EMPLOYMENT

IN THIS ISSUE

TEMPORARY EMPLOYMENT SERVICES – ASSESSING AUTOMATIC TERMINATION CLAUSES THROUGH THE TELESCOPE OF THE FIXED TERM CONTRACT

In general, our courts have declared automatic termination clauses which permit the immediate removal of the employee employed by a Temporary Employment Service (TES) from the client's premises unlawful, as these clauses constitute a breach of the employee's right to fair labour practices.

The Labour Court was recently tasked with determining whether the position is altered in circumstances where TES employees are employed under fixed term contracts which contain agreed end dates, being the date when the client terminates the Service Level Agreement (SLA) with the TES. This issue was addressed in the case of SATAWU on behalf of *Dube and 2 others v Fidelity Supercare Cleaning Services Group (Pty) Ltd, Case number: JS 879/10*.

In brief, the facts were that Fidelity provided cleaning services to the University of the Witwatersrand (Wits) through an SLA. The employees that Fidelity placed at Wits were members of SATAWU and had been appointed by Fidelity on fixed term contracts of employment.

The main aspects of the fixed term contract of employment were as follows:

> "Period of Employment
>
> The employee's employment will commence on the date appearing on the schedule to which this agreement is attached and terminate on the date appearing on the schedule or the date upon which the contract which exists between the company and the customer terminated or on the retirement date, whichever date occurs first; and
>
> The employee specifically acknowledges that he/she fully understands that the company's contract with the customer might be terminated by the customer and for any cause or might terminate through the effluxion of time and that in consequence thereof the nature of the employee's employment with the company and its duration is totally dependent upon the duration of the company's contract with the customer and that the employee's contract will terminate when any of the events predicated in 2.1 occur and the employee fully understands that there will be no entitlement of severance pay".

On the 27 November 2009, Wits gave notice to Fidelity to terminate the SLA and, in turn, Fidelity issued all employees with letters advising them that as a result of the termination of the SLA, their fixed term contracts would come to an end as agreed.

Wits subsequently required further services from Fidelity albeit with a reduced staff compliment. Although invited, none of the employees who were part of the present case applied. As a result, their employment was terminated for operational reasons and SATAWU challenged the dismissals.

In the Labour Court, SATAWU contended that in dismissing their members, Fidelity did not follow the required provisions of s189 of the Labour Relations Act, No 66 of 1995 (LRA). Alternatively, SATAWU submitted that the dismissals were unnecessary as the contract with Wits had in fact continued in a reduced form.

In response, Fidelity argued that there were in fact no dismissals as the services of Fidelity and thus the employees employed under Fidelity had automatically terminated. More particularly, the termination of the SLA was an agreed term that had been fulfilled.

The Labour Court had to determine whether such a clause as contained in a fixed term contract of employment, permitted its automatic termination, alternatively whether the employees' termination of employment constituted a dismissal.

In deciding the matter, the Labour Court considered a number of prevailing authorities, including the decision of *Sindane v Prestige Cleaning Services (2010) 31 ILJ 733 (LC)*, in which it was held, among other things, that in principle an employment contract can be terminated in a number of ways which do not constitute a dismissal and that these can include the natural expiry of a fixed term employment contract entered into for a specific period, or upon the happening of a particular event.

Notwithstanding this principle, in the decision of *SA Post Office Ltd v Mampeule (2010) 10 BLLR 1052 (LAC)*, the Labour Appeal Court held that parties to an employment relationship cannot contract out of the protection against unfair dismissal, whether or not they do so by means of an automatic termination clause or otherwise, as the LRA was promulgated in the public interest.

In the decision of *Nape v INTCS Corporate Solutions (Pty) Ltd (JR 617/07) [2010] ZALC 33*, the court also held that in applying the right not to be unfairly dismissed, the Labour Court will not be bound by contractual limitations created between parties and that conflict with the fundamental rights of workers.

The above principles have been amplified by the LRA Amendments and, in particular, s198(4C) of the LRA which provides that, "an employee may not be employed by a temporary employment service on terms and conditions of employment which are not permitted by this Act, any employment law, sectoral determination or collective agreement concluded in a bargaining council and applicable to a client to whom the employee renders services".

On the basis of these authorities, the Labour Court held that Fidelity's employees had been dismissed on the basis of operational requirements and that any clause in a contract between a client and TES which allows the client to undermine the right not to be unfairly dismissed, is against public policy and is thus unenforceable.

It is incumbent on both TESs and clients to ensure that the contractual arrangements which they agree to in their SLAs are compliant with the above authorities and the LRA in its amended form. Failure to comply may result in such terms being overruled by the courts.

Clients who make use of TESs are also cautioned where TES employees earn under the threshold of R205,433.30 and are contracted for a period longer than three months, as - in terms of the new s198A of the LRA, these TES employee will be entitled to institute action against either the TES, or the client, or both. As such the consequences of any unenforceable provisions in the SLA can now also be levelled against the client.

Nicholas Preston

TANTRUMS OVER THE NEW REQUIREMENTS FOR TRAVELLING WITH CHILDREN

On 26 May 2014, the amendments to the Immigration Regulations came into effect requiring any person travelling with a child under the age of 18, to be in possession of an unabridged birth certificate. The requirement comes into force as from 1 June 2015.

This comes after a lengthy postponement, since 1 October 2014, which the Department of Home Affairs (DHA) granted in order to afford travellers an opportunity to obtain unabridged birth certificates for any minor children which intend to travel into or outside the Republic.

Once the new regulations are implemented, passengers travelling in and out of South Africa will need to ensure that they carry an unabridged birth certificate, together with any other travel documents required for children under the age of 18.

Unlike a typical birth certificate, an unabridged birth certificate bears the details of the parents of the minor child to which the certificate has been issued. Much of the concern surrounding the new regulation relates to the processing time required to issue an unabridged birth certificate, as this can take on average 6 to 8 weeks. An abridged birth certificate, on the other hand, is generally issued within a few days.

Passengers who travel from non-English speaking countries are further burdened by this requirement as they must ensure that the unabridged birth certificate is accompanied by a sworn translation of the certificate.

According to the DHA, the rationale underpinning the amendments is to combat the alarming rate of children being trafficked to and from South Africa.

In spite of their good intentions, the amendments have created widespread outcry and have gained little support from stakeholders, particularly in the tourism industry. Despite the negative reception towards the changes, recent media publications have quoted the Minister of Home Affairs, Melusi Gigaba, saying that "[w]hen people are finished complaining they must comply. There is no way we are changing it". The intention is clear: the amendments are here to stay.

It is important to note that the regulations do not affect: (i) children travelling domestically and (ii) South African children born from 3 March 2013 onwards, as the DHA began to issue Unabridged Birth Certificates for children whose births were registered from this date.

Travellers who are frequently accompanied by their minor children must familiarise themselves with these changes in order to save themselves from the trouble of being denied entry to or departure from the South Africa. Travellers must also consider and plan future trips in advanced so that they are not disadvantaged by the length of time it takes to issue an unabridged birth certificate.

Michael Yeates 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.

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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