EMPLOYMENT

IN THIS ISSUE

SUSPICIOUS DISMISSALS: CAN EMPLOYERS DISMISS ON SUSPICION OF MISCONDUCT?

Section 188 of the Labour Relations Act, No 66 of 1995 permits an employer to dismiss an employee for reasons related to the employee's misconduct. Employers have tried to broaden the ambit of this form of dismissal, by arguing that employees can be dismissed based on a suspicion of misconduct alone.

In the leading case of *Algorax (Pty) Ltd v Chemical Industrial Workers Union and another [1995] 10 BLLR 1 (LAC)*, the court held that an employee may be dismissed based on a suspicion provided the suspicion is *bona fide*, reasonable and renders the continued employment relationship intolerable.

In the more recent case of *Senzeni Mbanjwa v Shoprite Checkers (Pty) Ltd and Others (DA 4/11) [2013] ZALAC*, the Labour Appeal Court (LAC) was tasked with considering whether this ground of dismissal was still permissible.

Senzani Mbanjwa (Employee) was employed by Shoprite Checkers (Pty) Ltd (Employer) in the position of cashier. On 28 April 2006, the Employee proceeded to ring up items for a customer, Ms Magoso (Customer), who worked as a car guard outside of Checkers' place of business. On the day in question, the Employee rang up the items at the kiosk as opposed to the normal tills. The Customer did not have the total amount of money with her and subsequently left the store, returning ten minutes later to pay for all of the items. The Employer's assistant manager, Ms Pillay (Manager), watched the Employee ring up the items and had also seen the Employee and Customer talking to each other on the previous day. For a number of reasons, some of which are mentioned above, the Manager was suspicious of the Employee's behaviour.

Following this suspicion, the Employee was called to attend a disciplinary hearing for allegedly committing 'gross misconduct' in that she attempted to under ring items while operating the till. The Employee was found to have committed the said allegation and was summarily dismissed. Questioning the fairness of her dismissal, the Employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

During arbitration, the Customer conceded that the allegation levelled against the Employee was based only on her suspicion that the Employee attempted to under ring items based on what she had witnessed. After considering the evidence, the commissioner concluded that the Employee's dismissal was substantively unfair.

On review, the Labour Court concluded that there had not been a full and fair hearing and remitted the matter to the CCMA to conduct the hearing anew. This decision was taken on appeal to the LAC.

The LAC held that the main issue was not whether dismissal was the appropriate sanction, but rather whether the Employee had committed the misconduct in the first place. The Court found that where an employer suspects that an employee has dishonest intentions, the employer can't rely on the suspicion as a ground of dismissal. Emphasising this point, the LAC stated that, "suspicion, however strong or reasonable as it may appear to be, remains a suspicion and does not constitute misconduct".

Employers should thus ensure that they have tangible evidence to support dismissals, rather than relying on ungrounded suspicions.

Hugo Pienaar and Joloudi Badenhorst

TEN-YEAR MULTIPLE-ENTRY VISAS SET TO PROMOTE INVESTMENT IN SOUTH AFRICA

At the beginning of the year, the Department of Home Affairs (DHA) announced its plan to introduce 10-year multiple-entry visas for national business executives from South Africa's BRICS partners, Brazil, Russia, India and China (Visa). During a recent speech in the National Assembly, the Minister of Home Affairs confirmed that the new Visa has been well-received.

The Visa is available for persons with diplomatic passports and also for ordinary passport holders who visit South Africa for business or tourism related reasons. The purpose of the Visa is to allow business executives, who frequent South Africa on short business trips, the opportunity to apply for a long-term multiple-entry visa. The Visa will allow the holder multiple entries into South Africa for up to a maximum of 10 years (as long as the holder's passport remains valid). The maximum stay period for a single entry is 30 days. The expected turn-around time after applying for a South African visa is 5 days.

The DHA has stated that this visa initiative is primarily a result of its mandate to manage immigration effectively in support of, amongst other things, its national development and security plan. The DHA is currently exploring the avenue of extending the same visa benefits to other countries.

Employers should note that this Visa does not allow a foreign national to take up employment in South Africa, as the scope of this Visa is limited to business activities, such as attending meetings in the country. A foreign national who takes up employment during their stay in South Africa under this Visa shall be deemed not only to have contravened the Immigration Act, No 13 of 2002, but also runs the risk of deportation and being declared either an undesirable or prohibited person.

Employers who partner with countries forming part of the BRICS council are called upon to utilise the Visa to avoid the burdensome process of applying for a short-term visitor's visa every time a foreign national wishes to enter the country for business purposes. The introduction of the Visa is expected to help South Africa tap into the vast investment potential of BRICS countries.

Michael Yeates and Thandeka Nhleko

THE XXI WORLD CONGRESS OF THE INTERNATIONAL SOCIETY FOR LABOUR AND SOCIAL SECURITY LAW IS TAKING PLACE IN CAPE TOWN FROM 15 TO 18 SEPTEMBER 2015, HOSTED BY THE SOUTH AFRICAN SOCIETY FOR LABOUR LAW (SASLAW) AND PROUDLY SPONSORED BY CLIFFE DEKKER HOFMEYR AND DLA PIPER AFRICA.

The 21st World Congress promises to provide a platform for a stimulating discussion on labour and social security law in a global environment where sustained economic and social uncertainty appears to have become the norm.

How do we continue to give effect to the basic objectives of labour and social security law under these conditions, and how best might those objectives be secured?

These and other questions will inform our order of business.

CLICK HERE FOR MORE INFORMATION.

CHAMBERS GLOBAL 2014 - 2015 ranks our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2015 in Band 2: Employment.

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