DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT ALERT

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EMPLOYMENT FEATURES – JUNE 2013

TRADE UNION HELD IN CONTEMPT OF COURT AND HEAVILY FINED

The remedy most pursued by employers facing unprotected strike action is to interdict unlawful behaviour from persisting.

However, often the employees and the responsible trade union simply disregard the provisions of the interdict and this has sparked the debate whether such interdicts are rendered meaningless.

The recent decision of *In2Food (Pty) Ltd v Food and Allied Workers Union (FAWU) & others* (unreported judgment) brings welcome relief to employers as the Labour Court held FAWU in contempt of court and imposed a substantial fine as a penalty for the unlawful actions of its members.

On 16 February 2013 an interim order was granted interdicting and restraining FAWU and its members from continuing with their unprotected strike action and from harassing, threatening, assaulting or intimidating any non-striking employees. Despite the order, FAWU's members continued with the unprotected strike.

On 22 February 2013 a further interim order was granted where the respondents were called upon to show cause why an order should not be made final holding them in contempt and committing the striking employees to imprisonment and for FAWU to be fined an amount of R500,000.

The court, per Judge Steenkamp found that "the time has come in our labour relations history that trade unions should be held accountable for the actions of their members. For too long trade unions have glibly washed their hands of the violent actions of their members. This in a context where the Labour Relations Act of 1995, which has now been in existence for some 17 years and of which trade unions, their office bearers and their members are well aware, makes it extremely easy to go on a protected strike, as it should be in a context where the right to strike is a Constitutionally protected right."

The Judge held that FAWU's actions had undermined collective bargaining and that "there is no justification for the type of violent action that the respondents have engaged in in this instance. And alarmingly, on the evidence before me, the union and its officials have not taken sufficient steps to dissuade and prevent their members from continuing with their violent and unlawful actions."

The employer had suffered losses of more than R16 million as a result of the respondents' actions. As a result the court found that FAWU and its office bearers were held in contempt of the order issued on 16 February 2013 and fined an amount of R500,000.

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Lockout of non-striking employees

The Labour Court had occasion to consider an interesting question stemming from the recent bus workers strike. In *Transport and Allied Workers Union of South Africa (TAWUSA) v Algoa Bus Company (Pty) Limited and Putco Limited* (unreported judgment) handed down on 3 May 2013, the bus companies in this matter were faced with the much publicised bus workers strike by members of SATAWU and TOWU in support of a higher wage demand.

Unlike SATAWU and TOWU, TAWUSA, the applicant in this matter, had not called its members to go on strike but had also not accepted the wage offer made in the bargaining unit by the bus companies. In response to the strike notice issued by SATAWU and TOWU the bus companies issued lockout notices. Although the wording of the notices differed slightly, the common effect was that the members of TAWUSA were locked out of the bus companies' premises, in circumstances where the union had indicated to the bus companies that it did not intend joining the strike action.

The court was required to consider whether an employer faced with a strike called by one or two unions can lawfully lockout all its employees, inclusive of those not on strike and having not been called to strike by the union they belong to.

The bus companies' first argument was premised on the fact that the members of TAWUSA were locked out in order to compel them to accept a demand. The demand was that the applicant's members should accept the wage offer made in the bargaining council by the bus companies. In probing this argument, the court examined the definition of a lockout in s213 of the Labour Relations Act, No 66 1995, the court specifically considered the phrase 'for the purposes of compelling the employees to accept a demand'. The court held that this would presuppose that the employees should have refused to accept a demand of the employer.

The bus companies' second argument was premised on the fact that the Applicant's members could have joined the strike, in other words piggybacked off the referral made by the other unions. The court held that this argument should be considered in light of the purpose of a lockout, the primary purpose of which is to compel acceptance of a specific offer. The court went further to caution that a loose interpretation of the definition of a lockout would be dangerous and would elevate a lockout to something that the legislature did not intend it to be, a recourse and not a right.

The court summarised that a lockout must always be accompanied by an express demand. To qualify as a demand, the locked out employees must be informed of the actions expected of them if the lockout is to be lifted, a lack of a demand renders the exclusion not to be a lockout. Turning to the facts in this case, the court found that there had been no demand made to TAWUSA and therefore there was no offer to compel the members to accept.

CHANGES TO LEGISTLATION / POLICY

Proposed amendements to Unemployment Insurance Act, No 63 of 2001

The Deparment of Labour recently announced its intention to amend the Unemployment Insurance Act, No 63 of 2001 (Act) to increase the benefits for employees who have lost their jobs. This was announced during Minister Mildred Oliphant's department budget speech.

The department proposed that the Act be changed to increase the benefit period from 8 months to 12 months. This would mean that employees would be paid over a longer period without additional contributions. She said workers would be given adequate time to claim UIF by increasing the period from six months to 18 months for death benefits and 12 months for other benefits.

Changes to intra-company transfer permits and corporate work permits in South Africa

The Department of Home Affairs has stated that no change of status or conditions is allowed whilst an employee is resident in South Africa on an intra-company transfer or corporate work permit. This means that any change of conditions that is sought by a foreign employee that has a valid intra-company transfer or corporate work permit cannot be made while resident in South Africa. A foreigner employee will have to travel back to their country of origin to make an application for their next residence permit to remain in South Africa.

The intention of the Department of Home Affairs is to impart skills into the South African labour market. Under the intra-company

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transfer permit the foreign employee is allowed to work in South Africa for a maximum period of two years to share their knowledge with local staff. Once the two year period of transfer expires, the foreign employee is required to return to their country of origin and resume employment with their original employer (the branch or affiliate company to the South African company).

The corporate permit allows a group of foreign employees to come into South Africa for a maximum of five years to share their scarce or critical skills within the local environment. Once the five year period expires, the foreigner is required to return to their country of origin.

INTERNATIONAL NEWS

Bill proposed to expand pregnancy and nursing rights in the American work place

The United States (US) House and Senate introduced legislation designed to improve protections for pregnant and nursing employees.

The Pregnant Workers Fairness Act is a bill that would require employers to make reasonable accommodations for pregnant employees and job applicants as well as those with limitations related to childbirth. The Pregnant Workers Fairness Act would institute certain anti-discrimination and retaliation protections for workers who request a reasonable accommodation related to their pregnancy, childbirth, or associated medical conditions, and prevent employers from requiring that a pregnant employee take leave if she could perform her job with a reasonable accommodation.

The second measure introduced would expand the pool of employees who receive certain nursing mother rights. The Affordable Care Act amended the Fair Labor Standards Act (FLSA) to require employers with 50 or more employees to provide rest breaks and space for non-exempt employees who are nursing mothers to express milk. Current law provides mothers who are classified as non-exempt employees with reasonable break times to express milk in a private, non-bathroom environment while at work. The Supporting Working Moms Act would expand this provision to cover approximately 12 million salaried women who work in traditional office environments. Employers are not required to compensate an employee for the break time to express milk, and an employer with fewer than 50 employees who is unable to meet the requirements under the provision is exempt if it would pose an undue hardship.

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