15 FEBRUARY 2021

EMPLOYMENT LAW **ALERT**

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COVID-19 TERS Relief Scheme and other employee benefits

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Telkom SA SOC Limited v van Staden and others [2020] JOL 49323 (LAC): Is your selection criteria fair and objective?

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COVID-19 TERS Relief Scheme and other employee benefits

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One of the notable highlights of the State of the Nation address delivered by the President on Thursday evening, 11 February 2021, was the announcement of the extension of the COVID-19 TERS relief scheme from 16 October 2020 to 15 March 2021. This comes after applications for the last payment period (16 September 2020 to 15 October 2020) closed on 31 December 2020, with prior signals from the unemployment insurance fund (fund) being that there was to be no further COVID-19 TERS relief scheme.

Although the extension is a welcome development, who can benefit from the extended period has yet to be clarified. It is anticipated that the extension will apply only to employees in those sectors of the economy that are currently not operating to full capacity, such as tourism, hospitality, and liquor.

Given the limitation on the beneficiaries of the extended scheme, employers also need to keep abreast of the other benefits which exist to assist qualifying employees as the crippling financial impact of the coronavirus continues to ravage business. The Department of Employment and Labour (Department) continues to offer a measure of financial assistance to employees who contribute to the fund, outside of the COVID-19 TERS relief scheme.

Employers who are forced to reduce the working time of their employees as a result of the pandemic and in turn, reduce their employees' salaries, can apply to the fund for short term/reduced work time benefits. The fund has streamlined the application process to assist employees, enabling employers to apply for the benefit by means of bulk applications on behalf of their affected employees. It is important that employers are alive to this benefit where there is a continued down scaling of business activity.

The benefits from the fund are calculated in terms of a sliding scale from an income replacement rate of 38% (for higher income earners) up to 60% (for lower income earners). The payments are made directly into the affected employees' bank accounts.

In addition to the short term/reduced work time benefits, employees who have no sick leave due to them and who are forced to self-quarantine/isolate for 10 days in order to curb the spread of the virus, can apply to the fund for illness benefits. This application process has also been simplified. Employers are required to assist employees by completing a declaration confirming that they have agreed with the employee that the employee must self-quarantine/isolate and not report for duty, and that the employee has used all of their sick leave entitlement.

COVID-19 TERS Relief Scheme and other employee benefits...*continued*

Employers and employees can agree to apply to the CCMA for approval from the Department, to benefit from this scheme.

The Department has also reminded employers of the normal TERS scheme (different from the COVID-19 TERS scheme) which remains available to employers whose businesses are in distress. This scheme which was in place before the pandemic afforded employers relief from the requirement to pay their employees (other than contributions to social security e.g. pension fund, death benefits and medical aid) and time to develop and implement turn around strategies. The employees undergo training at the cost of SETA and receive a training allowance paid by the fund. The objective of the scheme is to provide temporary relief for no more than 12 months and in so doing, avoid retrenchments. Employers and employees can agree to apply to the CCMA for approval from the Department, to benefit from this scheme. The scheme pre-lockdown in our experience has had successes and should be considered by employers involved in a restructuring exercise.

Gillian Lumb, Imraan Mahomed, Mbulelo Mango and Yusuf Omar

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Telkom SA SOC Limited v van Staden and others [2020] JOL 49323 (LAC): Is your selection criteria fair and objective?

Essentially, it was the fact of not having been placed into an alternative position that placed an employee at risk of selection for retrenchment. Non-placement was therefore what was proposed as the criterion for retrenchment.

In this case, the employees were retrenched following Telkom's "Fit for the Future" business restructuring exercise. The key issue for determination is whether the non-placement of employees is a fair and objective selection criterion.

The method used to select employees for retrenchment was that affected employees would be placed into vacant positions (following the restructure) using placement criteria, being *"(a) qualifications and experience (best fit for the job); (b) qualification and potential (c) LIFO where more than one employee qualifies for appointment to the same position; and (d) employment equity retention"*. Those employees not appointed during the placement process *"will be retrenched"*. Essentially, it was the fact of not having been placed into an alternative position that placed an employee at risk of selection for retrenchment. Non-placement was therefore what was proposed as the criterion for retrenchment.

The Labour Appeal Court (LAC) was tasked with deciding whether these selection criteria were fair and fairly applied. The LAC held that where a legitimate operational justification for restructuring exists, there is nothing innately unfair in requiring an employee whose position is affected to apply for placement into an alternative position.

In assessing the fairness of the selection criteria, the LAC found the following:

1. The placement process had been subject to extensive consultation and had been applied consistently to all affected employees.
2. While the placement process did not allow for interviews, it did permit employees to submit extensive written motivations in support of their placement and retention, and to object and appeal against an unfavourable decision taken against them. In addition, placement decisions were taken by a panel and then referred to two individual committees for verification and approval. Employees who were not placed were then permitted to be considered against substantially relaxed criteria for placement in a second phase of the placement process.
3. Employees did not exhaust the internal remedies available to them, as only four objections were raised, of which one was withdrawn and only one appeal was lodged. Such mechanisms provided the opportunity to rectify scores, reasons to be given for decisions taken, or any errors or irregularities corrected where they may have arisen. The result was that, having failed to exhaust such internal remedies available, nine of

Telkom SA SOC Limited v van Staden and others [2020] JOL 49323 (LAC): Is your selection criteria fair and objective?*...continued*

The LAC confirmed that the non-placement of an employee pursuant to a placement process is a valid selection criterion for retrenchment, provided the placement process itself is fair and objective.

the employees were unable to show that by the end of the first phase of the placement process, the selection criteria had been applied unfairly against them. Telkom was able to objectively justify the non-selection of the remaining employee who had lodged an appeal.

4 There was no evidence that the employees' non-placements were made on an unreasonable, arbitrary, subjective or inconsistent basis and accordingly there was nothing unfair about the selection criteria or its application.

The LAC has thus confirmed that the non-placement of an employee pursuant to a placement process is a valid selection criterion for retrenchment, provided the placement process itself is fair and objective. It is advisable that, when adopting this method of selecting employees for retrenchment, employees are provided with internal remedies such as internal objection and appeal mechanisms which are designed to provide immediate and cost-effective relief and allow any irregularities to be rectified speedily.

Aadil Patel, Kirsten Caddy and Dylan Bouchier

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Absenteeism – it was only one day!

Unhappy with the outcome, the employee referred an unfair dismissal dispute to the CCMA challenging the fairness of his dismissal.

In *Litha Malimba v Sun International Management Limited and others*, JR1594/18 (delivered 23 January 2021), the Labour Court was called to decide whether an employee's failure to report for duty – for one day – warranted a dismissal.

Mr Litha Malimba (Mr Malimba) was employed as a dealer. On 26 January 2018, the employee reported for work without his staff ID card. He was requested to go home to fetch his staff ID card and return to work the following day.

On 27 January 2018, the employee failed to report for work and did not inform management. The purpose of the rule was to ensure that the employer makes timeous alternative if an employee is unable to report for duty. The employee was charged with absenteeism and he was dismissed.

Unhappy with the outcome, the employee referred an unfair dismissal dispute to the CCMA challenging the fairness of his dismissal. He was not successful at the CCMA and he launched a review application at the Labour Court.

At the Labour Court, Mr Malimba argued that dismissal was not the appropriate sanction and was unreasonable considering the nature of the misconduct. In his analysis, Tlhotlhalemaje J noted the following:

- the offence of absenteeism requires fault on the part of an employee. In this case, the employee did not report for duty on 27 January 2018 and he did not inform management;
- the employee was on a final written warning for absenteeism;
- the employee refused to sign a document authorising the employer to dock his salary for one day; and
- discipline is management prerogative and it is the employer's right to deal with the offence as it deemed fit.

Ultimately, the court considered the employee's lack of honesty, accountability and multiple prior written warnings and dismissed his review application.

This case demonstrates that absenteeism is serious misconduct and depending on the facts of the case, may warrant a dismissal.

Thabang Rapuleng, Tamsanqa Mila and Keenan Stevens

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SEXUAL HARASSMENT IN THE WORKPLACE

Including the virtual world of work

A GUIDE TO MANAGING SEXUAL HARASSMENT

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CLICK HERE TO ACCESS THE GUIDELINE

EMPLOYMENT REVIVAL GUIDE

Alert Level 1 Regulations

On 16 September 2020, the President announced that the country would move to Alert Level 1 (AL1) with effect from 21 September 2020. AL1 of the lockdown is aimed at the recommencement of almost all economic activities.

CLICK HERE to read our updated AL1 Revival Guide.
Compiled by CDH's Employment law team.

EMPLOYMENT

RETRENCHMENT GUIDELINE

CLICK HERE for the latest thought leadership and explanation of the legal position in relation to retrenchments, temporary layoffs, short time and retrenchments in the context of business rescue.

A CHANGING WORK ORDER

CASE LAW UPDATE 2020

CLICK HERE to access CDH's 2020 Employment Law booklet, which will assist you in navigating employment relationships in the "new normal".

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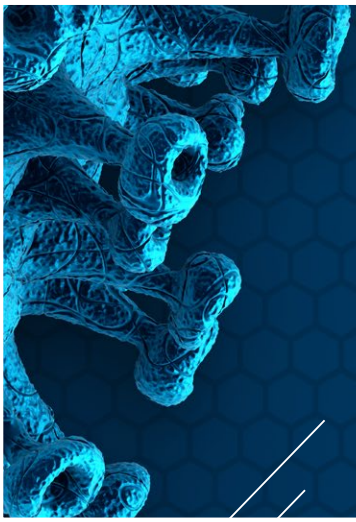

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Michael Yeates is recommended in Employment in THE LEGAL 500 EMEA 2020.
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The LEGAL 500 EMEA

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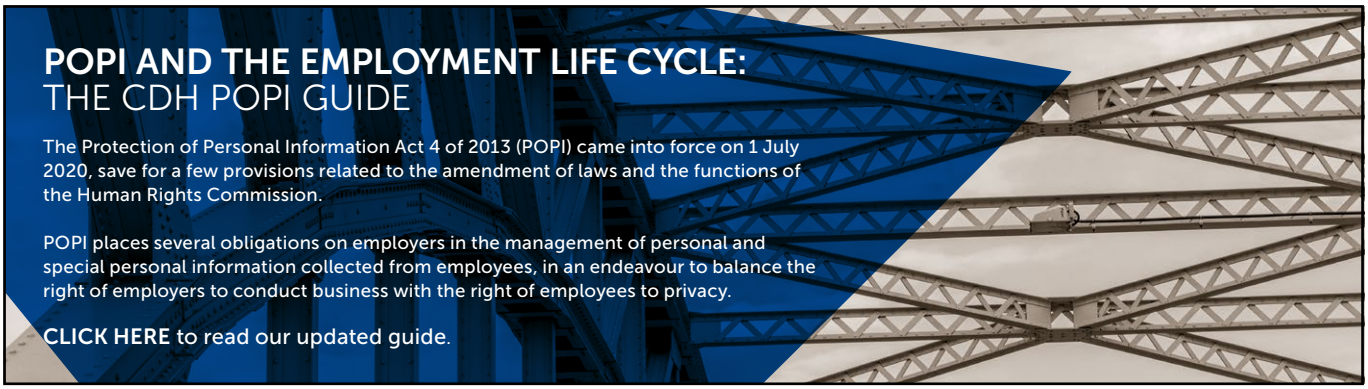
Michael Yeates ranked by CHAMBERS GLOBAL 2020 as an up and coming employment lawyer.

TOP RANKED Chambers GLOBAL 2020



POPI AND THE EMPLOYMENT LIFE CYCLE: THE CDH POPI GUIDE

The Protection of Personal Information Act 4 of 2013 (POPI) came into force on 1 July 2020, save for a few provisions related to the amendment of laws and the functions of the Human Rights Commission.

POPI places several obligations on employers in the management of personal and special personal information collected from employees, in an endeavour to balance the right of employers to conduct business with the right of employees to privacy.

CLICK HERE to read our updated guide.

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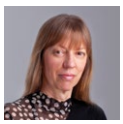

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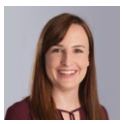

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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