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EMPLOYMENT LAW ALERT

IN THIS ISSUE

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Let the message be sent: *"This is the protection which our Constitution affords"* – the Constitutional Court's ruling on compensation in sexual harassment cases

Pursuant to an internal disciplinary inquiry, Dr McGregor was found guilty of sexual harassment against the then medical student who was thirty years his junior.

On 17 June 2021, the Constitutional Court (CC) handed down judgment in *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others* (CCT 270/20) [2021] ZACC 14 (17 June 2021). The appeal relates to a compensation order handed down in relation to the misconduct of Dr McGregor, a senior employee, on four charges of sexual harassment. The victim of such behaviour was a recently admitted medical practitioner.

Pursuant to an internal disciplinary inquiry, Dr McGregor was found guilty of sexual harassment against the then medical student who was thirty years his junior in that he – *"dared her to remove her clothes and swim naked"*; he suggested she have an affair with him; inappropriately pressed himself against her while demonstrating how to carry out a medical procedure; and made sexual advances and inappropriately touched her leg while they were driving together.

Having been dismissed, Dr McGregor referred an unfair dismissal dispute to the Public Health and Social Development Sectoral Bargaining Council (the Bargaining Council). The arbitrator found Dr McGregor guilty of three of the four charges of sexual misconduct. He found the dismissal to have been substantively unfair, because Dr McGregor had not been treated the same as another employee facing similar charges. The arbitrator found the dismissal procedurally unfair, as Dr McGregor had been denied an opportunity to defend himself n respect of relevant evidence that had been excluded during his disciplinary hearing. The arbitrator, exercising his discretion, opted not to order reinstatement since the misconduct had been proven and reinstatement would be intolerable. Instead, taking into consideration the nature of the misconduct and the extent of the Department's departure from substantive and procedural fairness, the arbitrator awarded Dr McGregor compensation in the amount of R924,679.92, which was equivalent to six months' remuneration.

Dr McGregor chose to institute review proceedings in the Labour Court (LC) on the basis that his conduct neither constituted sexual harassment nor did it warrant dismissal. Both the LC and the Labour Appeal Court (LAC) concluded that a reasonable decision-maker could not have reached a conclusion that an employee who was found guilty on three out of four charges of sexual misconduct was dismissed for an unfair reason. However, both courts found that the dismissal was procedurally unfair and did not alter the arbitration award with regard to the amount of compensation awarded.

On further appeal to the apex court, the CC dismissed Dr McGregor's appeal. It found that Dr McGregor's contention that the victim was not a credible witness and that the allegations had been *"trumped-up and false"*, and that none of the previous forums had adequately traversed or assessed the veracity of the allegations against him, were all baseless. The issues had been well ventilated in the LC and LAC and he had no prospects of success in the CC. However, the CC upheld a cross-appeal by the Department of Health, which took aim at the compensation awarded to him.

The gist of the Department's case was that the Commissioner, in deciding on the amount of compensation, was labouring under his erroneous belief that the dismissal was both substantively and

Let the message be sent: *"This is the protection which our Constitution affords"* – the Constitutional Court's ruling on compensation in sexual harassment cases*...continued*

The CC highlighted that sexual harassment is the antithesis of substantive equality in the workplace as it completely strips away a person's dignity to its core.

procedurally unfair. Therefore, when the LC and LAC found that the dismissal was only procedurally unfair, but substantively fair, the amount of compensation should have been decreased accordingly. The CC agreed that since the Arbitrator calculated the compensation based on a finding that the dismissal was substantively fair and procedurally unfair, then *"given that the dismissal is substantively fair, it stands to reason that the award of compensation should not have remained the same"*.

The CC highlighted that, the infringement of an employee's right not to be unfairly dismissed *"neither necessarily nor automatically confers a right to a remedy. Specifically, an award of compensation is never guaranteed"*. Importantly, the CC emphasised that the appropriateness of an order for compensation had to be viewed through the lens of the seriousness of the misconduct.

The CC concluded that, notwithstanding the gross nature of the misconduct, Dr McGregor himself had a right to a fair labour practice. Therefore, the CC decreased the amount of compensation from six to two months' compensation for the procedural irregularity.
The CC reasoned that the deviation in the procedure was minor. In fact, once the evidence complained of had been admitted during the arbitration, three out of the four charges for which Dr McGregor was dismissed were upheld

The CC highlighted that sexual harassment is the antithesis of substantive equality in the workplace as it completely strips away a person's dignity to its core. It is clear from the judgment that the CC was alive to the ubiquity of power imbalance between genders in the workplace and society as a whole. Moreover, the CC emphasised that it is incomprehensible for a man to be paid close to R1,000,000.00 in compensation from the public purse for a procedural glitch in an instance where he was supposed to be dismissed for his actions.

The CC emphasised that sexual harassment is deplorable and grossly unacceptable no matter at whom it is directed, however, *"the disparity in age and seniority is clearly an aggravating factor"*. *In casu*, Dr McGregor was thirty years the victim's senior and she was Dr McGregor's intern and had just qualified as a medical practitioner. The power imbalance, in this case, was glaring.

It is evident that the CC took offence at the compounding effect of sexual harassment on the victim when it is suffered at the hands of a senior. It is unacceptable to compel an employee to balance his/her sexual dignity and integrity with his/her duty to show respect for seniors in the workplace.

This judgment makes the valiant statement that sexual misconduct in the workplace must be met with the harshest of penalties as they pose a barrier to the achievement of substantive equality in the workplace. Employers need to comprehend the indisputable power imbalance caused by persons in authority in the workplace, gender and gaps in age. Employers must invoke the power afforded to them by the Constitution and put into place comprehensive policies and tools to combat sexual harassment and promote gender equality in the workplace.

"Let the message be sent: This is the protection which our Constitution affords."

Fiona Leppan, Kgodisho Phashe and Kananelo Sikhakhane

Herd mentality could get you herded into court ... and fired

You can be dismissed just for being in the crowd, even though you were not the one assaulting your fellow employee.

Can an employee get dismissed for participation in an unprotected strike action and assault without being identified? The short answer to the dreaded question, is yes. You can be dismissed just for being in the crowd, even though you were not the one assaulting your fellow employee. It is called *Common Purpose*. Can your employer take legal action against you? Yes, they can.

This is exactly what happened in January 2020, when the Labour Court, in the case of *NUMSA obo Aubrey Dhludhlu & Others and Marley Pipe Systems (SA) (Pty) Ltd*, case number JS878/17 had to assess whether 148 employees acted with common purpose when they assaulted the head of Human Resources. The employer argued that all the employees directed their disgruntlement towards the achievement of the heinous crime. Those that could confront the employee in person, physically assaulted him, and those that could not, incited the others to assault him, and rejoiced at the outcome.

The Labour Court (LC) restated the requirements for establishing common purpose and held that the employees who were identified as being on site had acted with common purpose in associating themselves with events on the day. The Labour Court reached this conclusion with reference to the decision of the Constitutional Court in *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others* (Dunlop) where it was held that it was unnecessary to place each employee on the scene to prove common purpose. This could be established by inferential reasoning having regard to the conduct of the employees before, during, and after the incident of violence. The LC that the evidence showed that the employees had taken part in the unprotected strike, had assembled in the canteen, marched on the employer's premises carrying placards, and demanded the removal of the employer's head of Human Resources.

Unhappy with the decision of the LC, the Union took the matter on appeal. In *NUMSA obo Aubrey Dhludhlu & Others and Marley Pipe Systems (SA) (Pty) Ltd*, case number JA33/20 the Labour Appeal Court (LAC) had to determine whether 41 of the 148 dismissed employees who had not been identified, had been on the scene when the assault took place, and therefore, could be associated with the assault. This was so since there was no evidence that the 41 unidentified employees had been on the scene of the assault, that they had been aware of the assault, had intended to make common cause with it, or that they had performed an act of association with it.

The employer on the other hand relied on the fact that the 41 unidentified employees had been placed on the scene of the assault through clocking records, were absent from their workstations, and video footage showed the entire crowd moving to the offices where the assault took place. Apart from one employee who was the only witness called by the Union during the trial proceedings, none of the other employees testified or made use of the Dropbox or WhatsApp opportunities provided by the employer to explain their conduct or whereabouts. For these reasons, the Labour Appeal Court (LAC) found that the LC did not err in finding that the 41 unidentified employees had acted with common purpose, that their dismissal was fair and that the appeal fell to be dismissed.

Herd mentality could get you herded into court ... and fired...*continued*

These are important principles to be taken into consideration during industrial action and shows that employees will have intent if they associate themselves with the crowd engaging in misconduct.

The LAC held that from the evidence before the LC, it was clear that all the employees, including the 41 unidentified employees associated with the actions of the group before, during and after the misconduct. The 41 unidentified employees took no steps to distance themselves from the misconduct either at the time of, during or after the assault. Instead, they persisted with the denial that any assault had occurred and refused the opportunity to explain their own conduct in relation to it.

The LAC differentiated between the test to be applied in a criminal law context and the test to be applied in an employment law context. The LAC held that in a criminal context, a person must have intended a criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself reckless as to whether the result was to ensue. In an employment law context, intention exists where it is proved that an employee intended that misconduct would result or must have foreseen the possibility that it would occur and yet, despite this, actively associated himself reckless as to whether such misconduct would ensue. When considering the facts before the Court, the LAC held that the employer proved that the 41 unidentified employees held such intent.

These are important principles to be taken into consideration during industrial action and shows that employees will have intent if they associate themselves with the crowd engaging in misconduct.

Aadil Patel and Hanelle Vrey

14 Day limitation to the right to strike – Is striking a crime? The impact of Adjusted Alert Level 4 on the right to picket or strike

The President has placed a 14-day limitation to the right to strike.

The announcement made by President Cyril Ramaphosa moving South Africa to Adjusted Alert Level 4 has placed stringent limitations to the right to gather - this extends to the right to strike or picket in terms of the Labour Relations Act 66 of 1995 (LRA).

In terms of the Disaster Management Act: Regulations, gazette on 27 June 2021 (Regulations), all gatherings are prohibited except in the following circumstances listed under Regulation 21:

- funerals;
- gathering for the purposes of buying or obtaining goods and services; and
- gatherings in the workplace.

Gatherings in the workplace are only allowed if they are for work purposes subject to health protocols and social distancing measures.

Can employees embark on a strike or a picket during Adjusted Alert Level 4?

The President has placed a 14-day limitation to the right to strike. It appears that until 11 July 2021, employees are prohibited from gathering for the purposes of convening a strike or picket in terms of the LRA. This is because a strike or a picket does not fall within the closed list of exceptions above.

Regulation 18 was amended to include the sub-regulation 18(9) which provides that;

> *"any person who incites, instigates, commands or procures any other person to commit any offence in terms of these regulations commits an offence and is, on conviction liable to a fine, or imprisonment for a period not exceeding six months or both such fine and imprisonment."*

In addition to the limitation on the strike to strike, the latest regulations suggest that anyone who participates in a strike or picket may face criminal action.

Is this an option for employers over the next 14 days?

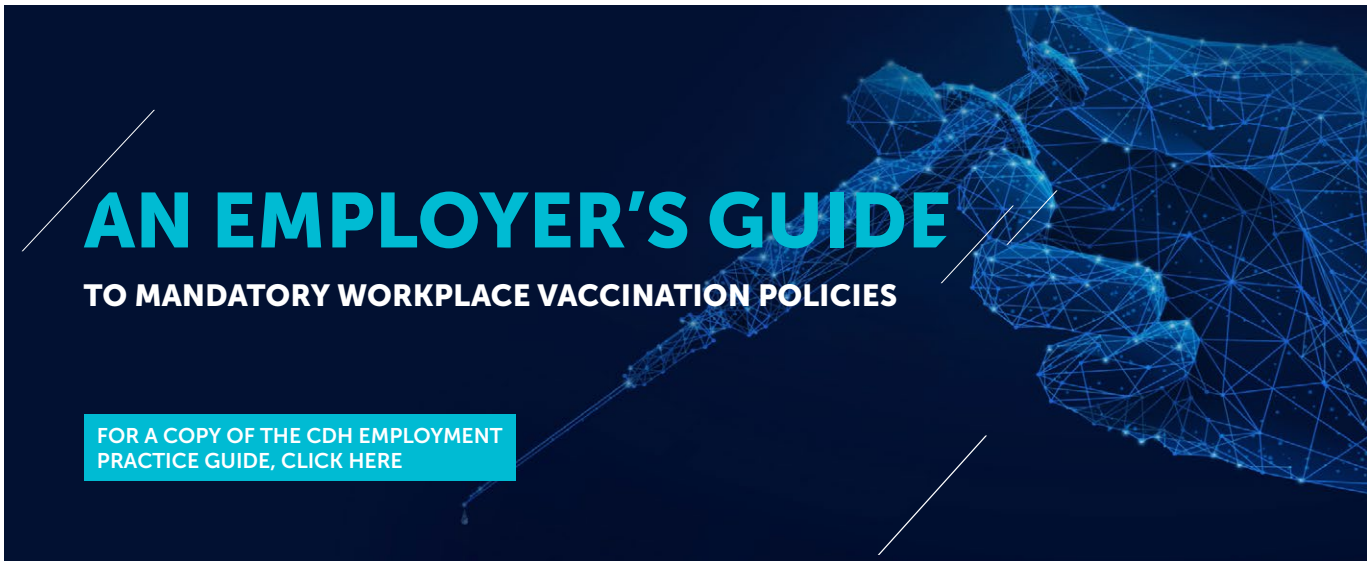
If employees gather for the purposes of a strike or picket, they will be in breach of the Regulations and may be liable for a fine or imprisonment for a period not exceeding six months or both.

In terms of the Regulations, law enforcement officers are required to order persons gathered in contravention of the Regulations to disperse immediately. If they refuse, the law enforcement officer may take appropriate action which includes laying a criminal charge against the convener of the gathering.

Conclusion

Strike action during Adjusted Alert Level 4 is prohibited. Embarking on a strike or a picket before 11 July 2021, would constitute a breach of the Regulation and may lead to criminal charges against employees and/or the union.

Thabang Rapuleng, Tamsanqa Mila, and Aubrey Mazibuko



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