DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT ALERT

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WHAT IS CONFIDENTIAL INFORMATION?

Every employer wants to restrain an employee from disclosing confidential information. In an era where information is power it is understandable that an employer may seek to protect its confidential information.

However, the term 'confidential information' has been so loosely used that, to some extent, it has lost its effect. While employers are entitled to protect their confidential information, the more fundamental information is how does one determine whether information is confidential? This question was answered by the Supreme Court of Appeal in *Competition Commission of SA v Arcerlormittal SA Ltd & Others (680/12) [2013] ZASCA 84 (31 May 2013).*

For information to qualify as confidential it must comply with three requirements, namely:

1. It must involve and be capable of application in trade or industry, ie it must be useful.

2. It must not be public knowledge and public property. In this regard, the employer will need to objectively determine whether the information is known only to a restricted number of people.

3. Finally, the information must be of economic value to the person seeking to protect it.

Therefore, before employers approach a court to interdict the disclosure of their 'confidential information', or attempt to discipline employees for disclosing 'confidential information', they should first ask themselves the question as to whether the information is indeed confidential. Applying the test as set out above will therefore be most useful.

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IN THIS ISSUE

DRESSING TO DISCRIMINATE – CORPORATE DRESS CODES AND DISCRIMINATION

Discrimination is regulated in s6 of the Employment Equity Act, No 55 of 1998 (EEA) and prohibits both direct and indirect forms of discrimination in the employment arena.

Section 187(1)(f) of the Labour Relations Act, No 66 of 1995 (LRA) renders a dismissal 'automatically unfair' if the reason for that dismissal is that the employer unfairly discriminated against an employee on any arbitrary ground including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

In the context of automatically unfair dismissals, an employer will be able to prove that a dismissal is fair if it can show that the reason for the dismissal was based on an inherent requirement of the particular job. For example, is may be fair to exclude a person who does not speak Zulu if the job requires the person to only communicate in Zulu.

One of the latest decisions dealing with this aspect was the decision of *Department of Correctional Services and Another v Police and Prisons Civil Rights Union (POPCRU) and Others* (2013) 34 ILJ 1375 (SCA).

The Supreme Court of Appeal had to determine whether the failure by employees to adhere to the employer's dress code could result in their dismissals and whether same amounted to an automatically unfair dismissal under s187 of the LRA. The Department of Correctional Services (Department) dismissed a number of their male correctional service officers who refused to cut their dreadlocks when instructed to do so.

The question was complicated further when the employees raised the issue of discrimination as being central to their dismissals. According to the Department's dress code, male employees were prohibited from wearing dreadlock styled hairstyles, whereas dreadlocks could be worn by female officers.

The dismissed male officers claimed that their dismissals were automatically unfair in terms of s187(1)(f) of the LRA. The dismissed officers claimed that they had been discriminated against on the basis of their religious beliefs, as some of them were in fact Rastafarian.

Others claimed discrimination against their cultural beliefs as they were obeying their ancestors calls to become traditional healers in terms of Xhosa culture thereby necessitating the dreadlock hairstyles.

The Department argued that the discrimination was justifiable because the Department had sought to eliminate the risk posed by the male officers who subscribed to religious beliefs that promoted the use of dagga. The Department argued further that the warders who wore dreadlocks were susceptible to manipulation by inmates and that this would result in them smuggling dagga into the correctional centres, whereas women did not pose the same problem.

The Supreme Court of Appeal confirmed that once discrimination on a listed ground is established, unfairness is presumed unless the employer proves the contrary. A discriminatory practice can only be justified in terms of s187(2)(a) of the LRA, namely that the dismissal is based on an inherent requirement of the job.

The court held that no evidence had been led to indicate that the employees' hairstyles detracted from their work performance or rendered them susceptible to manipulation by prisoners. Furthermore, there was no rational connection between the measure taken and its purpose.

In the premises, employers should ensure that the application of their disciplinary and other policies do not culminate in discriminatory practices. As a general rule, an inherent requirement of the job will be a defence to a claim of discrimination, provided that the inherent requirement has a bona fide, rational and commercial purpose.

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