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Employment Law ALERT

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Can the Pension Fund Adjudicator ignore a response to a disputed death benefit?

An employee who is a member of a retirement fund would have a death benefit that is payable to their dependents when they pass away. Importantly, the benefit does not form part of the deceased member's estate and is not subject to deceased estate processes. The trustees of the fund are responsible for allocating the death benefit under section 37C of the Pension Funds Act 24 of 1956 (Act).

The over-sensitivities of an individual employee do not amount to harassment or unfair discrimination

In the recent decision of *La Foy v Department of Justice and Constitutional Development and Others 1952/2017*, the Labour Court dismissed an application by an employee who sought relief as a result of alleged harassment by her employer, together with a plea for the reassignment of her job responsibilities, and a claim for compensation.



CLIFFE DEKKER HOFMEYR

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Can the Pension Fund Adjudicator ignore a response to a disputed death benefit?

An employee who is a member of a retirement fund would have a death benefit that is payable to their dependents when they pass away. Importantly, the benefit does not form part of the deceased member's estate and is not subject to deceased estate processes. The trustees of the fund are responsible for allocating the death benefit under section 37C of the Pension Funds Act 24 of 1956 (Act).

The intention of the Act is to protect dependents, even over the clear wishes of the member. Often an employer, and, more importantly trustees, are faced with competing interests of people who seek payment of the death benefit. What happens when there is a dispute about the allocation made by the trustees?

On the passing of a member of a retirement fund, the beneficiaries have the right to approach the fund for the allocation and payout of death benefits. Should a beneficiary be aggrieved by the allocation of benefits, after exhausting the fund's grievance processes, they may approach the Pension Funds Adjudicator (PFA) to set aside the fund's allocation. Can the PFA override the decision of the trustees?

In *Municipal Gratuity Fund v Pension Funds Adjudicator and Another* (364/2022) [2023] ZASCA 116 (31 July 2023) the Supreme Court of Appeal was called upon to determine whether the PFA's decision to set aside the fund's allocation was valid where the fund was not given the opportunity to put up its case before the PFA.

Brief facts

The deceased was a member of the Municipal Gratuity Fund (fund). At the time of his death, he was married to Mrs X and had a life partner Ms Y. The deceased had five children with Mrs X, while Ms Y had three children of her own. Both Mrs X and Ms Y applied to the fund for payment of death benefits to themselves and their children. After an investigation into the claims, the fund recommended that preference be given to Ms Y and her children, over Mrs X and her children. The basis of this decision was that Ms Y and her children were dependent on the deceased, while Mrs X was employed and financially independent. Aggrieved by the fund's allocation, Mrs X filed a complaint with the PFA. Attached to her complaint was the custody application of Mr Y, the father of Ms Y's children, which was intended to demonstrate that Ms Y's children were not dependent on the deceased.

The PFA informed the fund of the complaint brought by Mrs X. In response, the fund requested that the complaint be held in abeyance



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Annual Employment Conference 2023



Wednesday, 25 October 2023



09h00 – 13h00

Further information to
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pending the finalisation of the custody application brought by Mr Y, considering the direct impact the custody application may have on the re-distribution of death benefits. Notwithstanding the fund's request, the PFA proceeded to make a determination and ordered the fund to pay Mrs X R300,000 in death benefits to assist with the settling of her home loan.

The court's findings

The fact that the fund was not afforded the opportunity to make representations was concerning for the court. This is because section 30F of the Act provides that:

"When the adjudicator intends to conduct an investigation into a complaint, he or she shall afford the fund or person against whom the allegations contained in the complaint are made, the opportunity to comment on the allegations."

The fund not being granted the opportunity to make representations would have impacted the PFA's determination. Firstly, the PFA

would have known that the fund had never resolved to settle Mrs X's home loan, but rather required more information about the deceased's estate. Further, disregarding the fund's right to comment on the complaint before the PFA meant that the issue of Ms Y's factual dependency on the deceased, which was the basis of the fund's allocation, was not adequately challenged.

Conclusion

Section 30F of the Act affords a party the opportunity to make representations to the PFA. It is important that the fund or "the person against whom the allegations contained in the complaint are made" (and this often is the former employer) is given the opportunity to make the necessary representations to the PFA. Failure to do so means that the fund or the employer forgoes this right. But, where this right is exercised and the PFA ignores the representations, its decision will be subject to attack, as was the case in the *Municipal Gratuity Fund* judgment.

**Imraan Mahomed and
Thato Makoaba**



Employment 2023 Rankings

Employment Law practice is ranked in Tier 1.

CDH Kenya's Employment Law practice is ranked in Tier 3.

Leading Individuals:
Fiona Leppan | Aadil Patel

Recommended Lawyers:
Anli Bezuidenhout | Jose Jorge
Rizichi Kashero-Ondego | Gillian Lumb
Imraan Mahomed | Phetheni Nkuna
Hugo Pienaar | Thabang Rapuleng
Njeri Wagacha

The over-sensitivities of an individual employee do not amount to harassment or unfair discrimination

In the recent decision of *La Foy v Department of Justice and Constitutional Development and Others 1952/2017*, the Labour Court dismissed an application by an employee who sought relief as a result of alleged harassment by her employer, together with a plea for the reassignment of her job responsibilities, and a claim for compensation.

The Labour Court had to consider whether the applicant's claim of harassment constituted unfair discrimination based on arbitrary grounds under the Employment Equity Act 55 of 1998, as amended (EEA) and whether the provisions of the Labour Relations Act 66 of 1995, as amended could be bypassed to build a case under the EEA.

The applicant was employed as a Deputy Director-General in the Department of Justice and Constitutional Development (DJCD). During her tenure she endured a protracted period of suspension of five years out of a total period of seven years' service with the DJCD. She was suspended during an investigation about charges that were subsequently discredited, but which culminated in her eventual dismissal.

The dispute was initially referred to the Commission for Conciliation, Mediation, and Arbitration (CCMA),

where concerted efforts were made to amicably resolve the matter through conciliation. Regrettably, those endeavours were unsuccessful. Consequently, the CCMA issued a certificate of non-resolution of the dispute and the applicant approached the Labour Court about the allegations of harassment enumerating as many as 11 complaints.

Labour Court findings

In its determination of the alleged harassment, the Labour Court found that section 6(3) of the EEA did not elucidate the concept of harassment. Consequently, the court turned its attention to the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (COP), as well as other relevant legal precedents, including the case of *Moos v Makgoba* [2022] JOL 54225 (GP). In the *Moos* matter, the High Court found that

any subjective interpretation of the concept of harassment could not be sustained as it would leave the scope "too wide" and courts would be "inundated with harassment claims" where even the slightest conduct could be subjectively interpreted as harassment.

Upon a comprehensive review, the Labour Court concluded that after applying an objective standard, the applicant may have felt offended, or experienced unhappiness and distress as a result of the actions taken by DJCD. However, it was determined that her circumstances did not meet the threshold required to establish harassment as contemplated within the framework of unfair discrimination under the EEA, read with the provisions of the COP. Furthermore, with regard to the matter of onus, the court deliberated on section 11(2) of the EEA and reached the conclusion that the applicant did not discharge the burden of proof required by that provision.

The over-sensitivities of an individual employee do not amount to harassment or unfair discrimination

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Finally, the court emphasised that the legislative goals of promoting dignity, equality, and fair labour practices in the workplace are paramount. Consequently, an act of harassment could pose a threat to one or more of these fundamental principles. The Labour Court further expanded on this stating that managerial functions generally do not threaten dignity or equality, nor do they necessarily constitute unfair labour practices. In this instance the alleged actions did not meet the definition of harassment.

The Labour Court, after careful consideration, found that the applicant failed to prove the existence of unfair discrimination, leading to a rejection of her claim.

This judgment underscores the Labour Court's vigilance when addressing workplace harassment complaints. It highlights the potential for employees to misconstrue the distinction between managerial authority and harassment, often due to the grammatical nuances of the term "harassment". The court reiterated the importance of acknowledging that a court must remain cognisant of the idiosyncrasies and heightened sensitivities of individual employees, but this does not automatically amount to harassment.

Fiona Leppan, Kgodisho Phashe and Tyler Lillienfeldt



Cliffe Dekker Hofmeyr

2023 RESULTS

Chambers Global 2014 - 2023
ranked our Employment Law practice in
Band 2: Employment.

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Chambers Global 2015 - 2023
in Band 2: Employment.

Fiona Leppan ranked by
Chambers Global 2018 - 2023
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Imraan Mahomed ranked by
Chambers Global 2021 - 2023
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Hugo Pienaar ranked by
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BBBEE STATUS: LEVEL ONE 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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