3 MAY 2017

EMPLOYMENT ALERT

Our programme on Conducting a Disciplinary Enquiry has been accredited by the Services SETA.

IN THIS ISSUE

NO BEES, NO HONEY; NO WORK, NO MONEY

Section 34 (1) of the Basic Conditions of Employment Act (BCEA), inter alia, allows for an employer to make deductions from an employee's remuneration in respect of a debt specified in a written agreement, or, where the deduction is permitted by law, a collective agreement, a court order or an arbitration award.

LOOKS LIKE THE SHOE IS ON THE OTHER FOOT - RECRUITMENT REQUIREMENTS: A TWO-WAY STREET

When recruiting candidates for vacant posts, employers usually set out distinct requirements that must be met by prospective employees. What happens when the tables turn and the employer does not adhere to its own selection requirements?

CONSTRUCTIVE CRITICISM OR CONSTRUCTIVE DISMISSAL?

It is trite that in terms of the Labour Relations Act, No 66 of 1995 (LRA), 'dismissal' includes a scenario where "an employee terminates a contract of employment with or without notice because the employer made continued employment intolerable for the employee."

CDH
CLIFFE DEKKER HOFMEYR

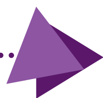
NO BEES, NO HONEY; NO WORK, NO MONEY

The question then arises whether s34 applies where an employee does not report for duty, and in what instances an employer is entitled to rely on the principle of "no work, no pay".

Section 34 (1) of the Basic Conditions of Employment Act (BCEA), inter alia, allows for an employer to make deductions from an employee's remuneration in respect of a debt specified in a written agreement, or, where the deduction is permitted by law, a collective agreement, a court order or an arbitration award.

An employer may only make a deduction from an employee's remuneration on the basis of a written agreement provided that they have complied with s34(2) which, *inter alia*, requires an employer to follow a fair procedure and to allow an employee a reasonable opportunity to make representations as to why the intended deduction should not be made.

The employer didn't pay the employees for the period that they did not take up the secondment.



The question then arises whether s34 applies where an employee does not report for duty, and in what instances an employer is entitled to rely on the principle of "no work, no pay".

In the recently decided case of *Mpanza and Another v Minister of Justice and Constitutional Development and Correctional Services and Others* (JS708/14) [2017] ZALCJHB 48, the employees sought an order declaring the deductions from their remuneration to be in contravention of s34 of the Public Services Act (PSA) read together with the s34 of the BCEA.

The employees, who were the applicants in the matter, were appointed to the department, who was also the first respondent, in the positions of Senior Advocate and State Advocate respectively as in-house counsel. In October of 2010, the department disbanded the in-house legal unit and the employees were then temporarily seconded to different units within the same department at the same place of work. The employees allegedly refused to take up such secondment and raised an issue as to the lawfulness of the aforementioned secondment.

The employer didn't pay the employees for the period that they did not take up the secondment.

The employees argued that at all material times they reported for duty and thus the deductions from their remuneration were unlawful. The department argued that the deductions from the employees' salaries were lawful in that the employees did not report for duty and that it had evidence to prove same.

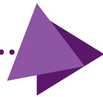
The Court confirmed that the standard of proof when dealing with these matters is a balance of probabilities and a Court is called upon to decide which version presented to it is more plausible. The Court held that the employees did not present any evidence proving that they did report for duty, while the department called witnesses and produced documentary evidence in support of their claim that the employees had failed to do same. The Court concluded that the version of the department was not shown to have any inherent impossibilities and accordingly accepted the version of the department that the employees did not report for duty.

CLIFFE DEKKER HOFMEYR

NO BEES, NO HONEY; NO WORK, NO MONEY

CONTINUED

The Court held that because the employees failed to tender their services to the department, the department was entitled in law to implement the no-work, no-pay, no-benefit rule.



The Court further reiterated that the employment relationship remains a reciprocal relationship. The Court quoted the judgement of *Coin Security (Cape) v Vukani Guards & Allied Workers' Union* and reminded us of the following:

> "The employee is under an obligation to work and the employer is under an obligation to pay for his services. Just as the employer is entitled to refuse to pay the employee if the latter refuses to work, so the employee is entitled to refuse to work if the employer refuses to pay him wages which are due to him."

The Court held that because the employees failed to tender their services to the department, the department was entitled in law to implement the no-work, no-pay, no-benefit rule. The Court held further that s34(2) (b) of the BCEA places an obligation on an employer to follow fair procedure before making any deductions to an employees' remuneration. The Court was satisfied that the department had met the standard of procedural fairness in that the employees were given a reasonable opportunity to make representations.

This judgment reminds employers that any deductions from the remuneration of employees must be both procedurally and substantively fair. Employers must ensure that proper records are kept of employee attendance in order to produce conclusive proof in Court of alleged failure to report. Furthermore, employers must ensure that the process followed in making any deductions from the remuneration of an employee is procedurally fair, and that an employee is given an opportunity to make representation as to why the intended deductions should not be made.

Despite this judgment, it may be argued that a failure to report for duty should not be classified as a deduction in that the employer simply and only paid for the performances of the employees. As the Court rightly pointed out, the employment relationship is a reciprocal one and thus where an employee fails to report, the employer should have an automatic right to *pro rate* an employee's remuneration and that same should not be classified as a "deduction".

Hugo Pienaar and Riola Kok

CDH
CLIFFE DEKKER HOFMEYR

LOOKS LIKE THE SHOE IS ON THE OTHER FOOT - RECRUITMENT REQUIREMENTS: A TWO-WAY STREET

The Department of Health's Eastern Cape office advertised a newly-created post of Deputy-Director: Clinical Support Services.

When recruiting candidates for vacant posts, employers usually set out distinct requirements that must be met by prospective employees. What happens when the tables turn and the employer does not adhere to its own selection requirements? This was the issue in the recent case of *Health & Other Service Personnel Trade Union of South Africa & others v Member of the Executive Council for Health, Eastern Cape & others* (2017) 38 ILJ 890 (LAC).

The matter was taken on appeal to the Labour Appeal Court where it was determined that the Department of Health had not justified why the job requirements were changed.

The Department of Health's Eastern Cape office advertised a newly-created post of Deputy-Director: Clinical Support Services. Among other requirements was that the job applicants must have "current registration with the Health Professions Council of South Africa (HPCSA)". The second and third appellants were both registered with the HPCSA and applied for the position, but were unsuccessful. The fourth respondent was the successful candidate, albeit that she was not registered with the HPCSA but with the South African Nursing Council (SANC).

The second and third appellants' main contention was that the fourth respondent did not satisfy the requirements for the position as advertised and in addition, as allied workers, this was the only position to which they could be promoted. The second and third appellants expressed that there would be no issue had the advertisement specified that the applicant should be registered with either the HPCSA or the SANC, but it had not done so. During the shortlisting process, the Department of Health widened the scope of the requirements to include candidates registered with other professional bodies apart from the HPCSA, although the advertisement had not reflected this.

The arbitrator from the Public Health & Social Development Sectoral Bargaining Council (PHSDSBC), where the dispute was referred, ruled that appointing a candidate who had not been registered with the HPCSA as per the advertisement, meant that the Department of Health had deviated from the requirements set out in its own advertisement and could not justify the deviation made during the shortlisting process. Thus the position had to be re-advertised per the arbitrator's ruling. The arbitrator's finding was taken on review.

At the Labour Court, the arbitrator's ruling was set aside and it was held that the arbitrator did not give sufficient reasons for being satisfied that the appellants had discharged the onus of proving an unfair labour practice as they had alleged that that was the result of the Department of Health's deviation from its own requirements.

The matter was taken on appeal to the Labour Appeal Court where it was determined that the Department of Health had not justified why the job requirements were changed, put differently:

> "the Department failed to discharge the evidentiary burden that had shifted to it to justify the departure from the requirements set for the position".

CDH
CLIFFE DEKKER HOFMEYR

LOOKS LIKE THE SHOE IS ON THE OTHER FOOT - RECRUITMENT REQUIREMENTS: A TWO-WAY STREET

CONTINUED

The Labour Appeal Court quoted the Constitutional Court judgment of Khumalo & another v Member of the Executive Council for Education: KwaZulu-Natal which was critical of the practice of setting requirements for appointment and departing therefrom when making the appointment.

The Labour Appeal Court conceded that the arbitrator's conclusion, to the effect that the second and third appellants discharged the onus to prove their unfair labour practice, was not "comprehensive and appear[ed] to be terse", however it held that it could not be said that the arbitrator did not provide adequate reasons for her decision. The Labour Appeal Court quoted the Constitutional Court judgment of *Khumalo & another v Member of the Executive Council for Education: KwaZulu-Natal* which was critical of the practice of setting requirements for appointment and departing therefrom when making the appointment.

It was held that the decision reached by the arbitrator that the post be re-advertised was justifiable on the facts and the Labour Appeal Court was satisfied that the award of the arbitrator fell within the band of reasonableness expected of reasonable decision makers.

In light of the foregoing, it is imperative that employers adhere to their own selection requirements when selecting prospective candidates in relevant advertised posts, failing which humble pie will be the order of the day as the advertisement and selection process may have to be revisited afresh.

Fiona Leppan and David Pule

CLICK HERE to view our NEW Employment Strike Guideline

CDH
CLIFFE DEKKER HOFMEYR

CONSTRUCTIVE CRITICISM OR CONSTRUCTIVE DISMISSAL?

In the case of Snyman/Solveco (Pty) Ltd [2017] an employee, who held the position of an actuarial scientist, resigned after two meetings that had occurred some months prior.

It is trite that in terms of the Labour Relations Act, No 66 of 1995 (LRA), 'dismissal' includes a scenario where "an employee terminates a contract of employment with or without notice because the employer made continued employment intolerable for the employee." In the circumstances, the termination by the employee will be regarded as a constructive dismissal in terms of s186(1)(e) of the LRA. The onus is on the employee to establish the existence of a dismissal when the employee claims that he/she has been constructively dismissed.

During the disciplinary enquiry, the MD denied making the statements towards the employee. He later changed his stance at the arbitration and attempted to claim that it should not be interpreted as an intention to insult and offend the employee.

In such circumstances, the employee will need to show that:

- the employment circumstances were so intolerable that the employee could not continue employment;
- the unbearable circumstances were the cause of the resignation by the employee; There was no reasonable alternative at the time but for the employee to resign to escape the circumstances;
- the unbearable situation must have been caused by the employer; and
- the employer must have been in control of the unbearable circumstances.

In the case of *Snyman/Solveco (Pty) Ltd* [2017] 4 BALR 467 (CCMA), an employee, who held the position of an actuarial scientist, resigned after two meetings that had occurred some months prior. The employee alleged that the employment relationship had become intolerable because of the manner in which she had been treated by the managing director (MD) during these two meetings. The employee testified that the MD had made comments such as, "I cannot believe you said that you want a career since you act like a .... packer...", "I can surely scratch out some filing work, since you cannot f..k that up", and "I do not have money to pay you to sit and roll 'boogers'!"

During the disciplinary enquiry, the MD denied making the statements towards the employee. He later changed his stance at the arbitration and attempted to claim that it should not be interpreted as an intention to insult and offend the employee. Despite the MD's denial, the employee's evidence on what the MD had said was not challenged under cross-examination. In the absence of contesting the evidence of the employee, her version, that the MD made such statements, was accepted.

The Commissioner took issue with the fact that the employee did not lodge a grievance against the MD in order to bring the issues to the attention of the employer prior to her resignation. During the evidence of the MD, she conceded that the situation could have been worse for the employee had she lodged a grievance.

In this particular case, the failure to lodge a grievance was not detrimental to the employee's allegation of a constructive dismissal.

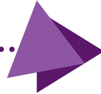
The Commissioner found that the treatment of the employee at these two meetings had gone beyond criticising the employee's work performance. In this instance, the Commissioner found that the dismissal was unfair as the employer's behaviour went so far as to intimidate, belittle, humiliate and threaten the employee. The employee was awarded two months' compensation.

CDH
CLIFFE DEKKER HOFMEYR

CONSTRUCTIVE CRITICISM OR CONSTRUCTIVE DISMISSAL?

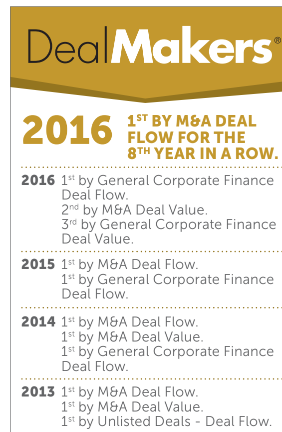
CONTINUED

It should never be calculated to victimise or demean the employee as this could be construed as grounds for a claim of constructive dismissal.



Employers are therefore advised to exercise caution in the manner and form that they provide their employees with guidance, mentoring and evaluation of performance. Constructive guidance and instruction should be provided to employees to enable them to perform well. It should never be calculated to victimise or demean the employee as this could be construed as grounds for a claim of constructive dismissal.

Rebecca Cameron and Samiksha Singh



CDH
CLIFFE DEKKER HOFMEYR

Employment
STRIKE GUIDELINE

Our Employment practice's new
EMPLOYMENT STRIKE GUIDELINE
answers our clients' FAQs.

Topics discussed include strikes, lock-outs and picketing.

CHAMBERS GLOBAL 2014 - 2017 ranks our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2017 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2017 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2017 in Band 3: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2017 in Band 4: Employment.

Michael Yeates named winner in the **2015** and **2016 ILO Client Choice International Awards** in the category 'Employment and Benefits, South Africa'.

CDH
CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Employment practice and services, please contact:

Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

Gillian Lumb
Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com

Kirsten Caddy
Director
T +27 (0)11 562 1412
E kirsten.caddy@cdhlegal.com

Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com

Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com

Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com

Nicholas Preston
Director
T +27 (0)11 562 1788
E nicholas.preston@cdhlegal.com

Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com

Samiksha Singh
Director
T +27 (0)21 481 6314
E samiksha.singh@cdhlegal.com

Gavin Stansfield
Director
T +27 (0)21 481 6313
E gavin.stansfield@cdhlegal.com

Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com

Ndumiso Zwane
Director
T +27 (0)11 562 1231
E ndumiso.zwane@cdhlegal.com

Anli Bezuidenhout
Senior Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com

Steven Adams
Associate
T +27 (0)21 481 6341
E steven.adams@cdhlegal.com

Samantha Bonato
Associate
T +27 (0)11 562 1134
E samantha.bonato@cdhlegal.com

Sean Jamieson
Associate
T +27 (0)11 562 1296
E sean.jamieson@cdhlegal.com

Zola Mcaciso
Associate
T +27 (0)21 481 6316
E zola.mcaciso@cdhlegal.com

Anelisa Mkeme
Associate
T +27 (0)11 562 1039
E anelisa.mkeme@cdhlegal.com

Prinoleen Naidoo
Associate
T +27 (0)11 562 1829
E prinoleen.naidoo@cdhlegal.com

Bheki Nhlapho
Associate
T +27 (0)11 562 1568
E bheki.nhlapho@cdhlegal.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2017 1629/MAY

CDH
CLIFFE DEKKER HOFMEYR