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EMPLOYMENT ALERT

IN THIS ISSUE

CDH
CLIFFE DEKKER HOFMEYR

THE CCMA CANNOT ALWAYS BE AT FAULT

The court held that a party referring a dispute must stand or fall on the merits of that dispute.

Where the parties make a conscious decision to run a case in an arbitration process in full appreciation of the jurisdictional consequences of their election, it is not appropriate for commissioners to intervene and dictate to parties what their real dispute is and how it should be litigated.

Who determines the nature of a dispute in arbitration proceedings? Is it up to the commissioner to decide on whether or not the real dispute falls within its jurisdiction?

The case of *Ngobe v J.P Morgan Chase Bank and Others* [2015] ZALCJHB 317 provides us with some direction in this regard.

The *Ngobe* case involved an employee who applied to the Labour Court to review and set aside the arbitration award made by a commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA). She based her review application on the allegation that the CCMA did not have jurisdiction to hear the dispute because it was an automatically unfair dismissal based on the employee's pregnancy.

The facts addressed in the arbitration award were the following: the respondent employer underwent restructuring and invited the employee in the matter to apply for a new position. Her application was unsuccessful and she was consequently retrenched.

The pre-arbitration minute set out the common cause facts, the facts in dispute, and the legal issues to be decided by the commissioner. The minute also specifically stated that there were no preliminary points to be determined. The commissioner was only to determine whether the dismissal was procedurally and substantively fair.

Upon considering the review, the Labour Court took the following into consideration:

(i) the employee was *dominus litis* in the CCMA;

(ii) the employee was assisted by her attorney throughout the proceedings;

(iii) the employee failed to raise any jurisdictional issues before or during the course of the arbitration; and

(iv) the employee agreed in the pre-arbitration minute that there were no preliminary points to be determined. The commissioner even confirmed, before evidence was led, that the matter before her was one of retrenchment.

The record disclosed that the employee pursued the dispute concerning her dismissal on the grounds of operational requirements throughout and even when the commissioner raised evidence relating to her pregnancy, giving an opportunity to raise a jurisdictional challenge, she did not do so.

The court held that the employee chose to rely on a particular course of action which was capable of being determined by the CCMA and she remained bound by that election. Furthermore, there is a trend in the CCMA for commissioners to intervene and halt proceedings where they form the view that they have no jurisdiction on the basis that the real dispute between the parties concerns a reason that is listed as automatically unfair.

The court held that a party referring a dispute must stand or fall on the merits of that dispute. Where the parties make a conscious decision to run a case in an arbitration process in full appreciation of the jurisdictional consequences of their election, it is not appropriate for commissioners to intervene and dictate to parties what their real dispute is and how it should be litigated.

Employers should therefore always hold an employee to their initial dispute and merits, and get on record what the nature of the dispute really is. The pre-arbitration minute is important as it acts as evidence of the true nature of a dispute.

Lauren Salt and Samantha Bonato

STRIKE DIARIES FOR THE DEPARTMENT: WHY IS IT IMPORTANT TO COMPLETE A LRA FORM 9.2?

Some industrial action does not come to the attention or knowledge of the department's officials. Although employers are expected to complete the LRA form after experiencing a labour dispute, some do not complete or send the form to the department for capturing.

In terms of s205(3)(a) of the Labour Relations Act, No 66 of 1995 (LRA), an employer must record details of strike, lockout or protest action in LRA Form 9.2 (LRA form).

The 2014 *Industrial Action Report*, and specifically Chapter 4: *Profile of Work Stoppages*, provides a brief overview of strike activities that occurred and were mentioned in the Department of Labour's media monitoring system in the year of 2014. It provides evidence on how the strike data system was frequently updated and maintained for the benefit of all interested parties. These kinds of disputes affect small, medium and big companies in the country. However, not all strike incidents are captured due to other limitations.

Some industrial action does not come to the attention or knowledge of the department's officials. Although employers are expected to complete the LRA form after experiencing a labour dispute, some do not complete or send the form to the department for capturing. These labour disputes are then not recorded or identified by the department.

The department has introduced an active media monitoring programme which is used to make contact with employers and encourage their voluntary compliance with reporting requirements.

The *Industrial Action Report* takes into account all labour disputes, including those that are pre-arranged between management and employees. It also includes protest action and pickets during lunch hours and after hours, as well as protests by workers who are on leave. Employers are not expected to complete the LRA form in all of these instances as recognised industrial action can only occur during office hours and by workers who are expected to be at work.

The record keeping by the department allows it to keep track of how many incidents occur, how long they last, whether they are protected or unprotected as well as what percentage of strike action occurs in the private and public sectors. Furthermore, it allows us to see what industries are predominantly affected within those sectors. Importantly, it reflects what the main reasons for the action were. For example, wage disputes were the most common reason for people embarking on strikes in 2014. The records also tell us which trade unions have the most members participating in strikes.

The capturing of data in this regard attempts to cover the entire country and is a painstaking exercise. Participation and cooperation by employers is therefore vital to enable the process to provide statistics which are accurate and have reasonable precision.

In addition to the expectation that employers report industrial action, the department has introduced an active media monitoring programme which is used to make contact with employers and encourage their voluntary compliance with reporting requirements.

Employers are encouraged to record all industrial action in the workplace and to ensure that accurate submissions are made to the department each and every time an incident occurs. The cooperation of private sector employers will speed up the process of data collection. Our suggestion is for employers to keep blank copies of the LRA form and fill one out should industrial action arise. The LRA form should then be immediately sent to the department.

Lauren Salt and Samantha Bonato

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