Employment Law

ALERT

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CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

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The National Minimum Wage Act 9 of 2018 (Act) was enacted to advance economic development and social justice by, *inter alia*, improving the wages of the lowest paid workers, and protecting workers from unreasonably low wages by establishing the national minimum wage (NMW).

A remedy of disgorgement: Secondment and the non-disclosure of secret profits

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FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

Annual increase to the national minimum wage

The National Minimum Wage Act 9 of 2018 (Act) was enacted to advance economic development and social justice by, *inter alia*, improving the wages of the lowest paid workers, and protecting workers from unreasonably low wages by establishing the national minimum wage (NMW).

In terms of section 6(5) of the Act, the Minister of Employment and Labour (Minister) must, by a date fixed by the President, determine the adjustment to the NMW, and by notice in the Government Gazette, amend the NMW contained in Schedule 1 and 2 of the Act.

In accordance with the requirements of section 6(5) of the Act, the Minister published the adjusted NMW rates in Government Gazette No. 48094 on 21 February 2023, increasing the rates as follows:

- The NMW increases from R23.19 to R25.42 for each ordinary hour worked.
- Farm workers are entitled to R25.42 per hour.
- Domestic workers are entitled to R25.42 per hour.
- Workers employed on an expanded public works programme are entitled to R13.97 per hour, increasing from an hourly rate of R12.75.

Schedule 2 of the Act, which pertains to the minimum learnership allowance for workers who have concluded learnership agreements contemplated in section 17 of the Skills Development Act 97 of 1998, has been amended. The minimum weekly allowance a learner is entitled to is based on the National Qualification Framework level of the learner and these allowances have now been increased and will therefore impact the cost of learnership agreements.

Contract cleaning sector

The Minister has increased the minimum wage for the contract cleaning sector as follows:

- In Area A, which consists of the metropolitan councils of the City of Cape Town, Greater East Rand Metro, City of Johannesburg, Tshwane and Nelson Mandela Bay, the minimum hourly rate has increased to R27.97.

Webinar Invitation

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Thursday, 2 March 2023

09h00 – 10h00 (CAT)

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Annual increase to the national minimum wage

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- In Area B, which consists of all areas in KwaZulu-Natal, the minimum wage shall continue to be determined by the Bargaining Council for the Contract Cleaning Service Industry.
- In Area C, being the remaining areas in the republic, minimum rates per hour have been increased to R25.50.

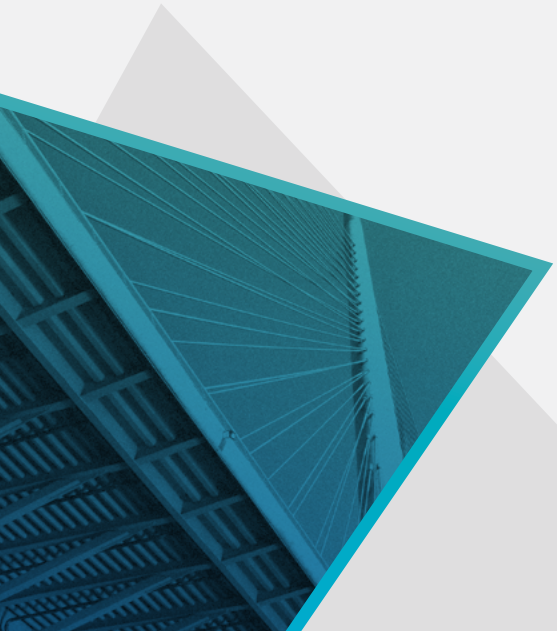
Wholesale and retail sector

The Minister has increased the minimum wage for the wholesale and retail sector. The increases are subject to the relevant geographical areas. Minimum wage rates prescribed for Area A are incrementally higher than those prescribed for Area B.

The minimum rate increases in the retail sector also differ according to recognised job categories such as, for example, general assistant, trolly collector, security guard, forklift operator, driver etc.

The changes introduced by the Minister will take effect from 1 March 2022.

CDH's Employment Law practice



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

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Fiona Leppan ranked by **Chambers Global 2018 - 2023** in **Band 2**: Employment.

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A remedy of disgorgement: Secondment and the non-disclosure of secret profits

The Labour Court in the case of *RFS Administrators (PTY) LTD v Samons and Others* (JS 641/17) [2022] ZALCJHB 110 (30 August 2022) dealt with the elements that a party must prove when seeking a remedy of disgorgement in terms of the Basic Conditions of Employment Act 75 of 1997 (BCEA) arising from a breach of an oral contract of employment.

A party seeking to claim a remedy of disgorgement must prove all the elements applicable to the remedy. If the remedy arises from a breach of a contract, the party claiming the remedy must also prove that profit was made in secret, other contractual remedies are inadequate, and there is a causal link between the alleged breach and profit made.

In this case, the Labour Court found that there was no employment relationship at the time the bonuses were issued. Therefore, there was no breach of contract.

Background

A summary of the facts is set out below.

RFS Administrators (the applicant) employed the respondents by way of oral agreement. The respondents were subsequently 'seconded' to the National Pension Fund For Municipal Workers and the National Fund For Municipal Workers (the Funds) in order to perform some functions.

The Funds took resolutions to pay the respondents bonuses, as a result of their exceptional performance, while under 'secondment'. In response to the payment of the bonuses, the applicant sought the remedy of disgorgement, claiming that the receipt of bonuses was a breach of the respondents' contracts of employment.

In supporting its claim, the applicant presented evidence that the amounts received by the respondents were received secretly and without the consent of the applicant.

In dealing with the period in which the bonuses were paid, the applicant contended that the respondents' employment relationship was still in place when the bonuses were paid. The respondents, on the other hand, argued that the employment relationship had come to an end prior to the payment of the bonuses.

A remedy of disgorgement: Secondment and the non-disclosure of secret profits

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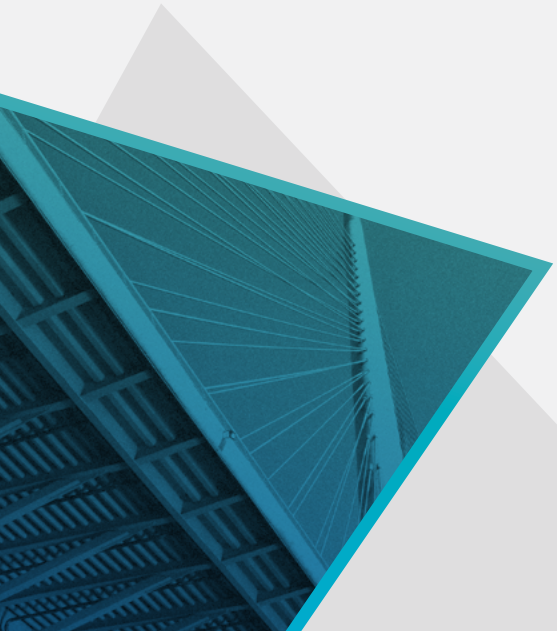

Questions before the Labour Court

The Labour Court had to deal with the following aspects:

- When does an oral employment contract cease and/or come into being?
- When does an employee owe an employer fiduciary duties?
- The requirements for disgorgement.

In response to these legal questions, the Labour Court made a distinction between a bonus and profit. It stated that a bonus is a form of remuneration that is added to a person's wages for good performance. Remuneration as defined, may be any payment in money or in kind or both. On the other hand, a profit is a financial gain, considering the difference between the amount earned and the amount spent.

Although it is trite that an employer and employee relationship may exist without an employment agreement, when seeking a remedy of disgorgement, an employment agreement must be proven. A party that alleges that there is an oral contract, bears the onus to prove the existence of the oral contract and its terms. On establishing the existence of the oral contracts, the Labour Court found that in light of the fact that the applicant was alleging that an oral agreement was concluded with the respondents, which the latter subsequently breached, the applicant bore the onus to prove the existence of the oral contract and its terms.

The Labour Court held that the employer and employee relationship ended when the respondents worked for the Funds and were remunerated or entitled to be remunerated by the Funds. The fact that administratively, the applicant managed the finances, and the human resources requirements of the principal officer's office did not suggest that the employment relationship had continued.

As to the question of whether there was a fiduciary relationship that arose as a result of the secondment agreement, the Labour Court stated that for fiduciary duties to arise, there must, within the particular relationship concerned, be specific contractual obligations, which the employee has undertaken and have placed them in a situation where equity imposes these rigorous duties in addition to the contractual obligations.

In conclusion, and based on the evidence presented, the Labour Court found that the applicant had failed to discharge the onus to prove the existence of an employment contract at the relevant time. Thus, there was no obligation on the respondents to not accept the bonus payments from their employers, being the Funds.

The Labour Court further considered whether there had been a breach of the employment contract. The court held that a breach happens when the agreed terms are not complied with, but in instances where the obligations no longer existed, there could be no breach of the contract.

A remedy of disgorgement: Secondment and the non-disclosure of secret profits

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Regarding the relief sought, the Labour Court emphasised that disgorgement is not an alternative remedy for breach of contract and that the primary remedy for breach of contract, is an order for specific performance. The alternative claim being a claim for contractual damages. Disgorgement becomes a remedy *sui generis*. It does not arise out of choice to obviate matters of proof.

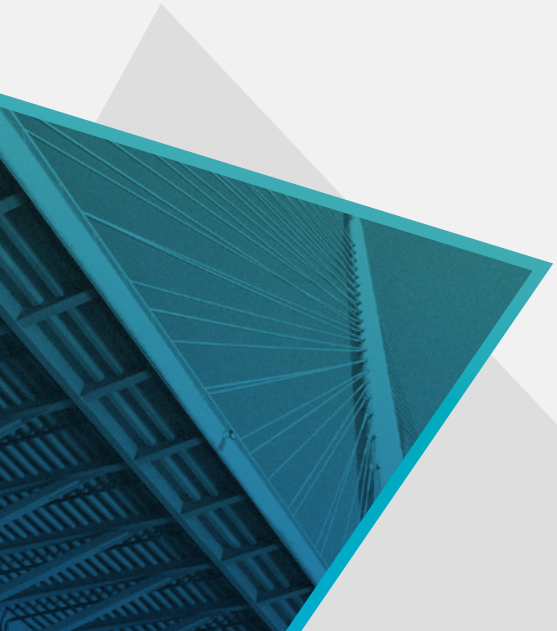
The third requirement when a claim of disgorgement is made, is that an employer who alleges extra income must prove a connection between the alleged breach and the remedy of disgorgement. In this instance the applicant failed to suggest any methodology that the Labour Court may employ to connect the alleged gain and the alleged breach. For all the above reasons, the claim for the disgorgement relief and the claim for damages were bound to fail.

Costs

In awarding costs, the Labour Court held that since the dispute involved or concerned an employment contract, the Labour Court has concurrent jurisdiction with the civil courts. As such, the ordinary rules in relation to costs would apply and the applicant's claim was therefore dismissed with costs.

The key takeaway is that when an employer is seeking a remedy of disgorgement, an employer must ensure that they have all the requirements in order to be successful for this remedy.

Hedda Schensema, Tshepiso Rasetlola and Sophie Muzamhindo



Menstrual leave: Advancing gender equality in the workplace

The opening up of the workplace and the inclusion of women in a formal manner in the economy has increased since the early 20th century.

Since then, the path to equal access to professional careers, closing the gender gap in relation to remuneration, and equal opportunities for promotion and leadership positions has been a long one, with gradual progress over time. The need to legally provide maternity leave benefits and legally safeguard employment in the context of pregnancy are some contemporary examples.

Recently, Spain has approved legislation that entitles relevant workers, who have medical approval, to menstrual leave. In the Spanish context, the state's social security system will be responsible for funding the leave entitlement. Spain is the first European country to join the list of nations that legally recognise menstrual leave in some form (some others include Japan, Indonesia, Taiwan and Vietnam).

As the emphasis on diversity and inclusion in workplaces gains momentum globally, some employers elect to provide their employees with the benefit of menstrual and menopause leave, even in jurisdictions where employees may not be legally entitled to such benefits. While the South African Government and the labour environment more broadly have yet to consider the implementation of menstrual leave or leave entitlements aligned with physiological fluxes such as menopause, the introduction of menstrual leave is a welcome and progressive enhancement of workplace accommodations that recognise forms of temporary incapacity, due to biological processes, such as dysmenorrhea, that affect women. This advances gender equality and normalises menstruation in the workplace and the effects it may have on women.

If an employer is considering implementing a menstrual leave benefit, it is important that it considers all the relevant factors before making a final decision. An employer will need to determine what would be a reasonable leave entitlement and whether this entitlement can be accumulated monthly. Whether an employee will require medical approval to access the leave will also need to be determined. Given that the nature of the leave has implications on privacy issues, employers must be both sensitive to and cautious around requirements for an employee to confirm menstruation or gender identity. In this regard, transgender men and gender non-conforming people may also be entitled to menstrual leave without identifying as women.

Finally, employers should guard against the possibility that menstrual leave may reinforce false and sexist positions relating to workplace productivity and people who take menstrual leave should not be prejudiced in terms of promotion and work opportunities due to an increase in time off from work.

Nadeem Mahomed and Gillian Lumb

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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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