DLA CLIFFE DEKKER HOFMEYR

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EMPLOYMENT MATTERS

HARASSMENT IN THE WORKPLACE, RESTRAINING ORDERS AND THE PROTECTION FROM HARASSMENT ACT

Employers have a duty to create and maintain a safe working environment for their employees. This includes the duty not to in any way facilitate harassment (including sexual harassment), or allow harassment to take place at work. If an employer fails to take appropriate action against an employee who harasses another employee, that employer may become liable for a harassment lawsuit in terms of the Employment Equity Act, No 55 of 1998 (EEA).

New legislation has recently supplemented this prohibition on harassment. The Protection from Harassment Act, No 17 of 2011 (PHA) came into force on 27 April 2013. The PHA applies to everyone who commits acts of harassment and is designed to protect victims of 'stalkers' and other individuals who commit acts of harassment. This includes harassment in the workplace.

The PHA defines 'non-sexual harassment' as conduct of a non-sexual nature where the perpetrator knows, or ought to have known, that it causes physical or psychological harm, or inspires a reasonable belief that harm may be caused.

PHA further defines 'sexual harassment' as unwelcome sexual attention from a person who knows, or ought reasonably to know, that the attention is unwelcome. It also broadens the definition of harassment to include electronic communications, such as emails, which can be used as a mechanism to harass persons.

In terms of the PHA, victims of harassment are entitled to have an interim protection order issued against the harasser. A protection order is essentially what the US judicial system refers to as a 'restraining order'. Together with the protection order, a warrant of arrest will be issued against the harasser which will remain in force until such time as the protection order expires or is set aside.

Employers will now have to manage situations where the victim and the harasser may be in the same workplace. If a court grants a protection order against the harasser, the employer will have to take steps to ensure that the protection order is upheld. This may include instituting disciplinary action against the harasser, or transferring the harasser to another department.

In *Grobler v Naspers Bpk en n' ander [2004] All SA 160 (CC)*, a manager was found guilty of sexually harassing an employee. The court found the employer to be vicariously liable for the

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conduct of the manager because it had failed to take appropriate action to prevent the harassment. The employer was liable for the resultant damages.

It would appear that the PHA enhances the Grobler decision and may justify further instances where employers are held liable for harassment through vicarious liability. Employers are therefore well advised to consider this new piece of legislation when applying their harassment policies, and when hearing disputes between employees.

Mark Meyerowitz and Shane Johnson

AN EMPLOYEE'S OBLIGATION TO COMPLY WITH A REASONABLE INSTRUCTION

The balance was tipped in favour of employers in the recent Labour Appeal Court decision of *Motor Industry Staff Association and another v Silverton Spraypainters and Panelbeaters (Pty) Ltd and two others [2012] ZALAC 42 (LAC).* Even though prevalent labour laws prohibit an employer from unilaterally changing terms and conditions of employment, this decision confirmed that employees do not have a vested right to preserve their working obligations completely unchanged.

In the Motor Industry matter the employer was in the business of panel beating and spray painting vehicles. During 2008 the employer started experiencing financial difficulties and, in a bid to increase its business and avoid job losses, it initiated a promotional campaign. As part of the campaign the employee was instructed 'to physically go to the office of the assessors and fleet companies in order to promote the business of the [company] and to procure work'. The employee blatantly refused to comply with this instruction. Although there was no contract of employment in place the employee maintained that the distribution of brochures to assessors and company clients did not form part of his job description. He further argued that the instruction given by the employer amounted to a unilateral amendment of the terms and conditions of his employment.

Subsequent to being issued with a final written warning and a disciplinary hearing having been conducted, the employee was dismissed. The employee referred the dispute to the Motor Industry Bargaining Council (MIBCO) where his application was dismissed. The Labour Court upheld the decision of MIBCO and found in favour of the employer. The employee persisted in his claim and lodged an appeal with the Labour Appeal Court.

It was submitted on behalf of the employee that he was entitled to refuse to obey an unlawful and unreasonable instruction given to him by the employer.

The Labour Appeal Court held that -

> "It is trite that an employee is guilty of insubordination if the employee concerned willfully refuses to comply with a lawful and reasonable instruction issued by the employer. It is also well settled that where the insubordination was gross, in that it was persistent, deliberate and public, a sanction of dismissal would normally be justified."

The Labour Appeal Court also referred to the case of *Mauchle (Pty) Ltd t/a Precision Tools v National Union of Metalworkers of South Africa and Others (1995) 16 ILJ 349 (LAC)* where it was held that:

> "I agree with the view expressed by the learned author … that employees do not have a vested right to preserve their working obligations completely unchanged as from the moment when they first begin work. It is only if changes are so dramatic as to amount to a requirement that the employee undertakes an entirely different job that there is a right to refuse to do the job in the required manner."

In the Mauchle case the court distinguished between a change in working conditions and a change in the terms and conditions of employment.

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The Labour Appeal Court found that the particular instruction was not a material change to the terms and conditions of the employee's core duties. In this regard the Labour Appeal Court held that:

> "Put differently, it was simply a variation in his work practice or a change in the manner his job was to be performed – a situation that was occasioned by sound and compelling operational reasons on the part of the company…Indeed it was, in my view, the situation in respect of which (the employee) did not have a vested right to preserve his working obligations completely unchanged as from the moment when he first began to work."

Accordingly, the Labour Appeal Court dismissed the employee's appeal and found that:

> "…the Company's instruction was a lawful and reasonable one which (the employee) was obliged and obligated to carry out. His blatant, persistent and public refusal to comply with this lawful and reasonable instruction constituted gross insubordination on his part. He seriously and inexcusably undermined the authority of management. In my view he was correctly convicted of the misconduct as charged and his dismissal was, therefore, substantively fair."

The Labour Appeal Court concluded by stating that the employee's conduct resulted in the irretrievable breakdown of the employment relationship between him and the employer and rendered his dismissal justified.

Gavin Stansfield

THE TERMINATION OF EMPLOYMENT: SETTLEMENT AGREEMENTS

Employers generally make use of settlement agreements to conclude the termination of an employment relationship in an amicable way. Such agreements are designed to provide the employer with security, and the assurance that the employee will not file any disputes against the employer. However, employers must be cautioned that, notwithstanding a settlement agreement, employees may still have a means of taking legal action against their employers.

It is a fundamental principle of law that once parties have decided to reduce a contract to writing, the resulting document is accepted as the sole evidence of the terms of contracts (known as the parol evidence rule). However, a party may rely on certain defenses to the parol evidence rule to 'get out' of the contract.

The two most common defenses which employees have raised in the past are misrepresentation and duress. When employees rely on misrepresentation they have to prove that they were provided with false information that induced them to sign the contract. When employees plead that they were under duress they are required to prove that actual violence occurred, or a reasonable fear of violence was present when they signed the contract.

The abovementioned principle came to the fore in two recent judgments of the Labour Court.

In the case of *Ferguson v Basil Read (Pty) Ltd*, an employee relied on misrepresentation in an attempt to avoid the consequences of a settlement agreement. The employee was faced with a possible dismissal for operational requirements and entered into a settlement agreement with the company in which he was paid his severance, his notice pay, and an *ex gratia* payment.

Upon learning that the company had commenced with a new building project, the employee claimed that he entered into the settlement agreement based on misrepresentation that the building project had been cancelled, and accordingly the agreement was null and void. He alleged that he was dismissed and entitled to compensation.

The court held that, on the facts, the employee had not proven that any misrepresentation had occurred whether by a false representation or by omission. Accordingly, the employee was held to have entered into a termination agreement in full and final settlement of any dispute arising from his employment and he was not dismissed.

It is common practice to have a witness sign a settlement agreement. However, the purpose of such witness is generally only to confirm the signatures of the settlement agreement.

We propose that to avoid any confusion, and potential for an employee to raise any defense to the settlement agreement, that the following is included in the 'Full and Final Settlement' clause of a settlement agreement:-

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1. that the witness confirms that the settlement agreement was fully explained to the relevant employee and that the employee entered into the settlement agreement of his own volition;

2. that the settlement agreement was translated into a language that the employee knows and understands; and

3. where applicable, that the employee has obtained legal advice on such agreement.

In the case of *Fakude & Others v Kwikot (Pty) Ltd*, the employees entered into a collective agreement via their trade union which governed the termination of employment for operational reasons. However, the company later required the employees to sign individual agreements for the payment of their packages. The court had to determine whether these circumstances constituted economic duress caused by the employer which would have the effect of vitiating the individual agreements.

The court held that the union had acted in the interest of the majority of its members and that the collective agreement was valid. Even though the minority union members were required to sign the individual contracts, they did so of their own free will, and the circumstances surrounding the conclusion of the collective agreement did not constitute duress.

However, as is evident from the case law above, employers should take care to ensure that settlement agreements are entered into in a fair and lawful manner.

Hugo Pienaar and Andrea Taylor

WHEN A RETRENCHMENT IS HELD TO BE UNFAIR, WHAT HAPPENS TO THE SEVERANCE ALREADY PAID TO THE EMPLOYEE?

In the recent unreported case of *Coca Cola South Africa (Pty) Ltd v Ndlovu* and others (case no D813/11 delivered on 7 May 2013) the Labour Court dealt with the issue of whether severance pay must be taken into account when awarding an employee compensatory relief pursuant to a finding that the employee was unfairly dismissed.

In this case an employee was retrenched by the employer and paid a severance package. The employee subsequently referred an unfair dismissal dispute to the CCMA. The arbitrator found that the employee's retrenchment was unfair and ordered retrospective reinstatement (including seven months' back pay).

The arbitrator specifically declined to deal with the issue of the employee's severance pay. The employer took the arbitration award on review on the basis that, amongst other things, the arbitrator failed to order the employee to repay his severance package in spite of the fact that the employee had been retrospectively reinstated. An order of retrospective reinstatement places the employee in the financial position he would have been in had he not been dismissed, and gives him his job back. The employer's contention was that the employee had sustained no loss which justified him retaining the severance package. The result of the award was that the employee was reinstated and allowed to keep his severance payment of approximately R1,3 million.

The Labour Court found that the arbitrator was obliged to deal with the repayment of the severance package because the severance payment occurred only as a result of the employee's retrenchment. The arbitrator's failure to do so therefore constituted a reviewable irregularity.

The court stated that, because the employee was reinstated to his previous position, he was placed in a position as if no dismissal had taken place. Under these circumstances the employee would have suffered no loss which was not addressed by an order of reinstatement with full back pay. In light of the relief granted by the arbitrator, the court found that the employee was no longer entitled to the severance package, which was intended to soften the blow of the retrenchment. Chetty AJ concluded, at paragraph 25, that:

> "There can be no justification for a result where [the employee] is reinstated with full back pay and retains a severance package which far exceeds the amount of his back pay. It is a decision that a reasonable decision maker would not reach."

This case sets a new principle that, in circumstances where an employee is retrenched and subsequently found to have been unfairly dismissed, the payment of the compensatory relief is subject to the repayment of the employee's severance package.

Aadil Patel and Kirsten Caddy

THE STRIKE NOTICE: IS IT OF ANY ASSISTANCE TO THE EMPLOYER?

The recent Constitutional Court decision of *South African Transport and Allied Workers Union (SATAWU) and Others v Lebogang Michael Moloto NO and Another [2012] ZACC 19 (CC)* found that employees are entitled to lawfully participate in a strike even if they are not members of the union which gave the required notice.

The respondents were the liquidators of Equity Aviation Services (Pty) Ltd which rendered services to various airports within South Africa. The majority of its employees were members of the South African Transport and Allied Workers Union (SATAWU).

SATAWU issued a strike notice after the parties had failed to resolve a wage dispute through conciliation. The aforementioned notice was issued on a SATAWU letterhead and referred to its members only. Minority trade unions confirmed that they were not party to the dispute. Despite this, employees who were not members of SATAWU participated in the strike notwithstanding their failure to comply with the provisions of the Labour Relations Act, No 66 of1995 relating to protected strike action. Accordingly, those employees who did not give the required notice were subsequently dismissed for their unauthorised absence from the workplace.

The dismissed strikers referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) challenging the lawfulness of their dismissal. When conciliation did not succeed, they referred the dispute to the Labour Court on the basis that their dismissal was automatically unfair in terms of s187(1)(a) of the Labour Relations Act. The Labour Court found that the dismissed strikers were covered by SATAWU's strike notice as they were its affiliates. Equity Aviation Services appealed this decision and its appeal was dismissed by the Labour Appeal Court. The matter then progressed to the Supreme Court of Appeal where the appeal was upheld. In the Supreme Court of Appeal the court reiterated that the purpose of the strike notice is to warn the employer of the 'the impending power play to enable it to make informed decisions".

Accordingly, the Constitutional Court had to decide whether the non-unionised members were in fact covered by SATAWU's notice of strike. The Constitutional Court held that the Supreme Court of Appeal had prescribed the incorrect meaning to s4(1)(b) of the LRA. In terms of s64(1)(b) every employee has the right to strike and every employer has recourse to lock-out if in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike has been given to the employer in writing.

The purposive interpretation which was followed by the Supreme Court of Appeal was challenged in the Constitutional Court. The majority of the Constitutional Court reiterated that parties should be cautious not to limit fundamental rights with implied limitations as opposed to those expressly stated. In this regard the Constitutional Court held that –

> "In our view there really is no contest. Interpreting the section to mean what it expressly says is less intrusive of the right to strike; creates greater certainty than an interpretation that requires more information in the notice; serves the purpose of the Act – specifically that of orderly collective bargaining – better; and gives proper expression to the underlying rationale of the right to strike, namely, the balancing of social and economic power."

According to the Constitutional Court the right to strike must 'be seen in the context of a right protected in order to redress the inequality in social and economic power in employer/employee relations'.

In contrast to the above, the minority had difficulty in understanding how the employer would be in a position to properly prepare for a strike if it does not know on behalf of whom the notice was issued. Furthermore, the minority were of the view that disorder would ensue if employees are entitled to strike even if a notice of strike makes no mention of their intention to do so.

The effect of the Constitutional Court's decision is that other trade unions' members or non-union employees are entitled to piggyback on a strike notice which was not issued on their behalf. In light of the above, employers may find it difficult to adequately prepare for an impending strike.

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