29 MARCH 2021

EMPLOYMENT ALERT

COIDA extended to include domestic workers

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"Calm down! It was just a Tweet...."

In the recent case of *Mabusela v Metropolitan Health* [2021] 2 BALR 142 (CCMA), the employer was reminded that a sanction of dismissal, seemingly justified by a disciplinary code and social media policy, may not always be warranted. Rather, an employer, must properly consider the circumstances surrounding an employee's conduct when considering an appropriate sanction.

Is there a deadline for referral of ongoing or repetitive acts of discrimination?

When does it become too late to bring an alleged unfair discrimination claim to the Commission for Conciliation, Mediation and Arbitration (CCMA) under the Employment Equity Act 55 of 1985 (EEA)? Does the 6-month period set in section 6(10) of the EEA apply to discrimination of an on-going or repetitive nature?

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"Calm down! It was just a Tweet...."

The employer sent its workforce home after the national state of disaster was declared at the end of March 2020, in order to mitigate the spread of the COVID-19 virus.

In the recent case of *Mabusela v Metropolitan Health* [2021] 2 BALR 142 (CCMA), the employer was reminded that a sanction of dismissal, seemingly justified by a disciplinary code and social media policy, may not always be warranted. Rather, an employer, must properly consider the circumstances surrounding an employee's conduct when considering an appropriate sanction.

The employer sent its workforce home after the national state of disaster was declared at the end of March 2020, in order to mitigate the spread of the COVID-19 virus. Two days later, management received confirmation that it was regarded as an essential service and proceeded to advise its employees to return to work after the first weekend of the level 5 lockdown (hard lockdown).

However, the employee was granted leave to attend a traditional ceremony in the Transkei, (two days prior to the hard lockdown). Several messages were exchanged between the employer and employee, from which the employee deduced that the employer was unwilling to arrange transport for his return to work.

Additionally, he was also advised that if he did not return to work that he would have to take annual leave and, once exhausted, any further leave would be unpaid.

This prompted the employee to send a Tweet to the President and the South African Police Service, claiming that the employer had forced its employees to return to work and, if employees were unable to do so, they were required to take annual leave. The employer viewed the Tweet as misconduct.

The employer submitted that the employee was guilty of contravening the employer's Social Media Policy and the Code of Ethics and Standards of Conduct Policy. In this regard, the employer contended that the employee had engaged in a malicious activity that had the potential to harm the reputation of the employer and to bring the latter's brand into disrepute, especially by using Twitter, which was a widely broadcasted social media platform.

The employee was dismissed pursuant to a disciplinary hearing. He challenged his dismissal at the CCMA and sought reinstatement.

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"Calm down! It was just a Tweet...."

...continued

The Commissioner held that dismissal was an inappropriate sanction. The Commissioner reinstated the employee, without back pay, on a final written warning, valid for 12 months.

The Commissioner found that the employee's conduct had to be evaluated in the context in which it occurred, in particular the unique situation created by the hard lockdown, which had caused some confusion for the employer. The decision to close its operations had been reversed by the employer when the employee found himself trapped in another province. It was understandable, according to the Commissioner, that the employee became frustrated by a situation beyond his control. There was also some truth to the Tweet because the employer had informed the employee that he would have to sacrifice his leave if he did not report for duty at his workplace. Furthermore, the Tweet had been posted for only two hours before the employee was instructed to remove it, which he immediately did. Even if the posting of the Tweet amounted to misconduct, the Commissioner held that the severity of the misconduct was mitigated by the circumstances surrounding the employee's misconduct.

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Employers are reminded to take cognisance of the circumstances surrounding an employee's conduct in determining an appropriate sanction, especially when the circumstances are beyond the employee's control. Employers are also reminded that the recommended sanctions contained in disciplinary codes may (and must) be deviated from in appropriate circumstances.

Sean Jamieson and Mariam Jassat

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COIDA

EXTENDED TO INCLUDE DOMESTIC WORKERS

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Domestic workers are now covered under the Compensation for Occupational Diseases Act 103 of 1993 (COIDA) and are therefore, able to claim compensation, in the event that they are injured or contract diseases whilst on duty, from the Compensation Fund.

COMPENSATION PAYABLE TO QUALIFYING DOMESTIC WORKERS

- Temporary total disablement (TTD) is payable to a domestic worker who is temporarily injured but recovers from the injury or illness.
- Permanent disablement lump sum is payable to a domestic worker who will not recover from the injury or illness.
- Permanent disablement pension is payable to a domestic worker who does not fully recover from an illness or sickness (the disablement is merely an inconvenience to the domestic worker).

COMPENSATION PAYABLE TO THE DEPENDENTS OF DOMESTIC WORKERS WHO DIED AS A RESULT OF INJURY ON DUTY OR OCCUPATIONAL DISEASE

FUNERAL EXPENSES

- Funeral expenses- payable to dependents of the deceased where the deceased passed on before 1 April 2019. Burial expenses are refunded to the dependents up to a maximum amount.
- The amount of R18 251 is paid as a lump sum to the dependents of the deceased who passed on after 1 April 2019.

SURVIVING SPOUSE AND DEPENDENCY AWARDS

- Surviving spouses will be paid a widow's lump sum award and a pension award. The pension award is terminated upon the widow's death.
- A child pension is payable to children of the deceased up to the age of 18, or until financially emancipated or until they marry. The child pension may be extended to children who are attending school over the age of 18.
- A partial dependency award is payable to the parents or siblings of the deceased as a once off lump sum payment.
- Whilst a pension award is payable to the parents or siblings of the deceased who were dependent on the income of the deceased and is terminated on the death of the recipient or the expiry of the lifespan of the deceased.

MEDICAL EXPENSES

- The Compensation Fund will cover reasonable medical expenses following incidents at work as well as chronic mediation as a result of an injury or illness contracted whilst working.
- The Compensation Fund will also pay for assisted devices such as wheelchairs, prosthetics, along with rehabilitation, reintegration and return to work programmes.

Employers of domestic workers are obliged to register with the Compensation Fund on **www.RegistrationCF@labour.gov.za** or **CFCallcentre@labour.gov.za**

Is there a deadline for referral of ongoing or repetitive acts of discrimination?

When does it become too late to bring an alleged unfair discrimination claim to the Commission for Conciliation, Mediation and Arbitration (CCMA) under the Employment Equity Act 55 of 1985 (EEA)?

When does it become too late to bring an alleged unfair discrimination claim to the Commission for Conciliation, Mediation and Arbitration (CCMA) under the Employment Equity Act 55 of 1985 (EEA)? Does the 6-month period set in section 6(10) of the EEA apply to discrimination of an on-going or repetitive nature?

Mngadi v Garth Jenkins NO and others (2021) 3 BLLR 248 (LAC) (Mngadi case) – Mngadi was employed in 1999 by Hulamin Ltd as an Operator. In 2008, he was promoted to Shift Leader, a Grade 11 position. The promotion meant that he now fell outside the bargaining unit defined in a collective agreement concluded between the employer and representative trade unions within the workplace. Mngadi contended that the exclusion of Grade 11 employees from the scope of the collective agreement amounted to unfair discrimination. The consequences of the exclusion were that he was paid less than his subordinates and was not entitled to certain benefits.

Mngadi initially referred a discrimination dispute based on what he identified as an arbitrary ground, to the CCMA in July 2016. He relied on the dictum of the *Labour Appeal Court (LAC) in SABC Ltd v CCMA and others* [2010] 3 BLLR 251 (LAC) – *"where it was found that the date that an unfair labour practice arises does not coincide with its commencement date when the nature of the unfair labour practice is such that it is ongoing – in such case, the dispute can be referred at any time..."*. He contended that there was no need for a condonation application. In the event that this was incorrect, he applied for condonation in the alternative in respect of the failure to pay the correct standing in allowance. The CCMA refused condonation on the sole basis that his claim lacked prospects of success. The Commissioner did not deal with Mngadi's contention that the act of discrimination was ongoing or repetitive, hence no need to apply for condonation. He merely assumed that the referral was late.

Mngadi took the Jurisdictional Ruling on review. He argued that condonation was in fact not required as the discrimination related to the low remuneration and benefits had been ongoing and repetitive since his promotion in 2008. It was perpetuated by every monthly salary payment. He continued relying on *SABC Ltd v CCMA* to advance the argument that condonation was in the circumstances not necessary. The Labour Court held that Mngadi's dispute arose solely from his promotion to a Grade 11 position. The six-month period commenced then. Furthermore, there was lack of detail on how the promotion constituted unfair discrimination. Accordingly, the Labour Court held that Mngadi was obliged to apply for condonation.

Is there a deadline for referral of ongoing or repetitive acts of discrimination?*...continued*

The six-month period prescribed in section 6(10) of the EEA applies to single acts of alleged unfair discrimination.

Mngadi then turned to the LAC. The LAC noted that the Labour Court and CCMA merely assumed that the referral was late, thus condonation was required. They disregarded his argument that the discrimination was in fact ongoing or repetitive. The LAC held that the Labour Court was mistaken in finding that the merits of a dispute are relevant to the determination of jurisdiction – *"whether a claim is meritorious or whether it is good in law is immaterial to the question of jurisdiction"*. Merits are only relevant to the question of prospects of success. However, where a party contends that the CCMA has jurisdiction and condonation is not necessary, merits of the claim are unrelated to that inquiry.

The LAC went on to refer to *SABC Ltd v CCMA* - the applicants complained about the promotion of three artisans resulting in ongoing discrimination in terms of which those artisans were favoured at their expense. The LAC held that since the applicants were continually being paid at a lower rate, the discrimination was not a single act but a *"continuing or repetitive act"* that recurred on each pay date. Applying that reasoning, the LAC found that Mngadi's claim related to the alleged ongoing and repetitive discrimination was not out of time, at least in relation to the payment of his salary (discrete repetitive acts) in the six months prior to his referral. Condonation was not required to conciliate the alleged dispute with regard to those past payments and intended future payments. The Commissioner erred in declining jurisdiction entirely to conciliate the alleged dispute and the Labour Court erred in holding otherwise.

Key takeaways

The six-month period prescribed in section 6(10) of the EEA applies to single acts of alleged unfair discrimination. Where the alleged discriminatory acts are on-going or repetitive, the six-month period immediately preceding the referral will be considered for purposes of determining whether a referral is late. The CCMA will have jurisdiction only in relation to the conduct complained of that took place six months before the referral, as well as future conduct.

Phetheni Nkuna and Menachem Gudelsky

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SEXUAL HARASSMENT IN THE WORKPLACE

Including the virtual world of work

A GUIDE TO MANAGING SEXUAL HARASSMENT

The purpose of our 'Sexual Harassment in the Workplace – Including the Virtual World of Work' Guideline, is to empower your organisation with a greater understanding of what constitutes sexual harassment, how to identify it and what to do it if occurs.

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CDH'S COVID-19 RESOURCE HUB

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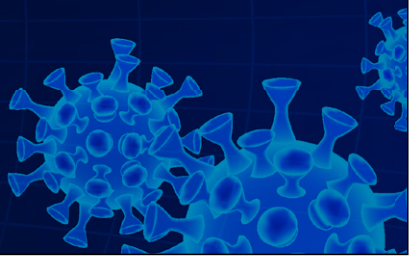

A CHANGING WORK ORDER

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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2021 RESULTS

CHAMBERS GLOBAL 2014 - 2021 ranked our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2021 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2018 - 2021 in Band 2: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2020 - 2021 in Band 3: Employment.

Imraan Mahomed ranked by CHAMBERS GLOBAL 2021 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2021 in Band 2: Employment.

Michael Yeates ranked by CHAMBERS GLOBAL 2020 - 2021 as an up and coming employment lawyer.

TOP RANKED Chambers Global 2021

Our Employment practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.

Fiona Leppan is ranked as a Leading Individual in Employment in THE LEGAL 500 EMEA 2020.

Aadil Patel is recommended in Employment in THE LEGAL 500 EMEA 2020.

Gillian Lumb is recommended in Employment in THE LEGAL 500 EMEA 2020.

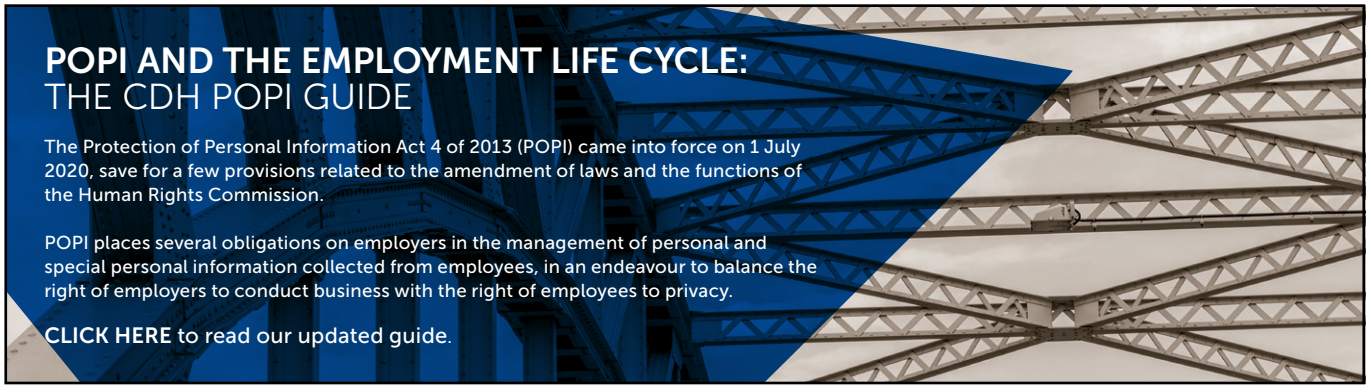
Hugo Pienaar is recommended in Employment in THE LEGAL 500 EMEA 2020.

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

Jose Jorge is recommended in Employment in THE LEGAL 500 EMEA 2020.

Imraan Mahomed is recommended in Employment in THE LEGAL 500 EMEA 2020.

The LEGAL 500 EMEA



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.

AN EMPLOYER'S GUIDE

TO MANDATORY WORKPLACE VACCINATION POLICIES

FOR A COPY OF THE CDH EMPLOYMENT PRACTICE GUIDE, CLICK HERE

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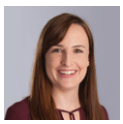

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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