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EMPLOYMENT ALERT

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CDH
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THE PRINCIPLE OF PLEA BARGAINING UPHELD IN THE LABOUR COURT

The misconduct concerned eight employees who were managers of the emergency medical services (EMS) directorate, of the Eastern Cape Department of Health.

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The misconduct concerned eight employees who were managers of the emergency medical services (EMS) directorate, of the Eastern Cape Department of Health. The employees in question misused an aircraft and irregularly applied EMS sponsorship to travel to a soccer match. Certain of the employees later met and colluded to falsely misrepresent that the trip had been for official business purposes.

The employees' guilt was common cause and the review concerned a question as to whether the employer had been inconsistent in its application of an appropriate sanction between the employees.

The employer subsequently discovered the employees' misconduct and misrepresentation and five out of the eight employees were subjected to disciplinary enquiries and dismissed. One out of the eight resigned before being charged with misconduct; another was given a final written warning but not dismissed; and finally a third was offered a plea bargain in terms of which he would plead guilty at the disciplinary hearing and testify against his remaining colleagues, all in exchange for a final written warning and two months' unpaid suspension, instead of dismissal.

The five dismissed employees referred their dispute to the bargaining council and the commissioner held that their dismissals were substantively unfair because the sanction of dismissal was inconsistently applied among them.

The employer applied to the Labour Court on review to set aside the award. The employees' guilt was common cause and the review concerned a question as to whether the employer had been inconsistent in its application of an appropriate sanction between the employees. According to Whitcher J, "the kernel of substantive unfairness in contemporaneous inconsistency, is that the employer was prepared for no good reason, to live with one employee after committing misconduct but not with another employee similarly placed".

The Labour Court qualified this and held that there were distinguishing factors between the eight employees that justified their varied treatment. Firstly, it was held that the commissioner acted unreasonably in ruling that the employer was unfairly inconsistent in its discipline. According to the court, "it is trite law that inconsistency does not arise if the dismissed employees were not similarly placed to the comparators relied upon by them". In this case, those employees who were dismissed relied on the three that were not in order to substantiate their claim of inconsistency.

In the first case of the employee who was disciplined but not dismissed, he was only found guilty of benefitting from the trip and not colluding in the false misrepresentation thereafter, as he did not attend the meeting. In comparison to the other employees, he was only found partially guilty of the misconduct, thereby justifying reduced punishment as opposed to the employees who were found guilty of both benefitting from the trip and the subsequent misrepresentation. These instances were found to be distinguishable and it was found that the differentiation was thus reasonable.

THE PRINCIPLE OF PLEA BARGAINING UPHELD IN THE LABOUR COURT

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The Labour Court found only superficial differences between a request for resignation and one for retirement as both constitute mechanisms of terminating the employment relationship.

Secondly, in the case of the employee who was offered a plea bargain with the purpose of the employer obtaining evidence against the co-accused, the Labour Court held that, "this, on its own, does not constitute inconsistent application of discipline". A lesser sanction was necessary to strike a compromise and obtain the employee's co-operation and testimony.

In addition, the employer's selection of an individual wrong-doer from the group is not in itself unfair because the employer has a wide discretion and, "the object of securing evidence to discipline employees who misconducted themselves would be completely defeated if every one of the employees involved in the misconduct were offered a plea bargain to testify against the others". As such the employer may consider factors such as:

- the individual's availability to testify;
- their credibility;
- their personal knowledge of the misconduct;
- their co-operation during the investigation;
- their attitude of remorse before the offer to enter into a plea bargain; and
- their previous disciplinary record.

Furthermore the onus is on the party alleging unfairness to prove it by means of factors such as:

- obvious favouritism;
- situations where the evidence was not reasonably necessary for a guilty finding;
- situations where an employee who committed gross misconduct is preferred and thus unfairly enabled, by means of the plea bargain, to use the other 'less guilty' employees as his/her scapegoats; and
- unfair racial, gender or other discrimination.

The foundation of a plea bargain in our law stems from s204 of the Criminal Procedure Act, No 51 of 1977, where this is frequently adopted in the criminal context. According to the Labour Court, "there is no reason why it should not be adapted and applied in the labour law context," since plea bargaining is a recognised method of obtaining evidence of wrong-doing.

As for the issue of the third employee who resigned, it was found that his facts were not clearly distinguishable from those of the sixth respondent, whose request for retirement was refused by the employer. The Labour Court found only superficial differences between a request for resignation and one for retirement as both constitute mechanisms of terminating the employment relationship. The fact that the employer permitted the resignation but not the retirement request, was substantively unfair because both employees sought to avoid discipline in exchange for their imminent exit, albeit through different mechanisms. The Labour Court agreed with the commissioner's finding that the employer's treatment of these two employees was inconsistent and substantively unfair.

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Dismissal was a justifiable sanction for the four remaining guilty employees and based on their particular facts.

Finally, the court disagreed with the commissioner's finding that the nature of the charges was insufficient to destroy the employment relationship. Rather, and under the circumstances, dismissal was a justifiable sanction for the four remaining guilty employees and based on their particular facts. The court held that certain forms of misconduct involving dishonesty, especially in relation to the employees' core job functions, such as lying to the employer about misuse of a medical aircraft, destroys the employment relationship and it may not even be necessary to lead evidence to prove the breakdown of trust in such instances.

Employers will find this endorsement as a useful tool when disciplinary action is to be considered in future, especially in cases of group misconduct.

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DEMANDS FROM UNIONS - A DANGEROUS TERRITORY FOR EMPLOYERS

The union approached the Labour Court (LC) alleging substantial and procedural unfairness.

The court ordered retrospective reinstatement of all the retrenched employees. The court did not order the employees to repay the severance pay they received.

The recent Labour Appeal Court (LAC) judgment of *RP Logistix (Pty) Ltd v TAWUSA and others* highlights the risks that an employer may face when complying with a demand from a union.

In this case, the employer wanted to relocate one of its depots approximately 25 kilometres, from Alrode to Isando. The union demanded that its members be paid a travel allowance, failing this, the union proposed that its members be retrenched.

After several meetings with the union where it insisted that the employer either:

- pay extra money for travelling costs to the employees; or
- retrench all of the employees; or
- the union will have a dispute on all the issues,

the employer commenced with a retrenchment process.

The union approached the Labour Court (LC) alleging substantial and procedural unfairness.

The LC considered whether the parties concluded a binding agreement regarding the retrenchment of the employees. The LC found that although the demand was made, it was still subject to discussion and could be withdrawn at any point. The LC noted that the union did withdraw its demand, but only after the employer had accepted it.

The matter was taken on appeal. The LAC found that there were telling actions by the shop steward (Mr Madolo) who made the demands which was indicative that he was "postulating an exaggerating response to a possible refusal to reimburse the drivers for their travelling expenses".

The LAC found that the employer knew that the proposal was not a serious offer and the employer "snatched at a bargain" when it accepted the proposal from the union to retrench its members.

The LAC ordered retrospective reinstatement of all the retrenched employees. The LAC did not order the employees to repay the severance pay they received.

Employers should at all times record in detail their understanding of a union's proposal and if the employer accepts the proposal, it must state unconditional acceptance thereof. More importantly the union should be invited to confirm the employer's understanding of any agreements reached. The employer should also ensure, insofar as it is possible, that the union's official is properly mandated and authorised to enter into any agreement.

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and Elizabeth Sonnekus

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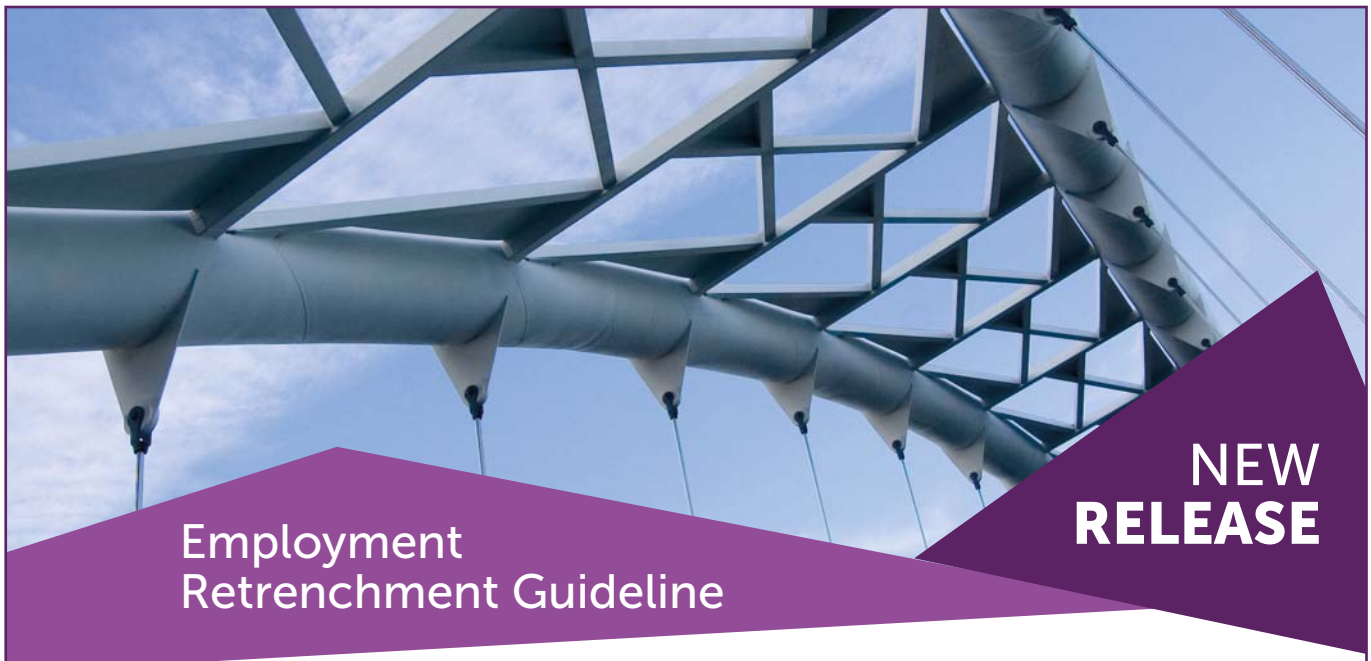

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