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EMPLOYMENT ALERT

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CLIFFE DEKKER HOFMEYR

Can employees directly approach the Labour Court for an unlawful deduction claim under section 34 of the BCEA?

The employees sought an order restraining the employer from continuing with the deductions in the absence of an agreement with the employees.

This question concerns the jurisdiction of the Labour Court to determine disputes arising from section 34 of the Basic Conditions of Employment Act (BCEA). It also raises questions regarding the approach when interpreting section 77 of the BCEA in respect of the Labour Court's jurisdiction. The Constitutional Court recently dealt with this issue in *Amalungelo Workers' Union and Others v Philip Morris South Africa (Pty) Limited and Another* [2019] ZACC 45.

The employees were granted vehicles which the employer effected monthly tax deductions from the employees' remuneration. Despite the depreciation of the value of the vehicles, the employer deducted the same tax amount for four years. In an effort to be retrospectively refunded for the deducted amounts, the employees approached the Labour Court with a claim that the deductions were in violation of section 34 of the BCEA and unlawful on the basis that they never agreed to them and the deductions were not required or permitted by law, collective agreement, court order or arbitration award. The employees sought an order restraining the employer from continuing with the deductions in the absence of an agreement with the employees.

The Labour Court *mero motu* raised an *in limine* point of jurisdiction. After being addressed by the parties on whether it had jurisdiction to compel the employer to refund the employees the deductions, the Labour Court held that it lacked the jurisdiction to directly enforce the provisions of the BCEA unless such provisions form part of contractual terms in section 77(3). In essence, the Labour Court found that unless the claim was based on a breach of a contractual term, it could not adjudicate the dispute acting as a court of first instance. The Labour Court dismissed the claim. The employees suffered the same fate in the Labour Appeal Court.

In dealing with the employees' leave to appeal, the Constitutional Court held that the determination of the Labour Court's jurisdiction raised constitutional issues which fell within its jurisdiction. The question was whether the Labour Court had requisite jurisdiction to adjudicate the employees' claim.

The Constitutional Court found that it was clear from the heading of section 77 of the BCEA that the Labour Court had exclusive jurisdiction over matters under the BCEA. Such exclusivity was only subject to the Constitution and the jurisdiction of the Labour Appeal Court. Being subject to the Constitution meant that section 77 of the BCEA had to be assigned a meaning that promotes and facilitates access to the Labour Court rather than a meaning that prevents such access.

Can employees directly approach the Labour Court for an unlawful deduction claim under section 34 of the BCEA?...*continued*

The Constitutional Court found that on a proper reading of section 77 of the BCEA, it was clear that the Labour Court enjoyed exclusive jurisdiction over all disputes and claims arising from the BCEA.

The Constitutional Court found that section 77(3) was an expansion of the Labour Court's jurisdiction to cover disputes arising from employment contracts. Such jurisdiction was shared with other civil courts. With regard to a direct approach to the Labour Court with a claim under the BCEA, the Constitutional Court held that the Labour Court has the power to determine disputes relating to the compliance with the BCEA except for the specific functions of the labour inspectors. It held that the BCEA did not have the equivalent of section 191 of the LRA which required dismissal disputes to be referred to the CCMA before being referred to the Labour Court.

In our view that the Labour Court's decision that it lacked jurisdiction was informed by a narrow interpretation of section 77 of the BCEA thereby limiting this

to a breach of a contractual term. On this point, the Constitutional Court found that on a proper reading of section 77 of the BCEA, it was clear that the Labour Court enjoyed exclusive jurisdiction over all disputes and claims arising from the BCEA.

The Constitutional Court concluded that what locates a dispute within the jurisdiction of the Labour Court is the application of the BCEA to the dispute. Accordingly, the Constitutional Court found that all claims to which the BCEA applies, fall within the exclusive jurisdiction of the Labour Court. As soon as a claim is ripe for litigation, the claimant is entitled to refer it directly to the Labour Court. The Constitutional Court remitted the dispute to the Labour Court to adjudicate the lawfulness of the deductions.

Fiona Leppan and Bheki Nhlapho

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Can an employer take disciplinary action for misconduct during the festive season?

Given the decreased number of available employees during the shutdown period, employees may use this opportunity as a bargaining tool when it comes to their salaries.

Something about the festive season creates a 'buzz' of excitement. More often than not, it is this 'buzz' which makes the festive season that much more memorable. Unfortunately, this can sometimes lead to reckless decisions by employees, which may influence whether they successfully return to work in January. This article deals with employees' conduct during the festive season that an employer may take disciplinary steps over.

This is because even during the festive season employees still carry an employer's flag - a flag which they are expected to uphold. Below are some of the examples of instances where the employer may be permitted to take disciplinary steps against employees.

Year-end functions or office parties have been regarded as a gateway to the festive season where employees get together in celebration of the year they have left behind. However, there may be instances where misconduct such as rude behaviour occurs during these functions. *The Intraspeed SA (Pty) Ltd v T Boyce N.O and Others* case is an example of such misconduct. The conduct complained of was that of an employee who asked his wife to send an email to his colleague which read 'F**k You Thank You' (sic) in response to a query from his colleague. Although this was meant to be a joke, the employer took disciplinary steps.

Given the decreased number of available employees during the shutdown period, employees may use this opportunity as a bargaining tool when it comes to their salaries. In *Searde! Group Trading (Pty)*

Ltd t/a Romatex Home Textiles v Petersen and Others, the employee was dismissed for failing to obey a lawful instruction in that the employee refused to perform maintenance work during the employer's annual shutdown period at his normal rate and insisted on a higher rate. The dismissal was held to be fair as the employee was not on leave during the shutdown period.

Social media is an important part of the festive season because employees will no doubt be showing off what they get up to during the holiday period. Where the content posted on social media becomes unacceptable and in violation of the employer's policies, employers can take disciplinary action for this misconduct. CDH recently published an alert dealing with racist comments made on social media by an employee. (<https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Employment/employment-alert-18-november-No-rest-for-the-wicked-Social-Media-Policy-.html>)

The basis for taking disciplinary action for conduct that occurred away from the workplace, especially during the festive season, is that employers are not precluded from holding their employees accountable for their off-duty conduct where there is a connection between the employee's conduct and the employer's business. As a result of this, the employer can exercise discipline over the employee for their off-duty conduct during the festive period. A key factor would then be to what extent the off-duty conduct has impacted the employment trust relationship.

Arlina Ramothar and Michael Yeates

EMPLOYMENT

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