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EMPLOYMENT ALERT

IN THIS ISSUE >

The case of the email – failure to copy your line manager on emails may lead to a dismissal

Subordination is a fundamental characteristic of the employment relationship and it involves the process of giving instructions to a junior employee with the reasonable expectation for compliance.

Can an arbitrator grant relief under s198B after the expiry of the fixed-term contract?

One of the 2014 amendments to the Labour Relations Act (LRA) sought to curb the reliance on fixed-term contracts by employers, which took the form of continuous renewals of fixed-term contracts even in cases where it was clear that the nature of the work was of an indefinite nature and permanent employment was more appropriate.

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The case of the email – failure to copy your line manager on emails may lead to a dismissal

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Subordination is a fundamental characteristic of the employment relationship and it involves the process of giving instructions to a junior employee with the reasonable expectation for compliance. In *Prabashnie Naicker v Africa Flight Services,* JR 843/17 (delivered 21 May 2019), the Labour Court was called to decide whether an employee's failure to adhere to an instruction to copy her line manager in her emails warranted a dismissal.

In 2013, Ms Prabashnie Naicker (Naicker) was employed by Africa Flight Services as a customer service agent. She reported to Ms Mellissa Fritz (Fritz). Part of Ms Naicker's duties included calculating payments.

On 3 November 2016, as a result of having provided clients with incorrect pricing, Fritz instructed Naicker to stop issuing incorrect charges and to copy her in all future emails to clients involving pricing.

Following this instruction, Naicker proceeded to forward pricing information and omitted to copy Fritz in her emails. On 7 November 2016, in a separate meeting, Fritz instructed Naicker to copy her in all her emails. The following day, on 8 November 2016, Naicker failed to comply with the instruction. Her failure to comply with the instruction continued between 14 – 16 November 2016.

On 16 November 2016, Naicker was issued with a notice to attend a disciplinary hearing. During the disciplinary hearing, she was charged with insubordination. She pleaded guilty to the charge and she was dismissed. Following her dismissal, she referred an unfair dismissal dispute to the CCMA challenging the fairness of her dismissal. She was not successful at the CCMA. Unhappy with the decision of the commissioner, she launched a review application at the Labour Court.

At the Labour Court, she argued that the commissioner's decision was not reasonable because her conduct was not "serious and deliberate" because she lacked the necessary intention to defy her line manager. Simply, she had just forgotten to copy her in the emails.

The Labour Court dismissed her review application. In his analysis, Tlhotlhalemaje J noted the following:

- Naicker failed to comply with the instruction on eight occasions between 3 – 15 November 2016;
- Her misconduct was persistent, prolonged and could not be equated to an honest mistake;
- Naicker was instructed to copy Fritz more than once;
- Copying someone on email was not a laborious task. It took less than a minute;
- The instruction was lawful and reasonable because Ms Naicker was prone to providing inaccurate pricing to customers; and
- Naicker often challenged Fritz's authority, knowledge and experience as her line manager.

The case of the email – failure to copy your line manager on emails may lead to a dismissal...*continued*

This case demonstrates that disobeying simple tasks may sometimes lead to gross insubordination.

The learned judge concluded that Ms Naicker's conduct of consistently disobeying a simple, lawful and reasonable instruction was overall, wilful and serous. He added that by failing to comply with the instruction, Naicker disrespected her line manager and challenged her authority and he concluded that she was guilty of gross insubordination.

This case demonstrates that disobeying simple tasks may sometimes lead to gross insubordination. Employees are therefore warned not to disregard instructions they deem unimportant, especially if they are intended to achieve a legitimate business and/or operational objective.

Thabang Rapuleng and Tamsanqa Mila

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Can an arbitrator grant relief under s198B after the expiry of the fixed-term contract?

Section 198B of the LRA has established instances where it would be justified to enter into fixed-term contracts, failing which the fixed-term contract might be deemed to be of indefinite duration.

One of the 2014 amendments to the Labour Relations Act (LRA) sought to curb the reliance on fixed-term contracts by employers, which took the form of continuous renewals of fixed-term contracts even in cases where it was clear that the nature of the work was of an indefinite nature and permanent employment was more appropriate.

Section 198B of the LRA has established instances where it would be justified to enter into fixed-term contracts, failing which the fixed-term contract might be deemed to be of indefinite duration. It follows that where an employee has good reason to assert that there is no justification to be placed on repeated fixed-term contracts, the relief provided in s198B read with s198D is for a dispute to be referred to the CCMA or bargaining council to interpret and apply the statutory protections afforded to employees, in particular those earning below the ministerial threshold.

Most employees do not take issue with being on fixed-term contracts until the expiry of such contracts and their employment terminates. The purpose of this article is to explore the legal position with regard to whether fixed-term employees can seek a declarator under s198D after the termination of their employment. This question recently was considered by the Labour Court in *Nama Khoi Local Municipality / IMATU obo Raymond August*.

The employee concerned was employed on two consecutive fixed-term contracts of three months each. Upon the expiry of the second fixed-term contract, the employee was given a notice indicating that his temporary employment had come to an end. Aggrieved by the termination, IMATU referred a dispute to the SALGBC under s198D and sought relief to the effect that the employee must be appointed on an indefinite contract. In its award, the SALGBC found that the employee had been employed for an indefinite duration and ordered reinstatement in his favour.

The Municipality instituted review proceedings in the Labour Court on the basis that relief under s198D relates to the interpretation and application of s198B but does not include the power to reinstate an employee whose services had been terminated. Further, IMATU never sought reinstatement but a declaration that the employee's contract was in fact an indefinite one. The essence of the grounds of review was that the SALGBC had acted *ultra vires* as reinstatement is a remedy for unfair dismissal which was never the issue before the SALGBC.

The Labour Court emphasised that s198B has its own dispute resolution process in that s198D makes it possible for employees to refer disputes whilst the employment relationship is ongoing. This is to determine the status of the employment relationship and for a declaration that the fixed-term contract is an indefinite one.

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Can an arbitrator grant relief under s198B after the expiry of the fixed-term contract?*...continued*

One difficulty that arises from this matter is that there is nothing proactive in the wording of s198D to suggest that employees must seek the declarator during the currency of their employment.

The Labour Court held that s198D was proactive in that it entitles employees to remedy the state of affairs during the currency of the employment relationship.

On whether the employee could seek such declaratory relief after the termination of employment, the Labour Court highlighted that distinct separate dispute resolution processes exist under s191 and s198D. It that the s198D process was not designed to apply after termination of employment. This is because the section does not provide relief similar to s193 and s194, such as possible retrospective relief or compensation, which apply to disputes relating to unfair dismissals and unfair labour practices. Accordingly, the Labour Court set aside the arbitration award.

One difficulty that arises from this matter is that there is nothing proactive in the wording of s198D to suggest that employees must seek the declarator during the currency of their employment. It could be argued that employees do not rely upon s198D during the currency of their employment because they either believe they are deemed to be employees under s198B(5) or fear victimisation by employers. There is no reason why in our law a declarator cannot be sought after the termination of the fixed-term contract. This is because nothing in s198B suggests that an employee on a fixed-term contract must take steps for the contract to be deemed to be of an indefinite duration.

Fiona Leppan, Bheki Nhlapho and Mayson Petla

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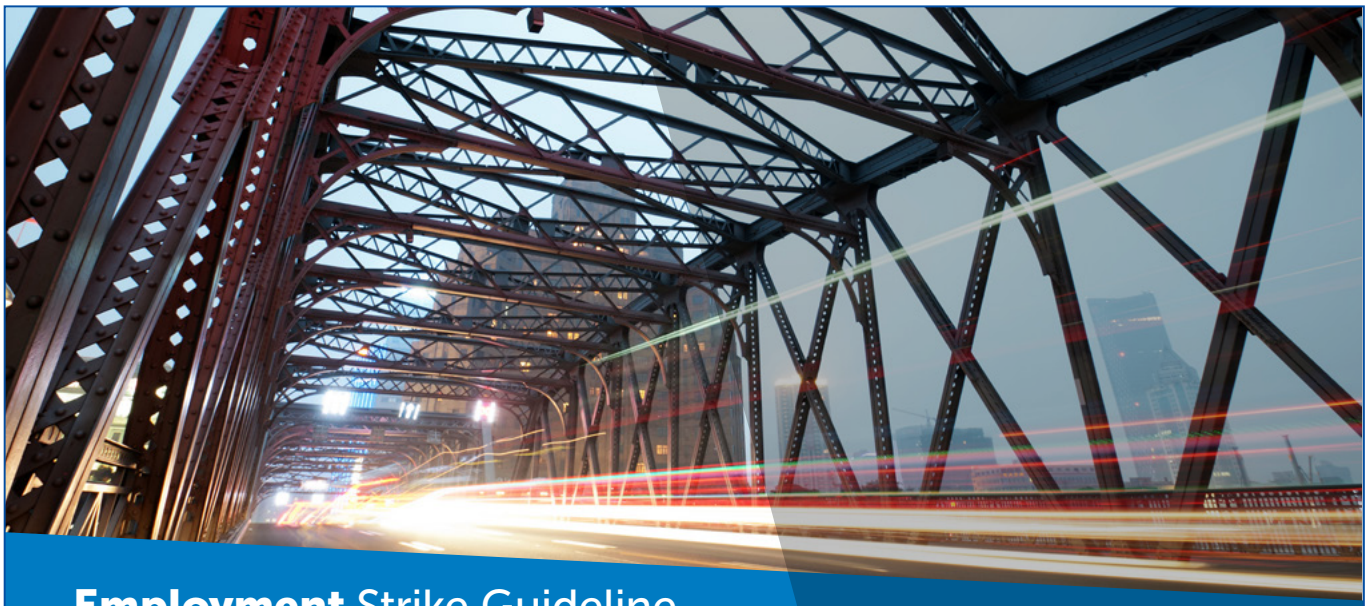

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 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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