DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT ALERT

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IN THIS ISSUE

DEFAULT ARBITRATION AWARDS – WHETHER TO REVIEW OR RESCIND?

Employees regularly refer disputes to the Commission for Conciliation, Mediation and Arbitration (CCMA) and cite their employers as respondents.

Unfortunately, the employers are often not properly notified by the CCMA and awards are sometimes granted in their absence. In these circumstances the employer has little option but to file an application for rescission. If the rescission application is successful the arbitration will be re-scheduled for a new hearing.

However, some employers are not aware that a rescission application must be launched within 14 days of receiving the award. If the rescission application is filed outside of this time period, an employer is required to apply for condonation for the late filing of their application for rescission.

To compound the challenges faced by employers, the CCMA sometimes fails to bring the condonation application to the attention of the convening commissioner. When this happens the commissioner will refuse rescission on the basis that there was no condonation application on file. The end result is that the employer receives a ruling stating that the rescission application was filed out of time and is therefore dismissed on the basis that it was not accompanied by an application for condonation.

As a result, the default arbitration award becomes valid and binding and the employer is then left with two options: it can either apply to the CCMA for a rescission of the rescission ruling itself, or it can take the rescission ruling on review to the Labour Court.

The question of whether to review or rescind under these circumstances was considered by the Labour Appeal Court (LAC) in the decision of *PT Operational Services v Rawu obo Ngwetsana (unreported judgment JA7/11)*. The court held that, if a CCMA commissioner fails to consider a condonation application, then he has not discharged his duty to properly consider the rescission application. The LAC is referring to the doctrine of *functus officio,* which states that, when a person performs an administrative function (such as a commissioner adjudicating matters in the CCMA), once a decision is made that person cannot revisit or change his decision.

However, the LAC held that "dismissing an application for rescission because it is not accompanied by an application for condonation, does not mean that the commissioner has considered the rescission application itself. A commissioner can only entertain the late application for rescission if it is accompanied by an application for condonation."

The LAC continued that "because there was no condonation application, the commissioner could not exercise his powers, duties or functions in terms of s144 of the LRA, because a condition precedent (that being condonation) had not been

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fulfilled. Therefore the commissioner's ruling dismissing the application was just another way of saying I cannot consider the application at this stage because there is no application for condonation. Without such application I have no jurisdiction to exercise my powers in terms of s144 of the LRA."

The LAC explained that a commissioner will become *functus officio* where he has exercised his decision making powers and in doing so, makes a final decision that cannot be revoked by the decision maker himself.

Accordingly, when a commissioner fails to consider an application due to some requirement such as condonation being missing, the commissioner does not become *functus officio* by dismissing that application because he simply cannot consider the merits without deciding condonation first. In such circumstances an application for rescission would be the appropriate course of action.

Conversely, where the commissioner has considered the merits of a matter before him in full, and in doing so makes a final decision, the commissioner becomes functus officio and thus an application for review (and not rescission) would be the appropriate course of action.

Employers will need to assess, on the facts of each case, whether a CCMA commissioner has discharged his powers and made a final decision before deciding whether to apply for rescission, or to take the matter on review.

Nicholas Preston

SOME LESSONS ON ULTIMATUMS IN UNPROTECTED STRIKES

It is often said that the best way to avoid unlawful strikes is by effective communication with striking employees. An ultimatum is very often the last step before disciplinary action is taken by an employer against employees involved in an unprotected strike.

An ultimatum serves the following purposes as stated in *Modise v Steve's Spar Blackheath [200] 5 BLLR 496 (LAC)*, "…it is, in the first place, a device for getting strikers back to work. It presupposes the unlawfulness of the strike otherwise it could not be given, but it does not sanction the misconduct of the strikers. It is as much a means of avoiding a dismissal as a prerequisite to effecting one. One is tempted to say that strikers are put in mora."

With this in mind, employers should reflect on the lessons taken from the Labour Court's recent decision in *Jackson Pule and Others v Mvelatrans (Pty) Ltd t/a Bojanala Bus Services (unreported JS535/2010)*.

On 19 November 2009, the employees of Mvelatrans t/a Bojanala Bus Services (Mvelatrans) embarked on a strike in pursuit of various demands. The employees had not taken any of the steps they were required to take under the Labour Relations Act, No 66 of 1995 (LRA). Consequently, on 20 November 2009, Mvelatrans obtained an interdict from the Labour Court, declaring that the strike was unprotected and effectively ordering the employees to return to work.

The court order was read to the employees at 15h00. At the same time, Mvelatrans read out an ultimatum to the employees directing them to return to work by 15h00 that day, on pain of disciplinary action. Pursuant to a collective disciplinary hearing, the employees were dismissed.

Ultimately, the Labour Court held that the dismissal of these employees was substantively unfair but procedurally fair. Three lessons can be distilled from the Labour Court's judgment.

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The evaluation of substantive fairness of a dismissal in these circumstances ultimately turns of the fairness of the ultimatum, which must be clear and unambiguous. The ultimatum should also afford the employees "…sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it." Given that the court order was read to the employees at 15h00, the same time which Mvelatrans appointed for the employees to return to work in the ultimatum, the effect of the ultimatum was to force the employees to return to work immediately. The deadline for the ultimatum to be adhered to had already expired by this stage. The court held that this was unfair. The lesson to be learned from this is that employers should pay careful attention to the time appointed in the ultimatum for employees to return to work.

How much time is sufficient? The court did not set a clear rule on this, but interestingly, held that a two hour notice period would not have afforded the employees sufficient time to consider whether or not they should return to work and the consequences of their failure to do so. The court indicated that burden is more onerous where employees are not represented by trade unions or do not have a formal structure such as a strike committee. The court held that "fairness would have required the respondent to have afforded the applicants the opportunity to go back home and discuss with their families the implications of refusing to obey the ultimatum."

Finally, when dealing with informal structures of this nature, it is important to establish whether any of the persons who purport to be leaders have actually been appointed as leaders and consequently, whether these persons are an appropriate channel to communicate with employees.

The Mvelatrans case has re-emphasised the importance of ultimatums in dismissals for participation in unprotected strike action. When a judgment call is made about aspects of an ultimatum, employers must pay particular attention to the purpose of the ultimatum and err on the side of caution.

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