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EMPLOYMENT ALERT

IN THIS **ISSUE**

IS THE TERMINATION OF EMPLOYMENT FOR OPERATIONAL REQUIREMENTS, WHERE THE PRESCRIBED TIME PERIODS ARE NOT ADHERED TO, AN INVALID DISMISSAL?

Previously, and as held by the Labour Appeal Court (LAC) in *De Beers Group Services (Pty) Limited v National Union of Mineworkers* (De Beers), if an employer did not comply with the peremptory time periods stipulated in s189A(8) of the Labour Relations Act, No 66 of 1995 (LRA) prior to issuing notice of termination of employment, the ensuing dismissals were declared invalid (meaning they were null and void as if they never occurred). This decision had far reaching consequences for employers involved in large scale retrenchments where a facilitator was not appointed.

CDH
CLIFFE DEKKER HOFMEYR

IS THE TERMINATION OF EMPLOYMENT FOR OPERATIONAL REQUIREMENTS, WHERE THE PRESCRIBED TIME PERIODS ARE NOT ADHERED TO, AN INVALID DISMISSAL?

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Previously, and as held by the Labour Appeal Court (LAC) in *De Beers Group Services (Pty) Limited v National Union of Mineworkers* (De Beers), if an employer did not comply with the peremptory time periods stipulated in s189A(8) of the Labour Relations Act, No 66 of 1995 (LRA) prior to issuing notice of termination of employment, the ensuing dismissals were declared invalid (meaning they were null and void as if they never occurred). This decision had far reaching consequences for employers involved in large scale retrenchments where a facilitator was not appointed.

The importance of this case is that the failure of an employer to comply with the time periods for issuing notices of termination as prescribed by s189A does not result in the invalidity or nullity of dismissals.

In the more recent LAC judgment of *Edcon v Karin Steenkamp and Others (JS350/2014) [2015] ZALAC JHB* (Edcon) the LAC held that the interpretation of s189A(8) in De Beers was incorrect and erroneous and that non-compliance with these provisions does not lead to invalid dismissals.

In the instance where a facilitator has not been appointed, as were the circumstances in Edcon, s189A(8) provides that:

> *"(a) a party may not refer a dispute to a council or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189(3); and*
>
> *(b) once the periods in section 64(1)(a) have elapsed:*
>
> *(i) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act; and*
>
> *(ii) a registered trade union or the employees who have received notice of termination may:*
>
> *(aa) give notice of a strike in terms of section 64(1)(b) or (d); or*
>
> *(bb) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11)."*

Notice of termination may not be given to any employee in terms of this section unless a period of 30 days has expired in terms of s189A(8)(a), as well as a further period of 30 days has expired in terms of s189A(8)(b).

The LAC held, in Edcon, that it could not have been the intention of the legislature to invalidate or nullify dismissals which results in the automatic reinstatement of employees. It went on to state that the De Beers judgment would have the anomalous effect that dismissals would no longer be assessed on fairness but be declared invalid merely because they were premature.

The LAC further held that s189A(8) contains no express provision requiring any of the parties to refer a dispute to the CCMA in the absence of consensus being reached during the consultation process. The section only states that no dispute may be referred to the CCMA before the 30 day consultation period has elapsed. Accordingly, it is not a requirement that a dispute must be referred to the CCMA after expiry of the 30 day period. However, it remains that once the periods referred to in s64(1)(a) have expired (being a further period of 30 days from the date on which the dispute is referred to the CCMA or the date on which the dispute is conciliated, whichever occurs first) then only can a notice of termination be issued.

The importance of this case is that the failure of an employer to comply with the time periods for issuing notices of termination as prescribed by s189A does not result in the invalidity or nullity of dismissals. While employers are obliged to comply with the peremptory legislative time-periods, non-compliance can still be dealt with on the basis of the fairness or otherwise of the dismissals as opposed to declaring them automatically invalid.

Kate Anderson and Kirsten Caddy

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Employment Retrenchment Guideline

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