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EMPLOYMENT ALERT

IN THIS ISSUE >

Where to go: High Court or Labour Court?

In the recent judgment in *Lewarne v Fochem International (Pty) Ltd* (1073/18) [2019] ZASCA 114 (18 September 2019), the Supreme Court of Appeal was tasked with determining whether the Labour Court has exclusive jurisdiction in matters concerning an employment contract in terms of sections 77(1) and 77(3) of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA).

Probation, poor performance and dismissal – A bitter trio

It is not uncommon for new employees to be subjected to a period of probation. However, when this period of probation is coupled with poor performance, is dismissal the appropriate sanction even though the employee continued working post the expiry of the probationary period?

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Ms Lewarne was employed by Fochem International, as its Financial Manager for eight years and was promoted to Director earning a gross salary of R75,000 per month. According to her employment contract, she was entitled to a 13th cheque equal to one month's salary payable on or before 20 December each year. In December 2016, Ms Lewarne only received R50,000, the reason given by the employer was her alleged misconduct and abuse of the company credit card.

Ms Lewarne proceeded by launching an application in the High Court for an order that the employer pay her the sum of R25,000 (being the outstanding pay for her bonus) and the sum of R300,000 less legal fee deductions. Lochem International opposed the application by filing a notice in terms of which it

averred that Ms Lewarne's application be dismissed on a point of law on the basis that the High Court lacked jurisdiction to determine the dispute. In support of the point of law raised, the employer alleged that on a proper reading of Ms Lewarne's founding affidavit, her pleaded case was essentially that the employer had made certain unlawful deductions from her remuneration and that for this contention she relied on the provisions of s34 the BCEA. The Labour Court therefore had exclusive jurisdiction to adjudicate the matter in terms of s77(1) of the BCEA.

The High Court upheld the employer's point of law and dismissed Ms Lewarne's application. The Supreme Court of Appeal overturned the decision of the High Court and held that it erred in finding that it did not have jurisdiction to adjudicate Ms Lewarne's claim. The court confirmed that s77 of the BCEA applies in instances where a dispute relates to or is connected to an employment contract.

The court found that the crux of Ms Lewarne's claim was for payment of money due to her in terms of her employment contract. It was this action that was before the court and on which it had to decide whether it had the necessary

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Where to go: High Court or Labour Court?...continued

The essence of this judgment is that it reaffirms the position that when one is faced with a dispute relating to an employment contract, both the civil and the labour courts have jurisdiction to adjudicate such claims.

jurisdiction. The court emphasised that it was not necessary for the High Court to place any reliance on Ms Lewarne's reference to the employer's professed reasons for withholding her remuneration. The fact that withholding remuneration was in contravention of s34 of the BCEA did not alter the essential nature of Ms Lewarne's application.

The essence of this judgment is that it reaffirms the position that when one is faced with a dispute relating to an employment contract, both the civil and the Labour Courts have jurisdiction to adjudicate such claims. The practicalities

of this decision however, stand to be tested. Before deciding to litigate an employment contract dispute in the High Court, one must bear in mind the volume of cases the High Courts (excluding the Labour Court) are inundated with as well as the length of time it takes for a matter to be heard. By way of example, in the Johannesburg High Court, a matter can be allocated a date as far as 2023 but in the Labour Courts, matters are allocated dates for hearing in 2020 or 2021. It therefore seems like a more time efficient strategy to proceed through the Labour Court instead of the civil courts.

Aadil Patel and Thabo Mkhize



Probation, poor performance and dismissal – A bitter trio

The purpose of a probationary period is not only to assess whether the employee has the technical skills or ability to do the job but also to ascertain whether the employee is a suitable employee in a wider sense.

It is not uncommon for new employees to be subjected to a period of probation. However, when this period of probation is coupled with poor performance, is dismissal the appropriate sanction even though the employee continued working post the expiry of the probationary period?

This question was considered by the Labour Appeal Court (LAC) in the matter of *Ubuntu Education Fund v Paulsen NO and others*.

Ms S was employed, subject to a six-month probationary period, by the Ubuntu Education Fund (UEF) as a supply chain coordinator. She was unable to achieve four Key Performance Areas (KPA's) required by virtue of her appointment. A temporary administrator was hired to do the procurement whilst Ms S familiarised herself with the administration systems. She was informed, at a meeting of the Fund, of the concerns about her performance. At a further meeting, she was also given assistance to improve. Performance appraisals revealed that Ms S was on average the worst performer in the company by a significant margin. A Poor Work Performance (PWP) hearing was convened, and she was subsequently dismissed for poor work performance.

She referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The Commissioner held that her dismissal was substantively unfair on the basis that she had become a permanent employee when her probation ended, and this indicated that the UEF was satisfied with her performance. The Labour Court refused

to set aside the award on the ground of unreasonableness as it accepted that she was no longer a probationary employee and that the commissioner had dealt properly with the evidence.

Interestingly, the LAC took a different view as the Labour Court and held that an inference that the UEF impliedly confirmed Ms S's permanent employment is neither plausible nor consistent with the proven facts. Accordingly, the Commissioner and the Labour Court erred in concluding that she was automatically confirmed as a permanent employee, despite the expiry of the probationary period.

Item 8 of the Code of Good Practice: Dismissal entitles employers to require new employees to serve a probationary period before the appointment of the employee is confirmed. Her contract of employment provided that the employee will be assessed during the probation period "for confirmation of his suitability" for permanent employment.

The purpose of a probationary period is not only to assess whether the employee has the technical skills or ability to do the job but also to ascertain whether the employee is a suitable employee in a wider sense. Aspects of demeanour, diligence, compatibility and character are considered under the ambit of "fit". An employee on probation is entitled to substantive and procedural fairness, but a lower standard of substantive fairness is permitted in terms of Item 8(1)(j) of the Code of Good Practice. Reasons for dismissal may be less compelling than would be the case in dismissal effected after the completion of the probationary period.

Probation, poor performance and dismissal – A bitter trio...*continued*

This judgment highlights the importance of assessment and guidance during a probationary period, how as a matter of fairness the completion of the review and evaluation process must be done even if it surpasses the time for the probationary period and that where an employee continues working post expiry of the probationary period, this does not necessarily mean the employee is now a permanent employee.

The LAC found that when the probation period came to an end, the UEF was engaged in an ongoing review and evaluation process as reflected in the minutes of meetings. This process was not completed until the PWP hearing. The LAC remarked that it would have been unfair in the circumstances not to have extended the probationary period. Although not formally extended, the LAC held that the probationary period was extended impliedly or by quasi mutual assent during which time Ms S was given a last opportunity to improve. She understood this in that at her PWP hearing she asked for her probationary period to be extended for another six months.

What about alternative employment? In this case, the UEF was a non-profit organisation with limited resources. It could not be expected to amend the

requirements of an advertised position to accommodate the limitations of a probationary employee who proves unsuitable. Dismissal was the appropriate sanction in this circumstance.

This judgment highlights the importance of assessment and guidance during a probationary period, how as a matter of fairness the completion of the review and evaluation process must be done even if it surpasses the time for the probationary period and that where an employee continues working post expiry of the probationary period, this does not necessarily mean the employee is now a permanent employee.

Michael Yeates and Arlina Ramothar

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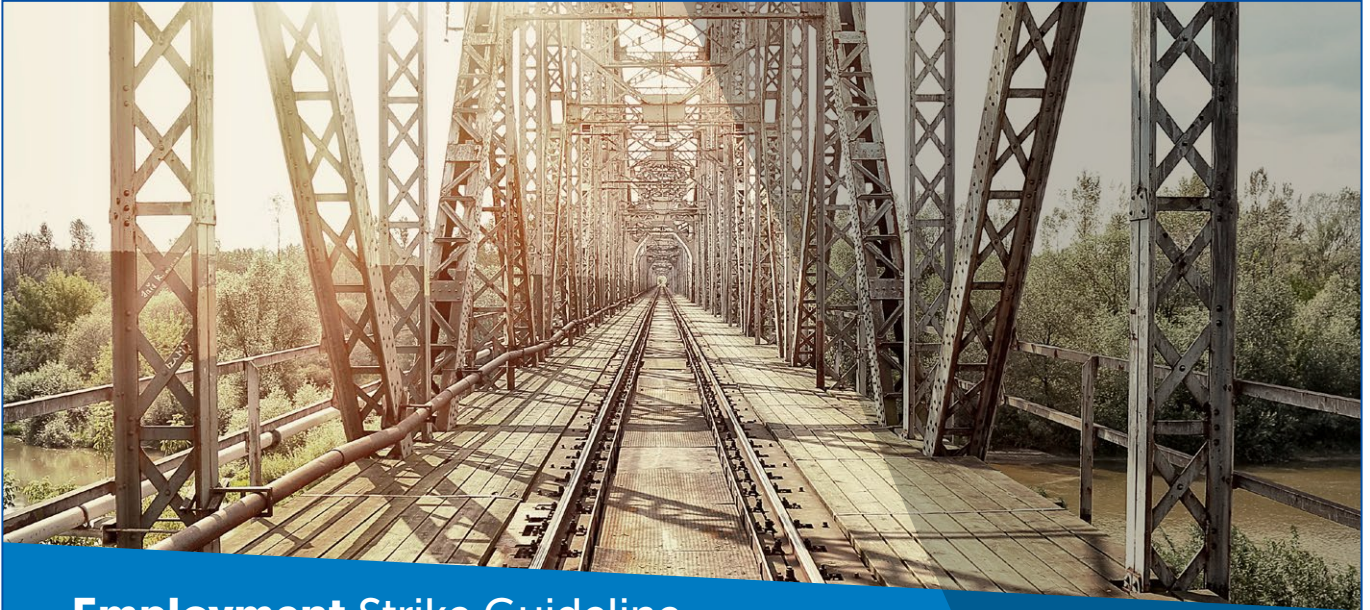
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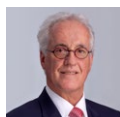
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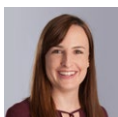
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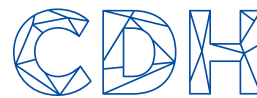
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