EMPLOYMENT

EMPHASISING THE DUTIES AND FUNCTIONS OF COMMISSIONERS

Can one review a decision of a commissioner who fails to provide cogent reasons for his decision?

In the recent decision of *The Workforce Group v CCMA & Others* (unreported case number JR30688/11 decided on 27 February 2015), the Labour Court had to decide whether an arbitration award, in which the commissioner provided very few reasons for the conclusion reached, was reviewable in terms of s145 of the Labour Relations Act, No 66 of 1995 (LRA).

The case dealt with a contract concluded between The Workforce Group (Workforce), which provides staffing solutions companies, and Rand Water. A large component of Workforce's business involves the provision of temporary employment services. A contract was concluded in which the Workforce would provide employment services to Rand Water. Further contracts were then concluded between Workforce and the employees and one of the terms of these contracts was that should the contract between Workforce and Rand Water be terminated, the contracts between Workforce and the employees would terminate automatically. This scenario is exactly what unfolded.

Ralefatane, AJ was tasked with reviewing an award made by a CCMA commissioner, which was only three pages long and lacked substantial reasoning for the conclusions given. However, prior to dealing with the award itself, the court was required to decide a preliminary point as various employees had not been cited as respondents. The court said it was imperative that all parties be cited, particularly if an order for costs is sought. As such, the court could only consider the single employee who had been cited as the respondent. This part of the judgement speaks to the importance of following the correct procedure when compiling pleadings for a review.

In dealing with the grounds of review the court noted that the fact that an arbitration award was only three pages long does not mean that the commissioner failed to apply his mind to the evidence placed before him. There could be instances where a commissioner might narrow the material facts of a dispute into a truncated award. However, the opposite reasoning also applies in that the commissioner could have written an award which is short because he or she did not deal with all the material evidence.

The court further noted that the commissioner must not omit to consider key issues as such an oversight may lead to an unjust and unreasonable decisions. Even if a commissioner lists all the facts in the award, this does not necessarily mean that the commissioner applied his mind to each. In supporting its position, the court referred to the decision of *Gaga v Anglo Platinum Ltd and Others* (2012) 33 ILJ 329 (LAC) in which the Labour Appeal Court held: *"Where a commissioner fails to properly apply his mind to material facts… The ensuing decision inevitably will be tainted by dialectical unreasonableness"*.

In the present case, the commissioner erred in considering the incorrect commencement dates of of the contracts, which the court found to be a material error in that such dates are critical, especially when a determination as to compensation is required.

Crucially, the court further found that the commissioner did not "bother himself to deal with the nature of the employment relationship". Considering the facts of this case, the nature of the employment relationship was paramount because the employees were employees of a labour broker rather than employees of the client. In this matter, there were two contacts which were dependent on each other, namely the contact between Workforce and Rand Water and the contract between the employees and Workforce. The court found that there was nothing to show that the commissioner had considered this important issue pertaining to the relationship between the parties.

In failing to consider material evidence and failing to give reasons for his decision, the commissioner denied the parties a just and fair process, resulting in a conclusion which was both unreasonable and prejudicial. Citing the decision, *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC), the court found

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that the decision was one which a reasonable decision-maker could not have reached. Therefore, this decision has solidified the duty of a commissioner to consider the material evidence before them and give a coherent award which is substantiated by reasoning which objectively, is rationally connected to the evidence tendered.

Fiona Leppan and Bryce Bartlett

HAVE EMPLOYEES WHO WISH TO USE TRADITIONAL HEALER CERTIFICATES FOR SICK LEAVE BEEN THROWN A BONE?

Employees have not been permitted to provide traditional healer's certificates as proof of incapacity after a period of absenteeism from the workplace. This is due to the lack of an established professional council as required by s23 of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA).

On 1 May 2014 a proclamation was made giving effect to several provisions to the Traditional Health Practitioners Act, No 22 of 2007 (THPA). The most significant of these provision was s4 of the THPA which established the Interim Traditional Health Practitioners Council of South Africa (Council).

The BCEA provides under s23 that for an employee to be paid out for sick leave a medical certificate must be furnished by an employee to account for their absence from the workplace due to sickness or injury. Furthermore, subsection 23(2) requires that a medical certificate furnished as proof of incapacity must be produced and signed by a medical practitioner who is registered with a professional council recognised by an Act of Parliament.

Prior to the proclamation of the THPA, employers were able to reject proof of incapacity certificates from traditional healers as traditional healers lacked a recognised professional council as required by s23(2). Essentially this meant that any certificates provided by employees from traditional healers were noncompliant with the provisions of the BCEA.

The President's proclamation effectively made way for the establishment of a council which the traditional healers previously lacked. Thus an impression was created that traditional healers would now be able to issue their patients with sick notes in accordance with s23 of the BCEA.

Despite the council's long awaited establishment, employers or employees should be wary of arriving at an incorrect conclusion. Section 47 of the THPA envisages a number of regulations which are required to be promulgated by the Minister of Health after consultation with the council in order to create a regulatory framework necessary to oversee the practices of tradition healer practitioners such as their qualifications, registrations, age and conduct, amongst other things.

In short, until such a time as the Minister of Health has promulgated the relevant regulations in order to bring traditional healer certificates in line with the requirements of the BCEA, employers are not obliged to accept a medical certificate from their employees that has been issued by a traditional healer.

Faan Coetzee and Kgotso Matjila

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.

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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?

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