017, the Labour Court delivered a judgment reviewing and setting aside a bargaining council's jurisdictional ruling in the matter of *JI Du Preez v South African Local Government Bargaining Council and others*. The jurisdictional ruling held that the Applicant was not an Employee of the Respondent as a result of the Respondent's withdrawal of its offer of employment due to the fulfilment of a suspensive condition.

The Applicant was asked to submit proof of his references within a specified period and if he failed to do so it would "unfortunately lead to the withdrawal of the initial job offer".

The facts are briefly as follows, the Applicant applied for a position as a Buyer. The application form contained a suspensive condition which was framed as follows:

> "I hereby declare that the information given on this form is true and correct. I accept that, in the event of my application been successful, any information to the contrary will lead to immediate dismissal".

The employer offered the Applicant employment, which the Applicant duly accepted. However, before the Applicant could start working, it became evident that the Applicant had misrepresented his employment history. The Applicant was asked to submit proof of his references within a specified period and if he failed to do so it would "unfortunately lead to the withdrawal of the initial job offer".

In a letter to the Applicant headed, "WITHDRAWN: OFFER OF EMPLOYMENT: BUYER (GEORGE)", the Respondent withdrew the offer of employment on the basis of the suspensive condition as contained in the application form.

At the Labour Court, the primary issue was whether the bargaining council's jurisdictional ruling that the Applicant was not an Employee of the Respondent was correct. The Applicant's case was that his employment status was confirmed when he accepted the offer of employment. The Respondent conceded the existence of an employment contract but argued that the undertaking to employ the Applicant was subject to a suspensive condition which allowed it to withdraw the employment offer before the Applicant resumed his duties, if the pre-employment information which he submitted proved to be incorrect.

The Labour Court accepted that the Applicant's employment was subject to a suspensive condition which entitled the Respondent to terminate the Applicant's employment relationship if the information provided by the Applicant was established to be inaccurate. The Court, however, stated that that would still mean that the Applicant was employed before the contract was terminated.

The Court held that the Respondent's letter did not purport to terminate the Applicant's employment but was withdrawing the offer of employment. The question which therefore arose was whether the offer of employment was itself subject to a suspensive condition, which would permit the Respondent to withdraw the offer of employment even after it had been accepted by the Applicant. The Respondent's difficulty was that the offer was not withdrawn before its acceptance. Further, the wording of the suspensive condition itself envisaged a situation where the application for employment had been successful and the Applicant had consequently been employed.

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SUSPENSIVE CONDITION – IS IT A WITHDRAWAL OF OFFER OR DISMISSAL?

CONTINUED

The Court set aside the jurisdictional ruling and referred the matter back to the bargaining council to determine the fairness of the dismissal.

The Court was satisfied that on the facts of the matter, the Respondent would have been contractually entitled to invoke the suspensive condition but that contractual entitlement was the right to terminate an appointment which had already been made; and not the right to withdraw the offer of employment.

The Court held that when the Respondent purportedly withdrew the offer of employment it was, in fact, terminating an existing employment relationship and therefore dismissing the Applicant. The Court set aside the jurisdictional ruling and referred the matter back to the bargaining council to determine the fairness of the dismissal.

This case speaks to the need to exercise great care in drafting the wording of suspensive conditions and when invoking the rights in terms of a suspensive condition.

Thabang Rapuleng

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Our Employment practice's new EMPLOYMENT STRIKE GUIDELINE answers our clients' FAQs.

Topics discussed include strikes, lock-outs and picketing.

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Fiona Leppan ranked by CHAMBERS GLOBAL 2017 in Band 3: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2017 in Band 4: Employment.

Michael Yeates named winner in the **2015** and **2016 ILO Client Choice International Awards** in the category 'Employment and Benefits, South Africa'.

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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