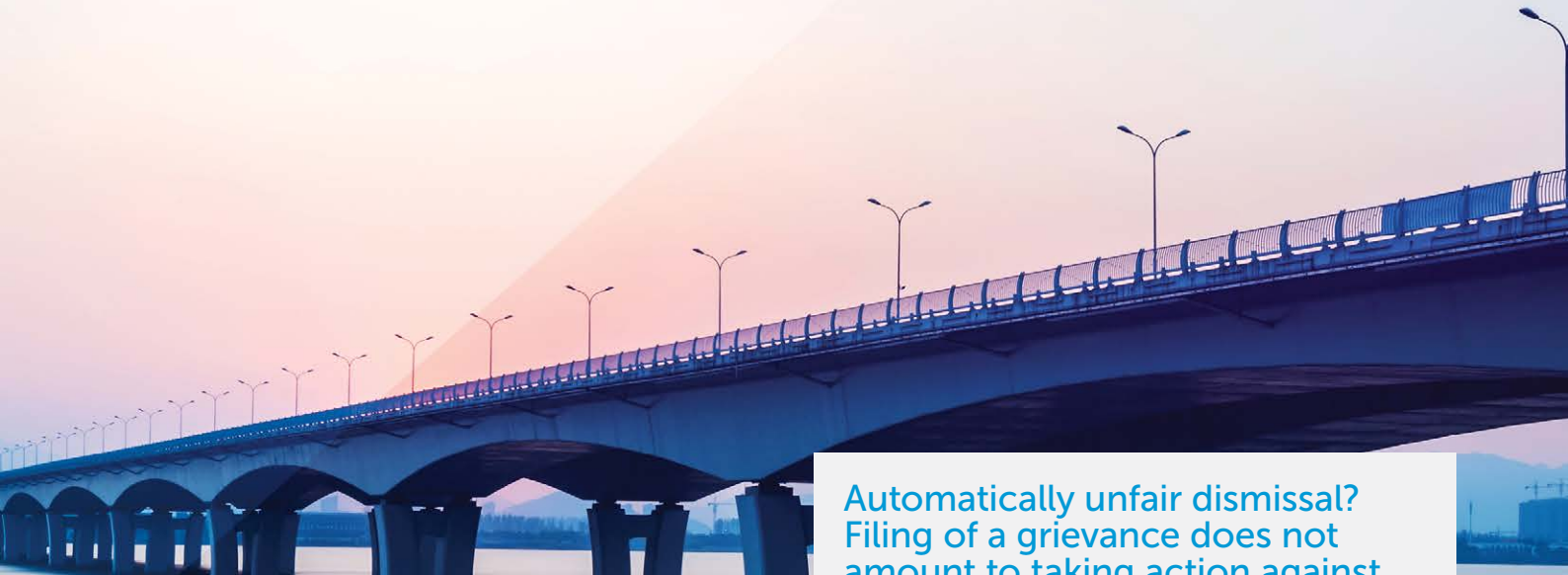
3 AUGUST 2020

EMPLOYMENT ALERT



Automatically unfair dismissal? Filing of a grievance does not amount to taking action against employer

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Bound to your word - Summary of judgment in *NUMSA v Tshwane University of Technology* [2020] JOL 47775 (LC)

In the recent matter between *NUMSA v Tshwane University of Technology*, the Labour Court was called upon to decide an urgent application by the Applicant to interdict the Respondent from terminating a recognition agreement between the parties pending a review application.

Policing the Fourth Industrial Revolution from an employer's perspective

According to Klaus Schwab, "*The Fourth Industrial Revolution is not a prediction of the future but a call to action.*" How right he has proved to be with the 'new normal' imposed on us by the COVID-19 pandemic. Employers are finding themselves forced to consider the need to introduce flexible work options and rethink how they manage, monitor, and interact with their employees.

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Bound to your word - Summary of judgment in *NUMSA v Tshwane University of Technology* [2020] JOL 47775 (LC)

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In the recent matter between *NUMSA v Tshwane University of Technology*, the Labour Court was called upon to decide an urgent application by the Applicant to interdict the Respondent from terminating a recognition agreement between the parties pending a review application.

In April 2019, the parties concluded a recognition agreement in terms of which the Respondent recognised the Applicant's organisational rights as provided for in section 12 and 13 of the Labour Relations Act (LRA).

Pursuant to the judgment in *NUMSA v Lufil Packaging and Others* 2020 (6) BCLR 725 (CC) wherein the Constitutional Court upheld a decision that a trade union cannot create a class of membership outside the provisions of its own constitution, the Respondent terminated the recognition agreement between the parties.

As basis of its termination, the Respondent contended that it was precluded from upholding the recognition agreement as it was void as a result of the Applicant not having a right to organise within the education sector.

Aggrieved, the Applicant sought to review this decision in terms of section 33 of the Constitution and provisions of the Promotion of Administrative Justice Act (PAJA). It contended that the Labour Court had jurisdiction to hear the matter in terms of section 157(2)(a) and (b) of the LRA.

The Labour Court dismissed the Applicant's contention that its application involved the violation of a fundamental right enshrined in section 33 of the Constitution by an organ of State as an employer, as such the court had jurisdiction to determine the matter in terms of section 157(2)(a) and (b) of the LRA.

With reference to the principle of subsidiarity, the court held that the Applicant's remedies lay in the LRA as organisational rights and disputes related thereto are specifically provided for. In reaching this decision, the court reaffirmed that labour issues are to be pursued and dealt with through the purpose-built mechanisms of the LRA, which is a specialised piece of legislation.

Accordingly, the court held that the application stood to be dismissed as the dispute between the parties was purely a labour issue. Any reliance on section 33 of the Constitution and PAJA was misplaced, and unfortunate.

Notwithstanding, having substantially disposed of the matter at this stage, the court went on to determine whether the Respondent's decision to retract from the recognition agreement constitutes administrative action. The court reemphasized that employment and labour issues do not amount to administrative action within the meaning of PAJA.

Bound to your word - Summary of judgment in *NUMSA v Tshwane University of Technology* [2020] JOL 47775 (LC)

Due to the Applicant being precluded from admitting members from outside its stipulated industries, it was not entitled by law to demand the enforcement of organisational rights.

Due to the Applicant being precluded from admitting members from outside its stipulated industries, it was not entitled by law to demand the enforcement of organisational rights. As such this application did not fall within the purview of PAJA because no administrative action had been taken by an organ of state, as the Respondent had merely complied with thejudgment in *Lufil* and retracted a void agreement, which under the circumstances doesn't constitute administrative action or fall within the purview of PAJA.

This judgment reaffirms that trade unions are only permitted to recruit membership in line with their constitutions. Trade unions wishing to challenge any such decisions ought to follow the process specifically outlined in the LRA.

Michael Yeates and Mayson Petla

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Automatically unfair dismissal? Filing of a grievance does not amount to taking action against employer

The respondent commenced employment with the appellant in January 2010. On 2 February 2015, the respondent had a disagreement with a colleague.

Section 187(1)(d) of the Labour Relations Act 66 of 1995 (LRA) regards it an unfair dismissal if an employer dismisses an employee on the basis that the employer is taking or intending to take action against the employer. But if there is no evidence that the employee was dismissed for taking or intending to take action against the employer, as in this case, the unfair dismissal will not fall into the category of automatically unfair dismissal.

In this judgment, the appellant appealed against the judgement of the Labour Court (Mabaso AJ), which was handed down on 26 January 2018, and held that the respondent's dismissal was automatically unfair in terms of section 187 (1)(d) of the LRA and ordered it to pay compensation equivalent to nine months remuneration.

The respondent commenced employment with the appellant in January 2010. On 2 February 2015, the respondent had a disagreement with a colleague. The respondent alleged that her colleague assaulted her shortly before the meeting was adjourned and instituted a grievance against her colleague. The respondent further reported the incident to the SAPS. A grievance inquiry was convened, the external chairperson found that the alleged assault was not proved. The appellant then charged the respondent with various counts of misconduct, including dishonesty.

Following a disciplinary hearing enquiry, the chairperson recommended the dismissal of the respondent. Subsequent to an unsuccessful conciliation process, the respondent referred the dispute to the Labour Court in terms of section 191(5)(b) of the LRA alleging that her dismissal was automatically unfair in terms of section 187(1)(d) of the LRA.

The question which was litigated upon was whether the disciplinary process which was instituted against the respondent and which led to her dismissal was a result and a direct consequence of the grievance she filed with the appellant and the exercising of a right in terms of the Act. The reason for the dismissal was thus in sharp dispute. To reiterate, the respondent's pleaded cause of action was that she was dismissed on the prohibited ground in section 187(1)(d) of the LRA.

The essential inquiry under section 187(1)(d) of the LRA is whether the reason for the dismissal was "*that the employee took action or indicated an intention to take action, against the employer*" by exercising any right conferred by the LRA or participating in any terms of the LRA.

During argument, the LAC was referred to the decision of the Labour Court in *Mackay v Absa Group and another* [1999] 12 BLLR 1317 (LC) (Mackay). The LAC noted that the court a quo in Mackay accepted that the LRA does not make explicit

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Automatically unfair dismissal? Filing of a grievance does not amount to taking action against employer...*continued*

The Mackay decision of the Labour Court was overturned by the Labour Appeal Court.

provision protecting an employee who lodges a grievance against his employer in terms of an internally agreed document such as a grievance procedure or code. The LAC however held that the court in Mackay incorrectly held that, in keeping with the main object of the LRA (the efficient resolving of disputes and the right to fair labour practices) the court must follow a purposive interpretation of section 187(1)(d) of the LRA which would mean that the right conferred by a private agreement binding an employer and employee as well as any proceeding provided by such agreement was to be contemplated in section 187(1)(d). The Mackay decision of the Labour Court was overturned by the Labour Appeal Court. The test for determining the true reason and whether a dismissal was automatically unfair in terms of section 187(1)(d) was laid down in *SA Chemical Workers Union v Afrox Ltd* 3 (1999) ILJ 1718 (LAC).The court must determine the factual causation by asking whether the dismissal would have occurred if the employee had not taken action against the employer. If the answer is yes than the dismissal is not automatically unfair. If the answer is no, the next issue is to determine whether the taking of action against the employer was the main, dominant, proximate or most likely cause of the dismissal.

The court held that a grievance complaining about a fellow employee's conduct does not constitute as taking action against an employer. The LRA does not expressly confer rights upon employees to file grievances.

In the premises, the respondent had failed to prove her cause of action that the proximate reason for her dismissal was the one envisaged in section 187(1)(d) of the LRA and that she was dismissed for an automatically unfair reason. In the result, the appeal was upheld in the appellant's favour.

Michael Yeates and Kgodisho Pashe

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Policing the Fourth Industrial Revolution from an employer's perspective

Employers have to think about how their current policies, disciplinary codes and procedures fare in the work from home environment.

According to Klaus Schwab, "*The Fourth Industrial Revolution is not a prediction of the future but a call to action.*" How right he has proved to be with the 'new normal' imposed on us by the COVID-19 pandemic. Employers are finding themselves forced to consider the need to introduce flexible work options and rethink how they manage, monitor, and interact with their employees.

Clearly, technology will spearhead the shift into the Fourth Industrial Revolution (4IR) and many of the changes undertaken as 'temporary' lockdown solutions can be expected to remain intact into the longer term. The anticipated efficiencies it will bring will drive the predicted changes across entire systems of production, management and governance.

Not to detract from some of the more exciting areas of the 4IR but some good old-fashioned fundamentals remain topical.

Work from home

Employers have to think about how their current policies, disciplinary codes and procedures fare in the work from home environment. This may mean that employers have to answer difficult questions such as:

- Do my contracts of employment provide for employees working from home?
- How can I ensure compliance and effectively monitor my employees without invading their (right to) privacy?
- Does my disciplinary code cater for an employee who works from home but commits a misconduct?

A flexible working option policy (FWOP)

Flexible working options and having your office 10 meters from where you sleep, demands that lines should not be blurred. Many employers will have to manage employees who slack off on the one end and those who burn out and overwork themselves on the other.

So how does an employer avoid the conundrum of whether an employee is working from home or living at work? The answer lies in the formulation of an unambiguous and detailed FWOP, the key components of which should include:

Legal considerations

All good policies take the necessary legal framework into account, so consider the relevant legislation as a starting point in drafting an effective FWOP in order to ensure that the employer remains compliant in this regard.

Practical considerations

The disciplines and routines entrenched in existing policies and procedures should not be abandoned and the drafting of an effective FWOP will require, amongst other things, consideration of the following to ensure that the employer retains control:

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Policing the Fourth Industrial Revolution from an employer's perspective...*continued*

The measures addressed in this article highlight but a few of the considerations required when implementing a work from home scenario.

Human resources

- Application processes to participate in work from home options and the employer's right to reassess or revoke flexible working options.
- Processes for monitoring productivity and compliance.

Technical requirements

- The imposition of positive obligations on employees working from home to meet specific technical requirements, such as wi-fi connectivity, electricity supply, and a secure telephone line.

Data Security

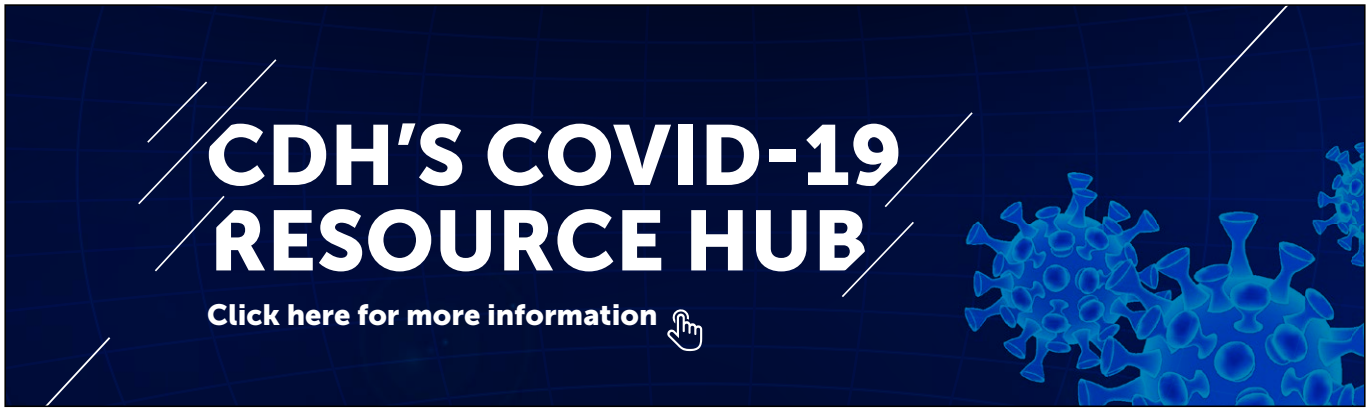
- Measures for protection of intellectual property and databases together with encryption and password technologies.
- Protection of personal information regulated by the Protection of Personal Information Act in environments where unauthorised access could be gained.

Conclusion

The measures addressed in this article highlight but a few of the considerations required when implementing a work from home scenario. The success and sustainability of implementing the practice will depend on the identification of all possible scenarios that could be encountered and then, formulating and implementing clear and concise policies to govern the way forward.

Heeding Klaus Schwab's clarion call will ensure that employers are not dragged into the 4IR screaming and kicking.

Jaden Cramer and Tony Phillips
Overseen by Sean Jamieson



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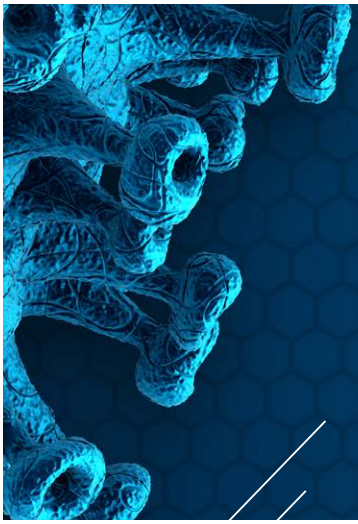

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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