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EMPLOYMENT ALERT

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Reviewing a collective agreement?

It is always interesting to find a case where different areas of law collide, bond and diverge. One such matter is *Mampane N.O and Others v National Union of Public Service and Allied Workers and Another* [2020] 2 BLLR 115 (LAC). In 2011, where the National Lotteries Board (NLC), in response to the Lotteries Act, sought to deploy new staff members to their different provincial offices. This resulted in some employees having to be transferred to different locations. The NLC consulted with the relevant trade unions such as NUPSAW about the deployment of staff and new job descriptions.

OHSA – yes, this includes mental health – what does the law say?

Our Occupational Health and Safety (OHS) legislation places a duty on every employer to maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of its employees. Indeed, the recently introduced SANS 45001 standard dealing with Occupational Health and Safety management in South Africa, which was introduced in August 2018, specifically acknowledges that an organisation's duty on workplace safety includes the promotion and protection of both its workers' physical and mental health.

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Reviewing a collective agreement?

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It is always interesting to find a case where different areas of law collide, bond and diverge. One such matter is *Mampane N.O and Others v National Union of Public Service and Allied Workers and Another* [2020] 2 BLLR 115 (LAC). In 2011, where the National Lotteries Board (NLC), in response to the Lotteries Act, sought to deploy new staff members to their different provincial offices. This resulted in some employees having to be transferred to different locations. The NLC consulted with the relevant trade unions such as NUPSAW about the deployment of staff and new job descriptions.

The trade unions involved, including NUPSAW, were satisfied with the methodology, which gave employees three preferential locations of which they could only get one; and most employees chose Gauteng. It was common cause that not all employees could be placed at their preferred locations. A collective agreement to this effect was entered into with the trade unions.

Mokgatlha was one of the employees who could not get her preferred location. She was chosen to be deployed to Kwa-Zulu Natal. Because she was unhappy with her deployment, she appealed the decision of her relocation to the Commissioner (CEO). On 7 December 2015, her appeal was considered and rejected by both the Commissioner and the Human Capital Manager. On 26 January 2016, Mokgathla submitted a memo complaining to the NLC's Human Resources Assistant about the decision to relocate her to Kwa-Zulu Natal. A further meeting was held by the Commissioner and the Human Capital Manager where it was reaffirmed that her relocation could not be deviated. On the same day a letter was then sent by the Human Capital Manager instructing Mokgatlha to report to the Kwa-Zulu Natal offices on 1 April 2016. She subsequently failed to appear at the offices on 1 April 2016, resulting in the Commissioner on 5 April 2016 instructing her that should she fail to report for duty at the Kwa-Zulu Natal offices on 11 April 2016 it will be taken that she has repudiated her contract of employment and that the NLC will therefore be within its rights to terminate her contract of employment.

NUPSAW, on behalf of Mokgatlha, challenged the decision taken by the Commissioner and the Human Capital Manager under section 158(1)(h) of the

Reviewing a collective agreement?

...continued

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LRA on the basis that the NLC is an organ of state and that its decisions could be reviewed under not only the LRA but also in terms of PAJA. Because disputes over the transfer of employees are not specifically dealt with in the LRA, they cannot be arbitrated under the LRA by the CCMA unless the transfer constitutes unfair labour practice thus the only course of action for Mokgathla was to seek a legality review. The Labour Court found in favour of Mokgatlha on the basis that the Commissioner had delegated her decision making power to the Human Resources Manager.

Aggrieved by the Labour Court's findings, the Commissioner appealed to the Labour Appeal Court (LAC). The LAC found that the Commissioner's decision was lawful and legal as she had personally reconsidered the appeal and was nonetheless empowered by statute to delegate her powers. Further, it found that Mokgatlha was bound by the transfer collective agreement. The LAC's reasoning was that the collective agreement was valid in terms of section 213 of the LRA and therefore was binding on Mokgatlha under section 23(1)(b) of the LRA. Further, the LAC found that this was a consequence of one belonging to a trade union in which one willingly transfers their rights and entrusts that union to enter into beneficial agreements on their behalf. Thus, a collective agreement cannot be reviewable because it is taken that the union has received a mandate from all its members to enter into the agreement. However, the LAC raised the point that had Mokgatlha been a non-party member she could have challenged the transfer on the basis that she was not bound by the collective agreement.

In conclusion, what the LAC effectively found is that a collective agreement entered into by a union is binding upon all its members and cannot be reviewed and set aside by an employee who is a member of the trade union which is a party to the collective agreement. If an employee fails to act within the terms of the agreement, be it a transfer or the like, it will be well within the employer's rights to terminate the employees' contract of employment. Employees should be careful as to how and what their trade unions agree to.

Arnold Saungweme, Bheki Nhlapho and Fiona Leppan

OHSA – yes, this includes mental health – what does the law say?

Employees suffering from mental health issues either directly or indirectly affect the workplace in the form of low morale, workplace inefficiencies or even lost time or workplace accidents.

Our Occupational Health and Safety (OHS) legislation places a duty on every employer to maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of its employees. Indeed, the recently introduced SANS 45001 standard dealing with Occupational Health and Safety management in South Africa, which was introduced in August 2018, specifically acknowledges that an organisation's duty on workplace safety includes the promotion and protection of both its workers' physical and mental health.

Employees suffering from mental health issues either directly or indirectly affect the workplace in the form of low morale, workplace inefficiencies or even lost time or workplace accidents. The World Health Organization (WHO) conducted a study in 2014 illustrating that by 2020, depression will be a primary contributor to the global health burden.

Mental health issues often (but not always) make their debut in the workplace in the form of poor or lacklustre performance on the part of the employee. Employers have been taught to respond to poor performance in the manner prescribed in the Schedule 8 of the Code of Good Practice – Dismissal, by embarking on a performance improvement programme (PIP), whereby reasonable standards of performance are clearly communicated and the employee's progression towards these standards are mentored and monitored.

The lines, however, become obscured where mental health issues manifest in other forms of misconduct such as acts of gross insolence, emotional or even violent outbursts, gross insubordination or irrational behaviour. These issues are much harder to identify especially in the face of pending misconduct disciplinary action, where emotions are running high and the trust relationship has been impacted.

Mental health issues have predominantly been addressed as an 'ill health' (incapacity) issue and not as a disability. The problem with this approach lies in the fact that where mental health in the workplace is treated as an incapacity issue, employees suffering from debilitating mental health issues, are not afforded the necessary protections prescribed under the Labour Relations Act, 1995 (LRA) and the Employment Equity Act, 1998 (EEA).

Neither the LRA, nor the EEA define what is regarded as a 'disability' within the employment law context. The question then begs, what passes for a 'disability' under our currently legislation and can this be (fairly) treated in the same manner as 'ill health/incapacity'? Our Labour Court has been divergent on this issue.

While the Labour Appeal Court in *Independent Municipal & Allied Trade Unions v Witzenberg Municipality* (2012) 33 ILJ 1081 (LAC) categorized the mental illness suffered by the employee as an issue of incapacity due to ill health, the same court in *New Way Motors & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) considered it as a disability.

Needless to say, this can be confusing.

OHSA – yes, this includes mental health – what does the law say?

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This judgment illustrates the onerous duty placed on employers to conduct proper investigations where they seek to dismiss poor performing employees who may suffer from, *inter alia* depression.

In *L S v Commission for Conciliation, Mediation and Arbitration & others* (2014) 35 ILJ 2205 (LC), the court held that the employer failed to conduct a proper investigation as to why the employee was underperforming. The court held, when someone suffers from a mental illness there might not be a wilful denial in performing, but rather the inability of the employee to perform. Where the employer opted to categorise the issue as that of misconduct instead of incapacity for poor work performance, the court found that this was unfair.

This judgment illustrates the onerous duty placed on employers to conduct proper investigations where they seek to dismiss poor performing employees who may suffer from, *inter alia* depression. It further highlights the importance of appointing skilled disciplinary chairpersons that are mindful of the finer intricacies of labour law and categorising the issues properly, so as to follow the correct procedures and applying the correct tests, when chairing disciplinary hearings.

More recently, the court in *Jansen v Legal Aid South Africa* [2019] JOL 42192 (LC) dealt with the dismissal of an employee who suffers from a mental condition of which the employer was aware. In this case, the employee was dismissed for misconduct in circumstances where his acts of misconduct were inextricably linked to his mental condition.

The labour court found that the employer in this case was under a duty to reasonably accommodate the employee. The court also found that the employer failed to comply with its duty and that as opposed to dismissing the applicant for misconduct, the employer had a duty to institute an incapacity enquiry.

The court found that the dismissal of the employee was automatically unfair in terms of section 187 (1)(f) of the LRA and that the employer unfairly discriminated against the employee in terms of section 6 of the EEA.

The Labour Court in Standard Bank of SA v Commission for Conciliation, Mediation and Arbitration & Others (2008) 29 ILJ 1239 (LC) provided some guidance for employers to follow when dealing with employees who suffer from 'disabilities'. The employer must consider:

- Whether the employee is able to do his work;
- To what extent the employee is able to perform his duties;
- Whether they can adapt the employee's current working conditions to accommodate the employee's disabilities; and
- If adaptation is not possible, the employer will have to find other suitable employment within its organisation if possible.

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Irrespective of the duration of the employment, the employer should always provide the employee with an opportunity to state a case.

To this extent, employers may be under a statutory duty to render assistance to employees suspected of suffering from mental health issues. This places an additional burden on the employer and further begs the question 'to what extent must an employer go in order to satisfy its OHS obligations?"

From the case law and the various legislative provisions, the following is clear:

- When an employer is faced with an employee who is suffering from mental health issues, the employee should be provided with as much support as reasonable possible and practicable. This may include an investigation by the employer to establish measures that may assist the affected employee or to adapt the working environment if this is practicable.
- Throughout the discussions with the employee, the employer should establish whether the illness is temporary or permanent and if there are any alternatives possible to avoid dismissal.
- Furthermore, and irrespective of the duration of the employment, the employer should always provide the employee with an opportunity to state a case.
- Should there be no alternative available short of dismissal, the employee may be dismissed for incapacity. However, in order to ensure that the employee is not successful in an unfair dismissal and/or unfair discrimination matter, the employer should be able to provide solid evidence that all viable alternatives were considered.

Michael Yeates

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EMPLOYMENT

CASE LAW UPDATE 2019

CLICK HERE to access CDH's Employment Law booklet to assist you in navigating the employment relationship during the current economic uncertainty.

E-learning Offering

Our Employment practice recently launched an e-learning module:

A better place to work

The module will empower your organisation with a greater appreciation and understanding of what constitutes sexual harassment, how to identify it and what to do it if occurs.

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CHAMBERS GLOBAL 2014 - 2020 ranked our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2020 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2018 - 2020 in Band 2: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2020 in Band 3: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2020 in Band 2: Employment.

Michael Yeates ranked by CHAMBERS GLOBAL 2020 as an up and coming employment lawyer.

TOP RANKED Chambers GLOBAL 2020

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 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.

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