EMPLOYMENT

IN THIS ISSUE

THE SIGNIFICANCE OF ALTERNATIVE REMEDIES IN URGENT INTERDICTORY PROCEEDINGS

During 2014, numerous urgent applications were launched by employees in the High Court and the Labour Court seeking to interdict their employers from proceeding with disciplinary action against them. Marcel Golding, the chief executive officer of e.tv, brought the most recent of such applications.

In *Golding v HCI Managerial Services (Pty) Ltd and Others (C933/2014) [2014] ZALCCT 52* Golding launched an urgent application before the Labour Court to interdict a disciplinary hearing and his suspension on the grounds of unlawfulness. On 14 October 2014, Golding was charged with several allegations of misconduct, including dereliction of his duties, gross negligence, dishonesty, breach of fiduciary duties and breach of the ethics policy in relation to his position as executive chairman of Hosken Consolidated Investments Limited (HCI). Essentially, the charges relate to Golding's unauthorised purchase of shares in Ellies Holdings Limited.

The disciplinary hearing was scheduled to start on 27 October 2014. Golding was suspended pending the disciplinary hearing. Having received notice of the disciplinary hearing on 14 October 2014, Golding launched his urgent application on 22 October 2014. The court found that the urgency was self-created. While Golding had been notified of the disciplinary hearing on 14 October 2014 he had taken nine days to draft his urgent application, affording the employer less than one day to file answering papers.

Golding's challenge in relation to the alleged unlawfulness of the disciplinary hearing related to the allegation that HCI, which took the decision to discipline Golding, was not his employer. Golding maintained that Sabido and e.tv were his employer and, accordingly, HCI did not have the power to discipline him. The court agreed that Golding was clearly an employee of Sabido and e.tv, but stated that this did not preclude him from being an employee of HCI. The court referred, with approval, to decisions of the Labour Appeal Court and Supreme Court of Appeal in which the court found that highly-placed employees in a group situation who perform services on behalf of a number of entities usually have more than one employer.

The court analysed the facts, including that HCI Managerial Services (the company secretary of HCI) pays Golding's salary, Golding receives no remuneration from Sabido or e.tv, the IRP5 issued to Golding reflects payments and remuneration received from HCI Managerial Services, Golding participates in the HCI employee share scheme and Golding is the executive chairman of HCI. The court concluded that on the evidence before it, Golding is an employee of HCI. Having made this finding the court held that the decision of HCI and HCI Managerial Services to discipline Golding was not unlawful. On the basis that HCI had the power to discipline Golding, the court also found that the decision to suspend him was not unlawful.

Golding not only challenged the lawfulness of his suspension, but also the fairness thereof. He alleged that his suspension was unfair because he was not given a hearing before the decision to suspend him was taken. The court considered the fact that in the case of a precautionary suspension, that is, pending a disciplinary hearing and not as a sanction for misconduct, the employee is usually suspended on full pay, resulting in any prejudice flowing from the suspension being significantly contained and minimised, and that the period of the suspension is typically limited in duration.

However, the court went on to find that while these facts may result in the right to a hearing being attenuated in the case of a precautionary suspension, the fact that Golding was not given an opportunity to make any representations before the suspension, may be unfair. Having made this finding, the court proceeded to address the further hurdle faced by Golding, namely the fact that he had an alternative remedy. Golding had a remedy in terms of s186(2) of the Labour

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Relations Act, No 66 of 1995, ie a claim for unfair labour practice. This claim must be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) or bargaining council for conciliation and, if not resolved at conciliation, for arbitration – and not to the Labour Court. Golding referred an unfair labour practice dispute to the CCMA one day before he launched his urgent application before the Labour Court. He had taken no steps to expedite the CCMA referral. The court found that no exceptional circumstances were shown to warrant the court's intervention and the application was dismissed with costs.

Save for very exceptional circumstances, the court will not come to the assistance of an employee who can exercise an alternative remedy.

Gillian Lumb and Farren Eckleton

REVISITING THE ROLE OF THE LABOUR COURT AND UNFAIR SUSPENSIONS

The recent decision of the Labour Court in *Golding v HCI Managerial Services (Pty) Ltd and Others (C933/2014) [2014] ZALCCT 52* is but one example of the approach of the Labour Court in dealing with alleged unfair suspensions and applications to interdict suspensions and disciplinary hearings.

We earlier dealt with the reluctance of the court to interdict disciplinary proceedings [1].

The road to fair suspensions and more particularly whether a suspension is unfair because the suspended employee was not given a hearing before the decision to suspend has been a twisted one.

The approach of the Labour Court has not been wholly consistent and various formulations of the applicable standard have been expressed, although in most cases the Labour Court has held the view that the *audi alteram partem* rule applies in precautionary suspension cases and that the employee is entitled to a pre-suspension hearing.

The right to a pre-suspension hearing at times was founded in non-compliance with the audi alteram partem rule based on the assumption that a suspension of a public official constituted administrative action reviewable on administrative law grounds. This principle was dealt with in *Muller v Chairman, Ministers' Council, House of Representatives and Others [1992](2) SA 508 (C)*. If that were to be the case then employees in the private sector would not have been entitled to such a right based upon administrative principles.

The Constitutional Court in *Chirwa v Transnet Limited and Others [2008] 2 BLLR 97 (CC)* held that labour practices in the public service do not constitute administrative action and removed administrative action as a basis for the right to a pre-suspension hearing for public servants.

The issue of a pre-suspension hearing in the case of a precautionary suspension was only fairly recently dealt with extensively by the Labour Appeal Court (LAC) in *Member of the Executive Council for Education, Northwest Provincial Government v Errol Randal Gradwell [2012] 8 BLLR 747 (LAC).*

The LAC considered the various approaches of the Labour Court and adopted a simple approach by resorting to an interpretation of s186(2) of the Labour Relations Act, No 66 of 1995 (LRA).

The express wording of s186(2)(b) provides that "the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee" is an unfair labour practice. In previous cases the Labour Court adopted the interpretation that this section only applied to disciplinary suspensions and not precautionary suspensions.

The LAC held that this section also applies to precautionary suspensions:

- (45) The right to a hearing prior to a precautionary suspension arises therefore not from the Constitution, PAJA [Promotion of Administrative Justice Act, No 3 Of 2000] or as an implied term of the contract of employment, but is a right located within the provisions of the LRA, the correlative of the duty on employers not to

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[1] "Can employees interdict their intended dismissals – A question of alternatives?" 23 June 2014

subject employees to unfair labour practices. That being the case, the right is a statutory right for which statutory remedies have been provided together with statutory mechanisms for resolving disputes in regard to those rights.

Employees in the private sector therefore have the same statutory rights as their counterparts in public service.

Because of the flexible nature of fairness, procedural fairness:

- … depends in each case upon the weighing and balancing of a range of factors including the nature of the decision, the rights, interests and expectations affected by it, the circumstances in which it is made, and the consequences resulting from it when dealing with a holding operation suspension, as opposed to a suspension as a disciplinary sanction, the right to a hearing, or more accurately the standard of procedural fairness, may legitimately be attenuated for three principal reasons. Firstly, as in the present case precautionary suspensions tend to be on full pay for the consequence that the prejudice flowing from the action is significantly contained and minimized. Secondly, the period of suspension often will be (or at least should be) for a limited duration … and, thirdly the purpose of the suspension – the protection of the integrity of the investigation into the alleged misconduct – risks being undermined by a requirement of an in depth preliminary investigation. Provided the safeguards of no loss of remuneration and the limited period of operational are in place, the balance of convenience in most instances will favour the employer. Therefore, an opportunity to make legitimate representations showing cause why a precautionary suspension should not be implemented will or to nearly be acceptable and adequate compliance with the requirements of procedural fairness[2].

The Labour Court in the Golding case followed the LAC, holding that Golding was not given the opportunity to make any representations at all before he was suspended but, while that might be unfair, he faced a further hurdle.

The LAC in Gradwell pointed out that an interdict is inappropriate if the applicant has an alternative remedy: "disputes concerning alleged unfair labour practices must be referred to the CCMA or Bargaining Council for conciliation and arbitration in accordance with the mandatory provisions of S191(1) of the LRA. The respondent in this case instead sorted the clarity order from the Labour Court in terms of S158(1)(a)(iv) of the LRA to the effect that the suspension was unfair, unlawful and unconditional".

The court further held the following: "a final declaration of unlawfulness on the grounds of unfairness will rarely be easy or prudent in motion proceedings. The determination of the unfairness of suspension will usually be better accomplished in arbitration proceedings, except perhaps if it is the ordinary or compellingly urgent circumstances. When the suspension carries with either reasonable apprehension of irreparable harm, then, more often than not, the appropriate remedy for the applicant will be to seek an order granting urgent interim relief pending the outcome of the unfair labour practice proceedings".

The LRA provides for alleged unfair labour practices to be referred to the CCMA or bargaining councils for arbitration. In the Golding case, the applicant only referred a dispute about an alleged unfair labour practice one day before launching his urgent application and he had not taken any steps to have the arbitration before the CCMA expedited. He also failed to show any irreparable harm.

Apart from dismissing the application on a lack of urgency, the Labour Court in the Golding case held that, in addition, there was an alternative remedy available to the applicant in that the alleged unfair labour practice could be dealt with by the CCMA. In the absence of any exceptional circumstances, there was no reason for the Labour Court to interfere and the application for an interdict failed.

It is trite law that a suspension of an employee contrary to contractual arrangements will constitute a breach of the contract. The suspension of employees must be addressed in contracts of employment to avoid a breach of contract. In the public sector, other statutory provisions may also apply to suspensions.

The Golding case again emphasised that the courts are reluctant to interdict alleged unfair suspensions or disciplinary enquiries in view of the statutory remedies of the LRA being available to employees.

Faan Coetzee

[2] Gradwell paragraph 44

THE DEPARTMENT OF HOME AFFAIRS SHEDS LIGHT ON THE NATURE OF INTRA-COMPANY TRANSFER WORK VISAS

If a foreign national wants to work in South Africa, they must be in possession of a valid work visa issued in terms of the Immigration Act, No13 of 2002 (Act). The foreign national can apply for a general work visa, a critical skills work visa or an intra-company transfer work visa (ICT visa). Each of these visas is geared towards various activities, depending on the intention of the foreign national and/or their employer.

In terms of s19(5) of the Act, an ICT visa may be issued to a foreigner who is employed abroad by a business operating in South Africa in a branch, subsidiary or affiliate relationship. The ICT visa is relatively common and easy to obtain if all the supporting documents are in order.

Prior to the recent amendments to the Act, ICT visas were limited to a two-year period and were not extendable. In other words, the holder of an ICT visa would be required to return to their country of origin upon the expiry of the ICT visa.

On 1 June 2014, the Immigration Amendment Act, No 13 of 2011 came into effect. In terms of the amendments to the Act (and the accompanying regulations), the duration of ICT visas was extended from two years to four years.

The extended duration was, however, only applicable to new applicants. Accordingly, foreign nationals who obtained ICT visas under the 'old' Act, would still be required to return to their country of origin once the ICT visa expired. This caused an influx in queries and frustration from companies regarding the discrepancies in the duration of ICT visas issued in terms of the 'old' Act and under the 'new' Act. Many applicants were frustrated by these discrepancies as there was no clarity on whether one could apply for a new ICT visa afresh.

On 27 October 2014, the Department of Home Affairs issued Immigration Directive 19 of 2014 in order to clarify the operational inconsistencies that were being experienced with regard to the extension of ICT visas. In terms of the directive, a foreign national who is assigned to a South African company and who is currently in possession of an ICT visa issued under the 'old' Act may apply for a new ICT visa, which will, if granted, be valid for an additional period of four years. The application for the 'new' ICT visa must, however, be submitted at the South African Mission in the applicant's country of origin or of normal residence.

This recent development assists South African employers who wish to retain foreign assignees for longer than two years. Employers should, however, note that they have additional obligations in terms of the Act. In terms of the recent amendments to the Act, an employer who employs a foreign national in terms of an ICT visa must submit an undertaking to ensure that a plan is developed for the transfer of skills to a South African citizen or permanent resident. Employers must use the extended period to ensure that the relevant skills are transferred in accordance with the undertaking. It should also be noted that applicants will only be entitled to one ICT visa, where after they will no longer be eligible to apply for an ICT visa and would be required to apply for a different type of work visa.

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