EMPLOYMENT LAW
ALERT

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CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

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Reimbursement claims for COVID-19 tests, unpaid leave, and loss of income under section 73A of the BCEA

On 1 January 2019, section 73A of the Basic Conditions of Employment Act 75 of 1997 (BCEA) came into effect. This relatively new provision permits employees earning below the prescribed threshold to claim monies owing to them in terms of the National Minimum Wage Act, the BCEA, a collective agreement, a sectoral determination or a contract of employment at the Commission for Conciliation, Mediation and Arbitration (CCMA).

In the CCMA matter of *Cousins v Bill Buchanan Association* [2022] 1 BALR 46 (CCMA), the disruptions occasioned by the COVID-19 pandemic and the civil unrest of July 2021 gave rise to questions as to who bears the cost of COVID-19 tests required by an employer, whether an employee who has exhausted leave entitlements may nevertheless claim compensation in respect of deductions for unpaid leave despite failing to report for duty, and whether the provisions of section 73A of the BCEA might lay the foundation for loss of earnings claims for an employee's private business.

Ms Cousins relied on section 73A when she referred a claims dispute to the CCMA, alleging that her employer owed her monies for:

- deductions of unpaid sick leave in the amount of R6,783.11, and R4,034.94 of unpaid leave due to the unrest in KwaZulu-Natal, totalling R11,718.05 for the period between 30 April 2020 and 31 July 2021;
- R8,500 for 10 COVID-19 tests; and
- loss of income for her private business in the amount of R27,000.

CLAIMS COVERED UNDER SECTION 73A OF THE BCEA

The employer in this matter submitted that the referral should be dismissed on the basis that the referred claims are not covered under section 73A of the BCEA. The issue that was to be decided was whether Cousins was entitled to such a claims dispute in the circumstances.

Firstly, the employer submitted that the Directions for Health and Safety in the workplace, dated 4 June 2020, provide that if an employee's sick leave entitlement is exhausted, they must make an application for an illness benefit in terms of clause 4 of the directive issued on 25 March 2020 on the COVID-19 Temporary Employer Relief Scheme (TES Scheme). In terms of Cousins' employment contract, any sick leave in excess of 30 days in the relevant leave cycle may be unpaid.

The employer submitted that Cousins used the sick leave due to her excessively, and as a result of having exhausted her sick leave entitlements, should have directed her claim for unpaid sick leave to the Department of Employment and Labour in terms of section 20 of the Unemployment Insurance Fund, which expressly states that if an employee's sick leave entitlement is exhausted they must make an application for an illness benefit.

Furthermore, the employer submitted that its business was operating at full capacity during the unrest. At no point in time did the employer instruct Cousins to stay off duty during the unrest. She, however, took a different view, stating that she was not informed that the employer would implement the no work no pay rule during the unrest. She also claimed that she was not informed that she needed to apply for the illness benefit under the TES Scheme.

Reimbursement claims for COVID-19 tests, unpaid leave, and loss of income under section 73A of the BCEA

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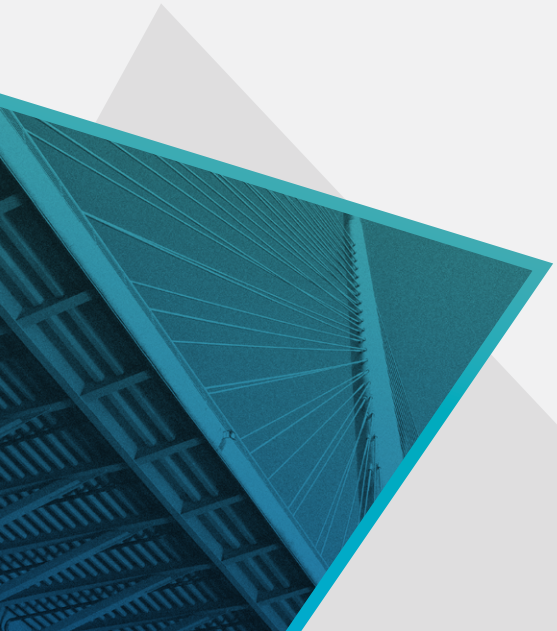

Cousins also argued that her employer owed her for the loss of income for closing her nail business which was operating under the respondent's business.

CCMA FINDINGS

In terms of the three claims by Cousins, the Commissioner found that:

- The money that Cousins claims she was owed in terms of her COVID-19 tests, and her loss of income for private businesses, fell outside what is expressly covered by section 73A of the BCEA.
- In terms of her exhausted sick leave, Cousins ought to apply for illness benefits in terms of the TES Scheme.
- As she had exhausted her sick leave and failed to tender her services during the unrest where the employer was fully operational, Cousins could not claim leave for the period of the unrest.

While the issue of compensation for the costs incurred by Cousins in respect of her COVID-19 tests fell outside of the scope of section 73A, the Commissioner remarked that item 27 of the Directions for Health and Safety in the workplace places a clear obligation on employers to implement health and safety measures to curb the spread of COVID-19, such as screening workers when they report for duty and requiring workers to be tested for the virus, when needed.

The Commissioner dismissed Cousins' case, finding that she was not owed any amount in terms of section 73A of the BCEA.

Employers can be comforted by the fact that any monetary claims that fall outside of the payments expressly indicated in section 73A of the BCEA will not be entertained by the CCMA, and employers should carefully scrutinise a monetary claim by an employee when considering whether it should raise this jurisdictional point.

AADIL PATEL AND DYLAN BOUCHIER

Retirement age and allegations of discrimination

Section 6 of the Employment Equity Act 55 of 1998 (EEA) includes, amongst the listed grounds on which an employer may not unfairly discriminate against an employee's, age. How section 6 impacts on and is to be understood in relation to an employer's retirement policy or practice was revisited by the Labour Court in *Khan v MMI Holdings Ltd* [2021] 42 ILJ 1737 (LC), a decision handed down in May 2021.

Khan was employed as the chief executive officer of MMI International, a division of MMI Holdings Ltd. When he started his employment he concluded a partially written, partially oral contract of employment with Bankmed. This contract transferred to MMI Holdings Ltd pursuant to various commercial transactions. The letter of appointment, made available by Khan, refers to various rules and regulations of Bankmed and states that these formed part of his terms and conditions of employment. The rules and regulations include Bankmed Pension Fund rules which provide for retirement at the age of 60.

On 30 May 2016 Khan received an email from MMI Holdings attaching documentation relating to his retirement. On 30 June 2016 he received a letter confirming his retirement as of 30 June 2016. Khan was not paid after 30 June 2016. Before the Labour Court Khan claimed that in the absence of a practice or policy or agreed retirement age, MMI Holding forcibly retired him. As part of his claim he alleged that if the court found that there was a retirement policy to which he was bound, this amounted to discrimination based on age, which is a listed prohibited ground in terms of section 6(1) of the EEA. He sought a declarator that such a policy unfairly infringed upon his rights and asked for payment of damages under section 50 of the EEA in the amount of R55 million.

MMI Holdings resisted the claim of unfair discrimination under the EEA, relying on section 187(2)(b) of the Labour Relations Act 66 of 1995 (LRA) which provides that *"a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity"*, and stated that section 6 of EEA and section 187(2)(b) of the LRA must be read consistently. Conversely, Khan argued that section 6 of the EEA must be read and interpretated separately from section 187(2)(b) of the LRA and that what the LRA regards as fair does not necessarily mean fair for purposes of the EEA.

When addressing the conflicting arguments the court applied the principle of interpreting statutes consistently. The court held that an employee whose employment terminated through the application of a retirement policy has two potential courses of action: automatically unfair dismissal under the LRA, or an unfair discrimination claim under the EEA, or both. The two claims would arise out of the same set of facts. This, the court found, clearly indicates that the LRA and EEA must be interpreted consistently. The court reasoned

Retirement age and allegations of discrimination

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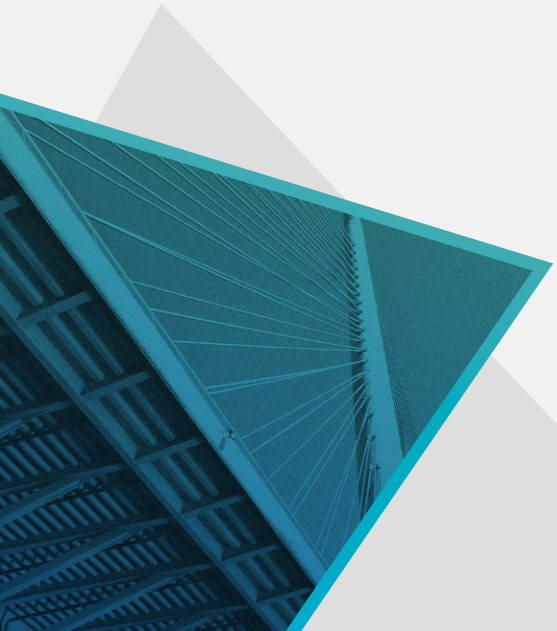
that the legislature could not have intended that the same conduct could be fair in terms of the LRA, but unfair in terms of the EEA. This would encourage employees to "*forum shop*" and bring claims under the EEA. In addition, the LRA was enacted before the EEA and the legislature would have been alive to the provisions of section 187(2)(b) of the LRA relating to fair dismissal based on the fact that an employee has reached the agreed or normal retirement age, when it enacted the EEA. The court concluded that the LRA and EEA can be interpreted consistently as section 187(2)(b) of the LRA is a justification ground affording an employer a defence under section 11(1)(b) of the EEA where the alleged discrimination is shown to be rational, not unfair, or otherwise justifiable.

This judgment serves as important confirmation that a retirement policy which establishes an age at which an employee retires – while differentiating between those younger than the retirement age and those who have reached or exceeded the retirement age – will not give rise to a successful claim for unfair discrimination based on age under the EEA.

GILLIAN LUMB AND
CLAUDIA GROBLER



COVID-19 vaccinations international case law blurb: Honolulu Hawaii

***O'Hailpin v Hawaiian Airlines* 2022 U.S Dist. LEXIS (02 feb 2022)**

This matter looked at the legality of Hawaiian Airlines (Hawaiian) vaccination policy introduced in August 2021 and effective from 1 November 2021. The policy required all US-based employees to be vaccinated against COVID-19, unless they had reasonable accommodation for a disability under the Americans with Disabilities Act (ADA), or sincere conflicting religious beliefs. Employees who had not been vaccinated by 1 November 2021 were allowed a further opportunity until 4 January 2022, as part of Hawaiian's transition period testing program (TPTP), which they needed to apply for TPTP by 24 October 2021. Hawaiian also offered employees who had not been fully vaccinated by 5 January 2022, 12 months of unpaid leave.

In addition, employees who sought exemption on the basis of the ADA or sincerely held religious beliefs were required to apply by 1 October 2021. Hawaiian received 500 exemption applications based on the latter ground. Due to the high volume, Hawaiian was unable to process all applications by 1 November 2021. To avoid dismissing employees whose applications had not been processed, Hawaiian temporarily placed them on the TPTP. Those whose applications were denied were offered the option of unpaid leave.

By 1 January 2022, about 95% of Hawaiian's workforce had been vaccinated. Four days later, Hawaiian commenced a process to terminate the employment of those employees whose exemption applications had not been granted. Employees who were not exempted and did not apply for unpaid leave were held out of service.

The aggrieved employees brought an urgent application on 5 January 2022, in which they argued that the vaccination policy was discriminatory, retaliatory, and a violation of the ADA and Title VII (religious discrimination). They sought a temporary restraining order and an order to show cause why a preliminary injunction should not be issued. The order was not granted.

In relation to the claim of discrimination on the basis of disability, the court noted that the employees were required to establish a prima facie case. Reasonable accommodation, if available, ought to not place undue hardship on the operation of the employer's business. It should not be too onerous, considering the employer's size, economic circumstances, and other relevant conditions. The employer would in this instance bear the onus of demonstrating the undue hardship. The court was satisfied that the company discharged the onus.

The court also found that Hawaiian's vaccination policy made provision for reasonable accommodation based on religion and/or disability. The employees however, failed to establish a case of discrimination on these grounds.

In relation to reasonable accommodation, the court held that, reasonable accommodation meant accommodating the employees without undue hardship to Hawaiian. The court concluded that accommodating the applicant beyond what is already provided for in the policy will result in undue hardship to Hawaiian. The court held that by implementing the vaccine policy, Hawaiian did not victimise the employees on the basis of their religious beliefs and/or medical conditions, but employees suffered the consequences as a result of not complying with the policy. There was no retaliation in response to the exemptions they sought.

The court engaged in a balancing exercise and found that public interest outweighed the interests of individual employees as the vaccine policy was implemented to protect Hawaiian's workforce and the traveling public, and to curb the spread of COVID-19.

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