DLA CLIFFE DEKKER HOFMEYR

# EMPLOYMENT

# ALERT

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## PROCESSING PERSONAL INFORMATION: THE EMPLOYMENT LAW 'INS' AND 'OUTS'

The Protection of Personal Information Act, No 4 of 2013 (POPI) is primarily aimed at promoting the protection of personal information of a data-subject which is processed by both public and private bodies. Its foundation lays upon the premise of the right to 'privacy' as constitutionally enshrined under s14 of the Constitution of the Republic of South Africa, 1996 (Constitution). This right is inclusive of a right to protection against the unlawful collection, retention, dissemination and use of personal information and is equally binding on the State.

### The definitions of 'personal information' and 'processing'

As part of our series of articles on the impact of POPI on employment law, this article focuses on the definitions of 'personal information' and 'processing' as well as the application of POPI and any exclusions which may be relevant.

'Personal Information' is very widely defined as any information relating to an identifiable person, whether natural or juristic. It includes all information about that person, such as, *inter alia*, race, gender, education, employment history, personal preferences, physical addresses and even the opinions of another individual about that person. Due to the broadness of this definition careful consideration of what information will be deemed personal will be required.

'Processing' has also been afforded a wide definition in the Act and is intended to be inclusive of all manners of processing, including, *inter alia*, the collection, storage, modification and destruction of information.

### The application of POPI

POPI is applicable to both public and private bodies and applies to the processing of personal information. The Act applies to the exclusion of any provision of any other legislation regulating the processing of personal information which is materially inconsistent with an object or specific provision of POPI. However, if other legislation provides for more extensive conditions regarding the lawful processing of personal information, the more extensive conditions will prevail.

### Exclusions from the application of POPI

POPI does not apply to the processing of personal information in the course of a purely personal or household activity. It also does not apply to the processing of personal information by the Cabinet, Executive Councils and Municipal Councils as well as any information relating to the judicial functions of courts. A further exclusion is devoted to the processing of information for journalistic, literary or artistic purposes.

### Conclusion

Although POPI is not yet in force, businesses will have to take considerable measures to transition from the current position, where hardly any laws place obligations upon organisations to ensure the protection of personal information, to the new dispensation comprising rigid requirements and onerous obligations.

Businesses typically process considerable amounts of personal information belonging to, amongst others, clients, suppliers and employees. Therefore, the importance of properly protecting personal information should not be underestimated.

*Antonia Pereira*

## NGEWU AND ANOTHER V POST OFFICE RETIREMENT FUND AND OTHERS [2013] 1 BPLR 1 (CC)

In the decision of *Ngewu and another v Post Office Retirement Fund and others* [2013] 1 BPLR 1 (CC), the Constitutional Court had to decide when pension benefits accrue to divorced spouses. In this case, Mrs Ngewu (Applicant) was married to a Post Office employee who had been a member of the Post Office Retirement Fund. During the divorce proceedings, the court found that a 50% share pension interest should be paid to Mrs Ngewu. However, under the Rules of the Fund, Mrs Ngewu's portion of her ex-husband's pension interest would not accrue upon divorce but rather when Mr Ngewu terminated his membership in the Fund.

Mrs Ngewu therefore sought to change the Rules of the Fund so that her pension interest, and those of other ex-spouses in a similar position, accrues on the date of divorce.

All parties agreed that the Post Office Act, No 44 of 1958 was unconstitutional in so far as it did not provide for the payment of the pension interest at the time of divorce. The agreement between the parties stemmed from the payment of divorced spouses' pension interests in terms of the Pension Funds Act, No 24 of 1956 and the Government Employees Pension Law Amendment Act, No 21 of 1996 which states that the pension interest is payable at the time of divorce (known as the 'clean-break' principle) where in comparison the payment governed by the Post Office Act is only payable upon termination of membership by the member in the fund.

The Constitutional Court held that this differentiation violated the right of equality before the law and equal protection and benefit of the law. Consequently, the Constitutional Court declared s10 to 10E of the Post Office Act unconstitutional but ordered that the declaration of invalidity be suspended for eight months for the legislature to cure the defect. The defect was subsequently cured in terms of the Government Employees Pension Law Amendment Act.

It is important to note that as a result of the judgments in the present case as well as the *Wiese v Government Employees Pension Fund and Others* (CCT 111/11) 2012 (6) BCLR 599 (CC) case, the assigned portion of the pension interest would be deemed to have accrued on the date of the divorce order. Accordingly, the non-member spouse is entitled to be paid the assigned amount directly to him/her or to have it transferred to an approved pension fund on the date of divorce. This would invariably result in the member's interest diminishing significantly on the date of divorce.

In conclusion, it is important to note that all pension fund rules which are not in line with the above applicable judgments (with regard to the time of pension benefits accruing and the payment thereof to non-member spouses) may be declared invalid and unconstitutional.

*Gavin Stansfield*

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## HOW FAIR IS FAIR? DILIGENT CONSULTATION ON RATIONALE AND SELECTION CRITERIA MAY NOT GUARANTEE PROCEDURAL FAIRNESS

When an employee is dismissed for operational requirements it is generally due to no fault on their part. They are blameless as the termination arises out of the operational needs of the Employer. Section 189 of the Labour Relations Act, No 66 of 1995 (LRA) affords the affected employee protection by placing an onerous burden on the employer to ensure that the reasons and process leading up to the dismissal are absolutely fair.

Not only must the employer's decision to retrench be based on genuinely justified operational requirements, but that decision to retrench must be executed in a manner which is fair. Fairness in these circumstances means that the employer is required to strictly comply with the consultation requirement to the fullest extent, as we will demonstrate in this article.

In a judgment recently handed down by the Honourable Judge Gush in the matter between *Stephen P Mawer v Nortech International (PTY) Ltd (D924/10) [2014] ZALCD* 1 (31 January 2014), the court found the employee's dismissal due to operational requirements was substantively fair. Procedurally, the court was satisfied with the choice and application of the selection criterion applied by the employer. The court went even further to state that the employer had "carefully and diligently" complied with the requirements of s189 of the LRA in consulting over the need to retrench and the selection of the employee.

Insofar as the procedure up to this point was concerned, it was faultless. However, the Labour Court found that after the selection of the employee, the employer completely abandoned the remainder of the requirements in s189 in that it failed to consult with the employee on the timing of his dismissal, severance pay and any assistance it could offer to him.

The court found this failure to be a material breach of the employer's duty consult on all the issues in s189(3) and found the dismissal to be procedurally unfair.

As such, the employer was ordered to pay the employee 12 months compensation plus costs. It bears mentioning that this is the maximum compensation the court could have awarded to the employee.

The judgment's point of departure is that the process prescribed by s189 of the LRA requires strict compliance with the entire process. The items on which the employer failed to fully consult relate to the consequences of retrenchment. Given the nature of retrenchment, those aspects of the consultation process are a fundamental and crucial part of the process in the courts view. Accordingly, the employer's deviation from s189 was found to constitute a material procedural irregularity.

In a retrenchment process, the employer has the prerogative to make the final decision if it fails to reach consensus with the other consulting party, but before it makes a final decision it has a duty to meaningfully consult with the affected employee/s. The judgment suggests that every part of the consultation process is equally and vitally important and failure to follow any part of the process even after it becomes apparent that the employee will be retrenched taints the whole retrenchment exercise.

In a large scale retrenchment (dismissals that meet the thresholds set in s189 A of the LRA) the employer has the option of appointing a Commission for Conciliation, Mediation and Arbitration (CCMA) facilitator to guide the process and guarantee procedural fairness by following the CCMA facilitation guidelines on such retrenchments. In a smaller scale retrenchment, the burden of ensuring procedural fairness rests squarely on the employer's shoulders. Furthermore, procedural fairness is typically raised after the employee/s is dismissed. Consequently, the employer may be burdened with a compensation order at a time when it may be trying to recover financially from whatever brought about the need to retrench.

The lesson in this for employers is that no part of the consultation process should be taken lightly. The employer must ensure that every procedural aspect and matter for consultation in terms of s189(3) is followed and fully consulted on with the affected employees or their representative.

*Mohsina Chenia and Shungu Mariti*

## A COLLECTIVELY CONSTITUTED HEARING: IS IT A BAR TO REVIEW?

In the recent case of *Overstrand Municipality v Magerman N.O and Another* (C86/2013) [2013] ZALCJHB 292 (28 October 2013), the court was faced with whether or not it could review and set aside the decision of a chairperson of a disciplinary hearing conducted in terms of a collective agreement in local government.

*In casu,* the respondent employee, the Head of the Municipality's Law Enforcement and Security division, was found to have committed misconduct in that he secured the withdrawal or reduction of personal speeding fines by falsely claiming that they had been incurred while performing his duties. The Internal Chairperson of the hearing imposed a sanction of a final written warning. The Municipality sought review of the Chairperson's decision, contending that in view of the serious nature of the offence, no reasonable Chairperson could have imposed a sanction short of dismissal.

The first issue that the court was required to determine was whether it could overturn the sanction imposed by an internal disciplinary hearing constituted by a collective agreement.

The court noted that, while it has been held that decisions taken in the course of an employment relationship do not constitute administrative action, the Labour Appeal Court and the Supreme Court had ruled that internal disciplinary proceedings constitute administrative action reviewable by the Labour Court in terms of s158(1)(h) of the Labour Relations Act, No 66 of 1995. Section 158(1)(h) provides that the Labour Court "...may review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law".

The question raised by the Municipality was whether the Supreme Court of Appeal's judgment in Ntshangase v MEC: Finance, Kwazulu Natal and Another [2009] 12 BLLR 1170 had been overruled by the Constitutional Court's later decision in Gcaba v Minister for Safety and Security and Others [2009] 12 BLLR 1145 (CC).

The Constitutional Court in Gcaba had found that -

*"Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognised by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of section 33 is to deal with the relationship between the State as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the State as employer and its workers. When a grievance is raised by an employee relating to the conduct of the State as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action."*

Returning to Overstrand, the court held that, albeit anomalous to determine that the dismissal of a public service employee does not constitute administrative action in one decision – Nsthangase, and shortly thereafter the decision of the chairperson of a disciplinary hearing does constituted administrative action – Gcaba - the court was bound by the Ntshangase decision. The court found that the Chairperson of the disciplinary hearing was exercising a statutory function, because the municipal function had delegated the power he possessed under the Municipal Systems Act, No 32 of 2000. The court determined that it consequently had jurisdiction to hear the Municipality's case

In respect of the merits of the case, the court found that the employee occupied a senior and trusted position, he had acted in an unlawful manner and subsequently, he tried to defeat the ends of justice by acting dishonestly. The court found that the mild sanction imposed beggared belief. The Chairperson had merely taken into account the employee's length of service and his performance without considering the duplicity of the employee's conduct, had taken irrelevant factors into account when considering mitigation and had overlooked the operational need to ensure that an official in the position of the employee should behave in an exemplary manner. Given the nature and gravity of the misconduct, the court found that there will be no point in remitting the matter back to the internal enquiry for re-consideration. Accordingly, the court determined that the only possible sanction in the circumstances was dismissal. The court, thus, set aside and replaced the Chairperson's decision with a sanction of summary dismissal.

The impact of this judgment is that it confirms the position in Ntshangase that local government can review an internal disciplinary decision and the court has jurisdiction to substitute such a decision

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