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EMPLOYMENT ALERT

IN THIS **ISSUE**

SAFETY IS LIKE A LOCK ... BUT WHO HOLDS THE KEY?

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An employer's health and safety obligations, set out in the Occupational Health and Safety Act, No 85 of 1993 (OHSA), were at the forefront in the matter of *Pikitup (Soc) Ltd // South Africa Municipal Workers' Union obo Members and others* [2014] 3 BLLR 217 (LAC) where the Labour Appeal Court (LAC) was called upon to determine whether such obligations fell within the scope of 'matters of mutual interest'.

The appeal involved the right to strike and, specifically, whether the demand by the union (SAMWU) that Pikitup abandon the implementation of random breathalyser testing for alcohol at its workplace was unlawful and whether health and safety issues are matters of mutual interest.

Before the LAC could determine whether health and safety issues are matters of mutual interest, the court had to first determine whether the union's demand was unlawful. The LAC began by setting out the obligations and duties found in ss8, 9 and 14 of OHSA as well as Regulation 2A of the Machinery and Occupational Safety Act, No 6 of 1983. The court took note of s38 of OHSA which states that any person who contravenes or fails to comply with the provisions of ss8, 9 and 14 is guilty of an offence and shall on conviction be liable to be sentenced to a fine not exceeding R50,000 or to imprisonment for a period not exceeding one year or both such fine and such imprisonment.

The court then went on to discuss the term 'reasonably practicable' which is specifically set out in s8(1) of OHSA. In this regard, the LAC confirmed that there is no standard as to what constitutes 'reasonably practicable' for the purposes of s8(1) of OHSA. However, the LAC did proffer a description in that the term involves weighing different considerations ranging from risk evaluation, means of removing or avoiding the risk, resource availability and a cost-benefit analysis.

The union's demand related to the employer's implementation of mandatory alcohol testing of its drivers by means of a breathalyser device. The dispute lay in the manner in which alcohol testing would be performed as it was alleged that the breathalyser produced inaccurate and unreliable results and the employer already had an existing alcohol and substance abuse policy in place which did not provide for breathalyser testing. The union argued that the proposed measure introduced by the employer to avoid risk was disproportionate to the risk in that the risk was so small that the preventative measure was not necessary.

The LAC expressed the view that due to there being alternative methods of alcohol testing, such as observation, blood, urine and the stroop test, it could not be said that the breathalyser was the only reasonably practicable way to ensure

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Consequently, the LAC was of the view that it was unreasonable to say that an employee had no interest in his or her own health and safety.

the safety of employees and others. The court's reasoning was premised on the following:

> "Reasonably practicable is a variable standard that must be determined objectively. The employer and to a lesser extent the employee as the duty holders (in terms of sections 8, 9 and 14 of the OHSA) must do a risk assessment and consider what can or should be done under the circumstances, considering their knowledge of the situation to ensure the health and safety of employees, co-workers and others who might be put in harm's way, because of their activities. They must then consider, given the circumstances, whether it is reasonable to do all that is possible to comply with their duty. In essence, this means that what can be done, should be done, unless it is reasonable in the circumstances to do something less, or in extreme circumstances, more".

The court went on to explain that, notwithstanding that Pikitup's alcohol and substance abuse policy did not provide for breathalyser testing, this did not render it to be in breach of its obligations as an employer under OHSA as OHSA did not specifically prescribe breathalyser testing for drivers per se. The LAC was therefore of the view that the union's demand was not unlawful.

In respect of whether health and safety issues could be considered to be matters of mutual interest, the LAC, firstly, acknowledged that the phrase is couched in very wide terms in that it can potentially encompass issues of employment in general and not merely matters pertaining to wages and conditions of service. In this regard the court expressed its view as follows:

> "the matter should not be too far removed from the employment relationship so that it can properly be said that it does not concern the employment relationship."

The LAC went on to place an emphasis on dual responsibility as OHSA requires both an employer and an employee to ensure the health and safety of everyone even though greater responsibility is placed on the employer. As a result, it is reasonable to construe that the whole of OHSA points to a need for employers and employees to work together in order to ensure the health and safety of everyone. The LAC further stressed that the term 'reasonably practicable' was the touchstone in the OHSA and that various interests were to be evaluated as well as a cost benefit analysis was to be conducted.

Consequently, the LAC was of the view that it was unreasonable to say that an employee had no interest in his or her own health and safety. Furthermore, even though breathalyser testing may be considered to be less invasive than giving a blood sample, it is still invasive in its own right as "it represents an inroad into the employee's right to privacy". Having consideration to the above, the LAC determined that it would be going against the general purpose of the OHSA should employees be precluded from engaging with the employer about matters which affect them directly on the basis that such decisions fall within the realm of managerial prerogative.

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This judgment is an important one as depending on the set of facts, it can be argued that certain health and safety issues may be matters of mutual interest where they involve the infringement on an employee's constitutional right(s).

This judgment, therefore, is an important one as depending on the set of facts, it can be argued that certain health and safety issues may be matters of mutual interest where they involve the infringement on an employee's constitutional right(s) ie right to privacy, human dignity, freedom of movement and bodily integrity. Thus, it would seem that in certain instances, where an employer wishes to amend or change a policy involving health and safety, as it was in the present case, it should tread carefully, as the amendment may be regarded as a change to the employees' terms and conditions of employment and, if such is the case, consent is to be obtained from the employees.

Michael Yeates and Thandeka Nhleko

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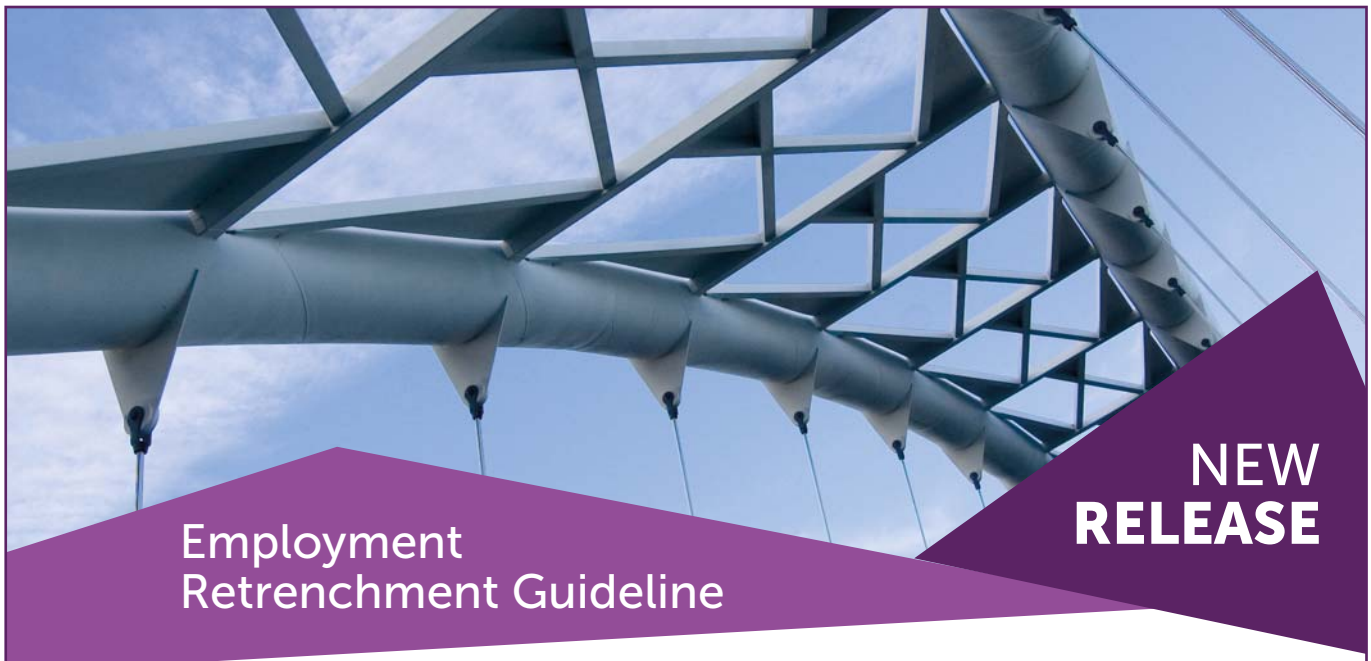

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