17 AUGUST 2020

EMPLOYMENT ALERT

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The never-ending story of *ultra vires*

In the recent judgment of *Passenger Rail Agency of South Africa v Commission for Conciliation, Mediation and Arbitration and others* [2020] 1 BLLR 49 (LC), the Labour Court was called upon to consider the review application issued by PRASA seeking to review and set aside an arbitration award in terms of which the arbitrator found, *inter alia*, that fixed-term employees of PRASA were deemed to be employed on an indefinite basis with effect from 1 April 2015.

TERS Update: Vulnerable employees and employees affected by COVID-19 regulations and directives

With effect from 17 August 2020, the Unemployment Insurance Fund will resume processing TERS applications. The TERS directive published on 11 August 2020 makes provision for two further applicants to apply for TERS benefits: (i) employees who are effected by the directives and regulations issued in order to reduce presence in the workplace and (ii) vulnerable employees who cannot be accommodated in the workplace.

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The never-ending story of *ultra vires*

The said fixed-term employees were all employed on fixed-term contracts with PRASA when section 198B of the Labour Relations Act 66 of 1995 (LRA) came into effect on 1 January 2015.

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The said fixed-term employees were all employed on fixed-term contracts with PRASA when section 198B of the Labour Relations Act 66 of 1995 (LRA) came into effect on 1 January 2015. Subsequent to the operation of s198B, the said employees remained in the employ of PRASA and were not required to sign new fixed-term contracts of employment.

The unions acting on behalf of the employees referred numerous disputes to the CCMA, which were later consolidated for the purposes of conciliation. Prior to conciliation, the parties concluded a settlement agreement which made provision for the appointment of fixed-term contract workers, and that the agreement was the full and final settlement of all disputes between parties, and any dispute relating to the interpretation or application of the agreement ought to be resolved in line with the provisions of the PRASA Bargaining Forum Constitution. The unions then brought an application the LC for the settlement agreement to be made an order of court in terms of section 158(1)(c) of the LRA, the court granted such order.

The employees then referred two disputes to the CCMA of their own accord, which were subsequently consolidated. The employees sought to be declared permanent employees in terms of section 198B of the LRA and for the CCMA to award backdated compensation.

The arbitrator found that the employees were integrated into the organisation, however PRASA never declared them permanently employed and thus the employees were treated differently to others who were permanently employed. In this regard, the CCMA found that the employees were not members of PRASA's provident fund and never received any bonuses as was customary for other permanent employees.

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The never-ending story of *ultra vires*...*continued*

The arbitrator found that the employees were integrated into the organisation, however PRASA never declared them permanently employed and thus the employees were treated differently to others who were permanently employed.

The arbitrator found that the differential treatment amounted to an unfair labour practice and could even amount to discrimination. The arbitrator also found that the employees were deemed to be employed for an indefinite period with effect from 1 April 2015 in line with section 198B(5) of the LRA which stipulates that a fixed-term contract is deemed to be a contract for indefinite employment after three months in the absence of a justifiable reason which impedes the automatic conversion.

By way of his award, the arbitrator referred to the remedial actions contained in section 198B(8)(a) of the LRA and ordered PRASA to pay the concerned employees all unpaid bonuses and past provident fund contributions backdated to 1 April 2015. PRASA was also directed to ensure that the employees were made members of its provident fund.

PRASA took the award on review to the Labour Court raising six grounds of review. Three of the grounds for review related to the issue of jurisdiction, in terms of which PRASA contended that the CCMA lacked jurisdiction as the parties reached a settlement agreement. PRASA argued that pursuant to the conclusion of the settlement agreement any dispute between the parties relating to the terms of the agreement ought to have resolved in line with the dispute resolution clause contained therein, by way of a referral to the relevant bargaining council. Furthermore, PRASA contended that the dispute ought to have been referred to the CCMA within six months after 1 April 2015, the date in which PRASA failed to declare or treat the employees as permanent employees and that the employees had not condonation for the delayed referral.

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The never-ending story of *ultra vires*...continued

RRASA further contended that arbitrator committed an error in law by conflating section 198B with section 189 where he held that any failure by PRASA to equally treat employees deemed to be employed permanently would constitute unfair labour practice and possibly discrimination.

RRASA further contended that arbitrator committed an error in law by conflating section 198B with section 189 where he held that any failure by PRASA to equally treat employees deemed to be employed permanently would constitute unfair labour practice and possibly discrimination. Lastly, PRASA contended that the arbitrator acted ultra vires in making the award for compensation by ordering it to effect compensation backdated to 1 April 2015 and addition to that also pay the provident fund contributions directly to employees, as section 198B does not mention any remedial powers which as a commissioner has.

The court found that the arbitrator lacked jurisdiction to hear this matter as there was settlement agreement in place between parties and employees were also bound to the terms of the agreement, therefore, this matter ought to have been resolved in line with the dispute resolution clause of the agreement by referring the dispute to the relevant bargaining forum, and in any event, the employees referred their dispute late and no condonation was sought.

The court further held that the arbitrator could not on the strength of section 198B, grant substantive relief to the employees in terms of remuneration and benefits – in doing so he acted ultra vires and committed an error in law as section 198B is concerned with fixed-term contracts of employees earning below the earning threshold and does not apply to employees already employed permanently as PRASA already conceded in the settlement agreement that the affected employees were employed permanently.

Furthermore, the court held that the arbitrator dealt with the matter on the basis that he was dealing with an unfair labour practice and in doing he committed a gross irregularity as the matter was referred to the CCMA and conciliated as a dispute relating to section 198B. The court held that if employees felt that they were treated differently they ought to have referred an unfair labour practice dispute, however, this was not the case. The arbitrator therefore lacked jurisdiction to deal with on the basis of an unfair labour practice.

The court upheld the review application, reviewing and setting aside the arbitration award.

Aadil Patel, Riola Kok and Rethabile Mochela

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IMPORTANT TERS UPDATES

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inclusion of employees who are on staggered working hours, shift rosters or any other system to reduce employee presence in the workplace as required by law.

On 11 August 2020, the Minister of Employment and Labour (Minister) issued a directive on the COVID-19 Temporary Employee/Employer Relief Scheme (Directive). The purpose of the Directive is to, *inter alia*, extend TERS benefits; provide relief to employees who may be affected by the regulations and directives issued by the Minister to reduce the number of employees at the workplace and to provide relief to employees who may be adversely affected due to the operational requirements of their employer.

1 Operation of Directive

Deemed to Commence:

27 June → 15 August

Unless withdrawn

2 Extension of TERS

Extension period:

01 July → 15 August

3 Date for processing TERS Applications

TERS Applications to be processed from:

17 August

4 An important category of employees who may now claim

In terms of the Directive, the Minister has created a new category of employees who may now claim a TERS benefit, these being:

- Employees whose employers are unable to make use of their services fully or partially due to regulations published by the Minister related to the limitation of employees at the workplace.
- This includes employees on a shift system, short time or staggered working hours.

5 Other categories of employees who may claim from TERS

- Employees whose employers are not permitted to commence operations (partially or fully);
- Vulnerable employees whose employers are unable to make alternative arrangements for them to attend work; or
- Employees whose employers are unable to make use of their services fully or partially due to operational requirement.

6 Calculation of benefits

- Qualifying Employees to receive a benefit calculated in terms of section 13 (1) of the Unemployment Insurance Act 63 of 2001 (UI Act).
- Notwithstanding the calculation in terms of section 13(1) of the UI Act, an employee will receive a benefit, which together with their remuneration, is equivalent to R3,500 where the benefit calculated in terms of section 13(1) of the UI Act is less than that amount.
- ! RESTRICTION: an employee may only receive a TERS benefit where, together with their remuneration, they do not receive more than they ordinarily would had received for working during that period.

7 Application process

The TERS benefit application process remains the same.

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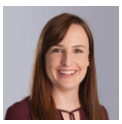

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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