DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT

ALERT

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WHAT IS SAUCE FOR THE GOOSE IS SAUCE FOR THE GANDER: EQUAL PAY FOR WORK

Many authors have debated whether the general prohibition against unfair discrimination (contained in section 6 of the Employment Equity Act, No 55 of 1998 (EEA)) adequately safeguards equal pay for equal work.

South Africa is a party to the International Labour Organisation (ILO) Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, or Equal Remuneration Convention. An "equal work equal pay" clause is provided in the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures and the Public Service Act Regulations. But does it go far enough?

The legislature has made recent amendments to the EEA and issued new regulations to the Act. Section 6(1) of the EEA now provides that discrimination may not take place on the following grounds: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth or any other arbitrary ground.

The inclusion of "any other arbitrary ground" now means that the EEA is in line with the Labour Relations Act, No 66 of 1995 – specifically s187(1)(f) which provides that an employer may not dismiss an employee for any reason related directly or indirectly to "any arbitrary ground".

Section 6(4) now provides that a difference in terms and conditions of employment between employees of the same employer, performing the same or substantially the same work or work of equal value (that is directly or indirectly based on any one or more of the grounds listed in subsection (1)) is unfair discrimination.

This new section provides focus to the issue of equal work and equal pay and affords employees the opportunity to link such an unfair practice directly to the Act. An employee must prove that the employer has allowed a situation to occur where employees who do the same work receive different pay or benefits, in a discriminatory manner, without any justifiable ground or reason for such a difference.

In the amended Employment Equity Regulations, the minister now also provides employees and employers with a clear definition of the meaning of equal work for equal pay, a methodology to determine when and how to apply the provisions of s6(4), and finally how to assess whether work is equal by considering various factors such as responsibilities, qualifications needed to perform that function and the conditions under which that work is performed.

Employers should audit their remuneration and rewarded practices carefully in order to identify potential claims. Where terms and conditions of employees differ, even where they do the same or similar work or work of equal value, the employer has to determine whether such differentiation is a listed or arbitrary ground and whether there is an acceptable ground of justification for such differentiation.

Gavin Stansfield and Kershwyn Bassuday

LABOUR APPEAL COURT CONFIRMS THE IMPORTANCE OF WHISTLEBLOWING

In the recent judgment of *Potgieter v Tubaste Ferrochrome and Others (JA71/12)* [2014] ZALAC 32 (12 June 2014), the position and importance of a statutory protection for whistle-blowers was confirmed.

The Facts

The respondent, a mine operator in Mpumalanga dismissed Mr Potgieter who had been in the mine's employ since 1989. The reason for Potgieter's dismissal was related to his refusal to obey an instruction to return to work after a period of illness. There was conflicting evidence at the time as to Potgieter's medical fitness to return to work.

As a result, Potgieter was summoned to a disciplinary hearing wherein he was charged with insubordination and absenteeism without permission. He was found guilty of both charges and dismissed.

Subsequent to his dismissal but prior to his appeal, Potgieter submitted a report which was later published in a local newspaper, and which alleged that the respondent did not have adequate measures in place to address the water pollution caused by its mining operations in the region.

The matter was referred on to the MEIBC and the commissioner found Potgieter's dismissal to be procedurally and substantively unfair and he was granted maximum compensation but without reinstatement. The lack of a reinstatement order was attributable to the fact that the disclosure of the report was only made subsequent to Potgieter's dismissal and was therefore not made in good faith.

The commissioner found that Potgieter's lack of *bona fides* resulted in his disclosure falling short of the protections granted in terms of the Protected Disclosures Act of 2000 (PDA).

On review, the Labour Court found that the decision of the commissioner was one that a reasonable decision maker in his position would have made and dismissed the review while granting Potgieter leave to appeal to the Labour Appeal Court (LAC).

The Legal Framework

Molemela AJA, in handing down judgment on behalf of the LAC, reiterated the importance of whistleblowing in a constitutional era by stating the following:

"The fostering of a culture of disclosure is a constitutional imperative as it is at the heart of the fundamental principles aimed at the achievement of a just society based on democratic values. (Our emphasis)[1]

Whistleblowing is furthermore defined by the (ILO) as being the disclosure of information pertaining to unlawful or irregular conduct by employees or employers. This definition is captured in the PDA.

In its preamble, the PDA provides procedures for the disclosure of information regarding unlawful or irregular conduct by employees or employers and to protect the employees who make such disclosures from being subjected to any form of occupational detriment or victimisation.

Interestingly, the LAC held that in certain circumstances the PDA may still find application post-termination of the employment relationship. The Constitution requires all legislation to be interpreted in a manner which promotes the purport of the imperatives found in the Bill of Rights. The PDA gives credence to such imperatives by seeking to encourage a culture of good governance, accountability and transparency, both within public and private organisations. In terms of the PDA, a "general protected disclosure" must comply with the following requirements:

- the disclosure must be made in good faith;
- the person making the disclosure must reasonably believe the allegation or content thereof to be true at the time at which it is made; and
- the disclosure must not be made for personal gain.

Potgieter contended that his disclosure was also protected in terms of the National Environmental Management Act of 1998 (NEMA). NEMA has most recently been amended by the National Environmental Management Laws Second Amendment Act of 2013 (the Amendment Act) and a number of the issues raised by the LAC emanated from the Amendment Act.

In particular, s28(1) of NEMA places a positive obligation on every person engaged in an activity which may pollute or degrade the environment, to cease with such activity, take steps to safeguard against such detriment and where such polluting activity is lawful but governed, to mitigate the adverse effects as far as possible.

Furthermore, s31 of NEMA states, *inter alia*, that all persons who make disclosures in good faith shall not be subject to reprisals of irreparable or serious damages, especially where such disclosure was made in the public interest. Importantly, the

[1] *At Paragraph 14.*

LAC emphasised that the protection encompassed applied to all persons who may be in possession of such information and not just employees.

Section 31(2)(b) of NEMA specifically protects whistle-blowers and for the purposes of this case affords protection to persons who disclose such pertinent information to news media, such as Potgieter.

Section 34 of NEMA imposes strict criminal liability on employers who act or omit to act in a prescribed manner in order to prevent environmental damage. In terms of section 34(6) of NEMA, this liability is extended to managers, agents and employees who, during the scope of their employment, act or refrain to act in a manner which is required to prevent environmental transgressions and as such, will be liable as if they were the employer, acting so unlawfully.

Section 49A of NEMA was inserted in terms of the Amendment Act and contains a list of offences including where a person unlawfully commits an act or omission, either intentionally or negligently and which:

- significantly contributes to or is likely to have a significant contribution to the polluting or degradation of the environment; and
- causes or is likely to cause detriment to the environment.

In terms of S49B of NEMA (also a new insertion in terms of the Amendment Act) a person found guilty of certain offences listed under s49A (including the two alluded to above) shall be liable to a fine of up to R10 million or imprisonment not exceeding 10 years or both a fine and imprisonment.

The mine alleged that the report to the media was based on the 'Golder Report' which consisted of sensitive information but the LAC held that disclosures made to prevent irregular or criminal conduct may in certain circumstances require the disclosure of sensitive information. Furthermore, while considering the reputational and commercial detriment the employer might suffer due to the protection of such a disclosure, to place these interests above those of an individual who made the disclosure:

i) in fear of facing criminal sanctions;

ii) after attempting to bring his concerns to the attention of the mine; and

iii) made such disclosure in good faith as he believed it was in the public interest,

would erode the very objective of whistle-blower protection.

The LAC accepted that the provisions of NEMA may not have been known to the commissioner but that his failure to consider the evidence in its totality, resulted in the commissioner failing to heed the LAC's warning against such restrictive methods of interpretation and accordingly, it was held that the published media report was a protected disclosure in terms of the PDA, bolstered by the protection expressly afforded to Potgieter in terms of NEMA.

The Remedy

With regard to the remedy granted, the LAC stated that the default remedy for unfair dismissal was reinstatement subject to exceptions including the one relied upon by the commissioner in granting his award, namely an irretrievable breakdown of trust in the employment relationship.

The LAC, in referring to previous judgments handed down by it, asserted that the overriding consideration when determining whether reinstatement is an appropriate remedy is fairness, and the concept of fairness is to be determined on the facts of a particular case, bearing in mind the core objective of the Labour Relations Act of 1995 (as amended), being security of employment.

The conclusion reached by the commissioner was solely based on the incorrect perception that Potgieter's disclosure was vindictive and made with malicious intent against the employer. Accordingly, the appeal was upheld and Potgieter was reinstated with retrospective back pay from the date of his dismissal.

Conclusion

This judgment successfully imported the objective of whistle-blower protection in a free and open democratic society, driven by constitutional imperatives such as freedom of expression and accountability.

Through a progressive approach to interpretation and application of the PDA and through recognising the proactive measures imposed on persons in terms of NEMA as well as the severe consequences for non-compliance therewith, the LAC has laid the foundations for achieving the goals set forth in the preamble of the PDA.

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