DLA CLIFFE DEKKER HOFMEYR

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DRAFT PROTECTED DISCLOSURES AMENDMENT BILL HAS WIDER AMBIT THAN BEFORE

The Protected Disclosures Amendment Bill of 2014 (Bill) seeks to amend the Protected Disclosures Act, No 26 of 2000 (Act). In short, the purpose of the Act is to provide procedures for disclosing certain information regarding unlawful or irregular conduct by employees or employers and to protect employees from being subjected to occupational detriment or victimisation on account of having made a protected disclosure.

A protected disclosure is a disclosure made to a legal adviser, an employer, a member of the executive council of a province, or a person or body which is made in good faith and is made substantially in accordance with any procedure prescribed. The proposed legislation seeks to improve the Act in varying ways; a few of the most prominent aspects will be expounded upon below.

The first important aspect is that the Bill seeks to remedy the Act by the addition of the word 'workers' to ensure that (independent contractors, consultants, agents and persons working for the State) will also be entitled to exercise certain remedies if they are subjected to an occupational detriment as a result of having made protected disclosures. In this regard, the Bill also seeks to extend the definition of 'occupational detriment' to include an employee or worker being subjected to any civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement arising out of the disclosure of a criminal offence.

The Bill further proposes that civil and criminal liability be excluded for disclosing information that would expose criminal activity in the hope that this would facilitate and encourage disclosure. However, it must be noted that in terms of the Bill, should an employee knowingly or believing the information not to be true, disclose false information they will be guilty of an offence and on conviction is liable to a

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fine or to imprisonment for a period not exceeding two years or both. The Bill moreover inserts a duty or obligation on employers to set up appropriate (internal) procedures for dealing with disclosures and to inform all employees and workers of such procedures and to conduct an investigation should a protected disclosure be made. With regard to victimisation of an employee for the protected disclosure, the Bill aims to impose joint liability on both the employer and client should the employer have acted with express or implied authority or with the knowledge of a client by subjecting the employee or worker to victimisation. Once such victimisation is proved, the Bill provides that compensation or damages will have to be paid to the employee or worker.

In conclusion, the Bill seeks to improve disclosure of information by making it the responsibility of every employee, worker and employer to disclose information without the fear of reprisal, should such disclosure relate to suspected or alleged criminal or other irregular conduct to prevent the irregular or unlawful conduct.

The Department of Justice and Constitutional Development has called upon all interested parties to submit comments on the Bill which are to be submitted no later than 4 July 2014.

Gavin Stansfield and Abdul Allie

CAN EMPLOYEES INTERDICT THEIR INTENDED DISMISSALS – A QUESTION OF ALTERNATIVES?

The Labour Court recently revisited this issue in its judgment handed down on 6 June 2014, in *Mmatli & 19 Others v Department of Infrastructure Development (Gauteng Province), J1238/14.*

The applicant employees were historically employed on a month to month basis by an entity within the Gauteng Department of Public Transport, Roads and Works. Their fixed term contracts of employment had been renewed a number of times until October 2009 when they were all transferred to the Department of Infrastructure and Development.

A number of the applicant employees continued to work under this fixed term arrangement and refused to apply for permanent positions when they became available. This resulted in the Department issuing the remaining applicant employees with backdated fixed-term contracts which would expire in September 2012. A dispute over the employees contemplated termination dates subsequently ensued and was referred to the Labour Court.

The Department thereafter embarked on a further project to absorb the applicant employees into permanent positions, but again the applicant employees refused to apply for these positions when they became available.

Eventually and on 12 May 2014, the Department issued letters to the applicant employees stating the following:

"We are pleased to inform you that your contract with the department has been renewed effectively from 01 April 2011 until 30 June 2014;

You are required to sign and submit the attached contract to the Human Resources Department by no later than 15 May 2014;

Failure to submit a signed contract by 15 May 2014 will be construed as a rejection of the renewal of your contract. Accordingly, your services will be terminated in line with such rejection."

The applicant employees refused to sign the letters and accordingly faced termination of their contracts of employment. To avoid their termination, the applicant employees filed an urgent application in the Labour Court seeking to interdict and prevent their dismissals and compelling the Department to act lawfully.

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In considering the matter, the Labour Court mentioned that s189 of the Labour Relations Act, No 66 of 1995 (LRA) which deals with operational dismissals was in all probability the relevant section based on the facts. However, the Department had not embarked on such a process.

Accordingly, the Labour Court held that the applicant employees had established a prima facie right not to be unfairly dismissed, even if open to some doubt, and for this reason the first requirement for an interdict had been satisfied.

The issue, however, turned on one of the other requirements for an interdict, namely whether the applicant employees had an alternative remedy available to them.

In deciding this particular requirement, the Labour Court had regard to the decision of *Booysen v Minister of Safety and Security & Others (2011) 1 BLLR* page 83 (LAC) at page 99, wherein it was held that the Labour Court does indeed have jurisdiction to interdict any unfair conduct including that of disciplinary action, but that such intervention should be exercised in exceptional cases only and should be left to the discretion of the court. The Labour Appeal Court held further that although it will not lay down a legal test per se, one of the factors for consideration will be whether the failure to intervene would lead to grave injustice or whether justice may be attained by other means (ie through an alternative remedy).

With this in mind, the Labour Court in Mmatli held that justice was available to the applicant employees through other means, more particularly the unfair dismissal protections contained in s186 of the LRA, which provides adequate assistance and relief to the applicant employees in the event that they are unfairly dismissed.

On this basis, the Labour Court dismissed the applicant employees' urgent application.

First and foremost employers should ensure that they act within the ambit of the LRA when taking action against employees and in turn, employees and unions should reconsider the 'knee-jerk' reaction of rushing to court on an urgent basis, when there are alternative remedies available to them.

Nicholas Preston

CLEAR STRIKE NOTICES AND A REMINDER OF THE INTERIM RIGHT TO STRIKE UNDER S64(4) OF THE LRA

In the recent decision of *Imperial Group (Pty) Ltd v SATAWU, J1072/14*, the Labour Court was asked to confirm an interim strike interdict, dealing with an alleged unilateral change to terms and conditions of employment.

Prior to the interim interdict being granted, the South African Transport and Allied Workers Union (SATAWU) and their members had referred a dispute to the Bargaining Council alleging a unilateral change to the terms and conditions of their members. Simultaneously with this referral, SATAWU gave the employer 48-hours' notice to restore the status quo, failing which they would embark on a protected strike in terms of s64(4) of the LRA.

The 48-hour notice period then expired and the employees immediately commenced with their strike action.

In cases of an alleged unilateral change to terms and conditions of employment, s64(4) of the Labour Relations Act, No 66 of 1995 (LRA) provides a unique and expeditious remedy to employees if the status quo is not restored. However, the court

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confirmed that the interim remedy to embark on a protected strike only continues until such time as a certificate of outcome is issued, or until the expiry of a period of 30 days since the referral, whichever occurs first.

The court in examining the facts found that the dispute had been conciliated on 4 February 2014 and accordingly, the right to continue with the protected strike also lapsed on that day. SATAWU was therefore required to issue a fresh strike notice if it wanted to continue with the protected strike action.

The effect of failing to do this meant that any strike action in terms of s64(4) of the LRA which went beyond the conciliation date of 4 February 2014, was unprotected and could therefore be interdicted.

As an additional factor, the court also considered the clarity of the strike notice and the letter which SATAWU had relied upon as their strike notice.

In analysing the strike notice, the court referred to the decision of *Ceramic Industries Ltd t/a Better Sanitary Ware v National Construction Building and Allied Workers Union (1997) 18 ILJ 671 (LAC)* in which it was held that a strike notice should be sufficiently clear to articulate the union's demands and to place the employer in a position where it can take an informed decision to resist or accede to those demands.

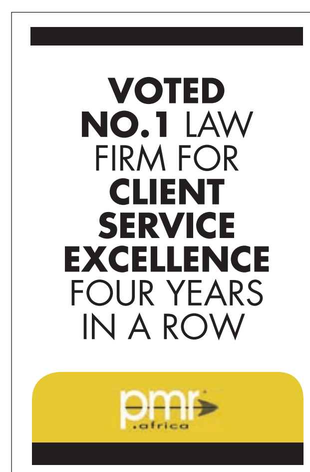
Having regard to this authority, the court held that neither the referral form nor the covering letter from SATAWU met these requirements, nor did it identify the terms and conditions clearly enough in order to avoid ambiguity on the part of the employer. Given this non-compliance, the court held that the employer was entitled to interdict the strike.

Employers should therefore scrutinise strike notices so as to ensure that the strike notice is sufficiently clear to enable the employer to know what the union's demands are from a simple reading of the document. Vague strike notices will be grounds to interdict a strike.

Furthermore and in cases of strike action over the unilateral change to terms and conditions of employment, the court has now confirmed again that a strike will lose its protected status after the conciliation phase has been completed, unless a further strike notice is issued.

Employers should therefore consult with their legal representatives as soon as possible after receiving a strike notice, so as to ensure that the strike notice is clear and valid.

Nicholas Preston



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