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EMPLOYMENT ALERT

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KEEPING EMPLOYEES SAFE FROM THREATS OF CRIMINAL MISCONDUCT

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Employers are occasionally confronted with difficult choices, especially when their employees fall victim to threats of violence in the workplace. These threats can manifest in a number of different forms and can range from threats made by striking workers against non-striking workers, to threats made by members of a community against public officials.

In the recent judgment of the Labour Court in the case of *City of Johannesburg v Swanepoel N.O and Others* (JR2316/12) [2016] ZALCJHB 80 the court provided a measure of clarity on the extent of an employer's obligation to provide a safe working environment for employees as provided for by the Occupational Health and Safety Act, No 85 of 1993 (OHSA).

Section 8 of OHSA provides that all employers have a duty to provide and maintain, as far as reasonably practicable, a safe working environment which is free of risk to the health of their employees. Additionally, according to s9 of the same Act, employers are obliged to conduct their activities in such a manner as to reasonably ensure that these activities do not expose persons other than their employees, who are directly affected by the employers' activities, to any hazards to their health and safety.

The court in the above judgment was faced with the determination of the justifiability of the dismissal of the Third Respondent (employee) by the Applicant (employer) as a result of the refusal of the employee to be transferred to a different Region. The employer proposed the transfer of the employee on grounds of his and his family's protection and safety.

The employee had been working on a delayed ongoing project aimed at the improvement and development of the Alexandra Township (project), however, over the years since the inception of the project, the community in Alexandra, had become disgruntled as a result of a lack of progress. This dissatisfaction led to a demand for the removal of the employee from the project. Prior to this, there had already occurred previous demonstrations, an alleged 'arson attempt' directed at the home of an official working with the employee, and a sit-in at the office of the Mayor. A further contributor to the tensions was allegedly attributed to the employee's investigation into allegations of fraud and corruption in the project which led to him receiving death threats.

The tension between the community members and the employee, and the consequent concerns for the safety of the employee and his family, led the employer to seek to transfer the employee to a different region based on the same terms and conditions of employment. The aim of the transfer was to prevent any harm to the employee and his family and to allow emotions to 'calm' in order to properly investigate the community's grievances in the absence of the employee.

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Employers often rely on the South African Police Service (SAPS) to ensure that no harm befalls its working employees and contractors, but does this reliance on SAPS absolve those employers from taking further precautionary measures?

The employee's refusal to transfer subsequently resulted in his dismissal for gross insubordination for his failure to comply with a lawful and reasonable instruction of his employer.

The Labour Court, in deciding that the dismissal had indeed been fair, held that the actions of the employer in requesting the transfer of the employee had been a reasonable move in the circumstances in compliance with its duties in terms of OHSA. Thus, the refusal of the employee to abide by the instructed transfer constituted gross insubordination and had prevented the employer from complying with its statutory obligations. Furthermore, the Labour Court found that:

> "[t]he duty to provide a safe working environment rests upon the employer under both common law and statute. It is the working environment that must be safe and not just the actual place where work is rendered."

The court's reasoning from this judgment provides that, should the particular circumstances of a case so require, an employer, in accordance with OHSA and the common law, will have a duty to take further steps than expected in the ordinary course in order to prevent harm to its employees. The obligation may be extended to situations where employees may become vulnerable to criminal misconduct should the circumstances call for it.

Another example of where this obligation may be extended, finds itself in the workplace where unprotected, or even protected industrial action has turned violent. The Labour Court is often called upon to interdict and prevent unlawful and violent conduct during the course of strike action, where employees who do not wish to partake in the strike action are intimidated and in some instances violently assaulted for their 'lack of solidarity'. Employers often rely on the South African Police Service (SAPS) to ensure that no harm befalls its working employees and contractors, but does this reliance on SAPS absolve those employers from taking further precautionary measures?

The question begs whether criminal misconduct is 'foreseeable' and whether the employer is in a position to take precautionary measures in order to reasonably safeguard its employees who did not wish to embark on industrial action.

Needless to say, every situation would be determined on its own merits and circumstances.

Employers should be aware that the specific health and safety standards prescribed by OHSA constitute a minimum threshold and situations may be encountered when additional action should be taken by the employer in order to ensure that a safe working environment is maintained.

Michael Yeates and Emilia Pabian

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LONGER SERVICE, MORE PAY – IS THIS UNFAIR DISCRIMINATION?

The collective agreement entered into between Pioneer Foods and the Food and Allied Workers (FAWU) provides that Pioneer Foods pays newly appointed drivers 80% of the salary paid to its longer serving drivers.

Whether paying employees with longer service who perform the same work or work of equal value to their colleagues amounts to unfair discrimination was one of the issues which the Labour Court considered in the recent decision of *Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR) and Others* (Case no: C 687/15, 19 April 2016).

The commissioner ordered the payment of damages and the correction of the rate of pay to 100%.

The case is one of the first appeals to be decided by the Labour Court under an amendment to the Employment Equity Act, No 55 of 1998 (EEA) which was introduced on 1 August 2014. The amendment affords parties dissatisfied with an award relating to alleged unfair discrimination to launch an appeal before the Labour Court.

WAR had referred an alleged unfair discrimination dispute to the CCMA on behalf of seven of its members. The alleged unfair discrimination arose out of the application by Pioneer Foods of the terms of a collective agreement. The collective agreement entered into between Pioneer Foods and the Food and Allied Workers Union (FAWU) provides that Pioneer Foods pays newly appointed drivers 80% of the salary paid to its longer serving drivers. This applies during the first two years of employment.

The commissioner found in favour of WAR reasoning that the differentiation in payment for work of equal value was a breach of s6(4) of the EEA. Section 6(4) regulates equal pay for work of equal value and provides that a difference in terms and conditions of employment between employees of an employer performing the same or substantially the same work or work of equal value based on any of the grounds listed under the EEA (including, eg race, gender, language or any other arbitrary ground) is unfair discrimination. The commissioner found that the treatment was unfair and not based on rational grounds, particularly as the employees had previously performed work for Pioneer Foods through a labour broker and were therefore not new employees in the true sense of the word. In making this finding the commissioner referred to s198A of the Labour Relations Act, No 66 of 1995 which provides that after three months, the client is deemed to be the employer of an employee employed by a temporary employment service, and must be treated on the whole not less favourably than employees of the client doing the same or similar work, unless there is a justifiable reason for different treatment. The commissioner ordered the payment of damages and the correction of the rate of pay to 100%.

The Labour Court did not agree with the commissioner's reasoning and finding. In evaluating WAR's claim the court found that WAR did not allege discrimination on any of the listed grounds eg race and gender and that as a result it bore the burden of proving, on a balance of probabilities that the conduct is not rational, amounts to unfair discrimination and is unfair. More specifically WAR was required to identify and prove the arbitrary ground on which the employees alleged discrimination and in order to prove that the differentiation amounts to unfair discrimination, show that the arbitrary ground on which the differentiation is based impairs the dignity of the employees and is a barrier to equality.

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Applying the two-stage test the court found that differentiation on the basis of being newer employees is not an unlisted arbitrary ground of discrimination and a practice of paying newer employees at a lower rate for a two year period is in any event neither irrational nor unfair.

The court referred to the two-stage test laid down in *Harksen v Lane N.O.* 1998 (1) SA 300 (CC). Firstly, does the differentiation amount to discrimination? If it is on a specified ground then the discrimination will have been established. If it is not a specified ground then whether or not there is discrimination will depend on whether objectively the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. Secondly, if the differentiation amounts to discrimination does it amount to unfair discrimination? If it is found to have been on a specified ground then unfairness will be presumed. If on an unspecified ground unfairness will have to be established by the complainant. The test of unfairness focuses on the impact of the discrimination on the complainant and others in his or her situation.

Applying the two-stage test the court found that differentiation on the basis of being newer employees is not an unlisted arbitrary ground of discrimination and a practice of paying newer employees at a lower rate for a two year period is in any event neither irrational nor unfair. The Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value states that such differentiation is not unfair discrimination if the difference is fair and rational and is based on any one or a combination of various factors including the individuals' respective seniority and length of service.

The court concluded that length of service is not an arbitrary ground and that paying newly appointed employees 20% less than their longer serving colleagues does not amount to unfair discrimination, even if the new employees have the same level of experience and expertise as the longer serving employees. In fact, and as the court said, 'this is a classic example of a ground for differentiation which is rational and legitimate and, indeed, exceedingly common'. The longer serving employees are rewarded for their loyalty. This case confirms that differentiation is not always unfair and does not always amount to a breach of the EEA.

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CAN EMPLOYERS RETRENCH BASED ON POOR PERFORMANCE?

A question that comes up regularly is whether employers can retrench employees who are poor performers.

With retrenchments on the rise, it is important for employers to be aware of the risks associated with the selection criteria they apply in choosing which employees to retrench.

A question that comes up regularly is whether employers can retrench employees who are poor performers. Although this question has been previously considered, the Labour Court recently had an opportunity to revisit the question in *Louw v South African Breweries (Pty) Ltd* [2016] ZALCJHB 156.

In this case, subsequent to a restructuring at the employer, the employee's position became redundant. The employee unsuccessfully applied for a position in the new structure and after parties were unable to find a suitable alternative to retrenchment, the employee was dismissed.

The employee challenged the fairness of his dismissal and his main complaint was based on the inclusion of his performance rating in the selection criteria.

The selection criteria that was applied by the employer was as follows:

> "... to select the best candidate for the job based on the top profile; taking into account skills, historically agreed performance ratings, qualifications and experience and thereafter length of service."

The employer took the employee's performance rating into account in assessing the employee's application for the position in the new structure. The success of the employee's application had an impact on whether the employee would be retrenched.

In terms of s189(2)(b) of the Labour Relations Act (LRA), the employer and other consulting parties must either agree on the method for selecting the employees to be dismissed or, if they cannot agree, the employer has the right to adopt selection criteria which is fair and objective.

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The problem with including performance ratings in selecting employees for retrenchment is that performance ratings are, generally, not 'objective'. This is because it involves the scoring or rating of an employee's performance by their manager which entails the exercise of a discretion. The exercise of a person's discretion includes an element of subjectivity. In addition, it brings into the selection criteria the element of fault on the part of the employee, in circumstances where retrenchments are regarded as 'no fault' dismissals in our law.

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CONTINUED

Notwithstanding the authority that performance can be regarded as a fair selection criterion provided employees are given an opportunity to challenge the assessment, it remains a risk which may result in a dispute.

Our courts have previously held that productivity and conduct can be regarded as fair selection criteria provided that the affected employees are given the opportunity to challenge the assessment.

The employer argued that the inclusion of the performance rating was fair because the employee had not appealed against his performance assessment. In considering procedural fairness, the court found that the fact that the employee did not appeal against the performance rating was irrelevant as the employer was aware long before it formulated the selection criteria that the employee was unhappy with his performance rating. The court held that the employer should for this reason not have included the employee's performance rating into the selection criteria before allowing the employee an opportunity to be heard regarding his rating. This rendered the dismissal procedurally unfair.

Notwithstanding the authority that performance can be regarded as a fair selection criterion provided employees are given an opportunity to challenge the assessment, it remains a risk which may result in a dispute.

Kirsten Caddy

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NEW
RELEASE

Employment Retrenchment Guideline

Answering your pertinent questions around consultations, large-scale retrenchments, facilitation vs non-facilitation, selection criteria, voluntary separation packages and vacancies-bumping.

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