EMPLOYMENT LAW

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Sexual harassment

The test for sexual harassment in the workplace.

KB v Nedbank Ltd [2020] 2 BALR 138 (CCMA)

The Commissioner confirmed that sexual harassment is a form of unfair discrimination under the EEA.

SUMMARY OF THE FACTS

The employee referred an unfair discrimination dispute to the CCMA on the basis of 1) sexual harassment; and 2) intimidation and victimisation. She claimed compensation and damages for medical expenses incurred as a result of the alleged sexual harassment, intimidation and victimisation.

The employee who referred the said dispute was the personal assistant to the employer's Executive Manager: Group Risk, Mr Haripersad (the Manager).

The employee alleged that the Manager sexually harassed her on two occasions during the Group Risk awards function hosted by the employer on 6–8 March 2019. In the first instance, whilst being driven back to hotels with other employees, the Manager touched her hair.

In the second instance, the Manager touched her shoulder as the employee was visibly upset by a remark made to her by another manager about her performance. He told her that they would discuss the issue when they got back to the offices. The Manager subsequently initiated a meeting with the employee and criticized all aspects of her work. She subsequently attended counselling sessions.

The employee then lodged two internal grievances in respect of 1) sexual harassment; and 2) intimidation and victimisation.

The internal investigation held that there was no proof of sexual harassment. Subsequently, the employee applied and was appointed in another position. However, aggrieved by the internal investigation finding, the employee referred an unfair discrimination dispute to the CCMA for conciliation instead of continuing the internal grievance procedure. The Commissioner confirmed the findings of the internal investigation, and thus the employee referred the dispute for arbitration.

SUMMARY OF THE FINDINGS OF THE CCMA

The issue before the Commissioner was whether the alleged conduct amounted to sexual harassment and whether it constituted unfair discrimination.

The Commissioner confirmed that sexual harassment is a form of unfair discrimination under the EEA.

The Commissioner held that in respect of determining whether the conduct amounted to sexual harassment in the workplace, the test is objective. The facts must be assessed against the standard expected of an employee as provided

Sexual harassment*...continued*

The test for sexual harassment in the workplace.

KB v Nedbank Ltd [2020] 2 BALR 138 (CCMA)

in the Code of Good Practice (the Code). Intention is not required to prove sexual harassment but will add to the gravity of the matter. The honesty, morality, ethics or religious affiliation of the employee and arbitrator are irrelevant to the determination.

Regard must also be given to the definition of sexual harassment in the Code.

Sexual harassment is defined as unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace considering the listed factors. These factors are the following:

- whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
- whether the sexual conduct was unwelcome;
- the nature and extent of the sexual conduct; and
- the impact of the sexual conduct on the employee.

An employee may indicate that sexual conduct is unwelcome expressly and by way of non-verbal conduct such as walking away or not responding to the perpetrator. The arbitrator also relied on the judgment in *Gaga v Anglo Platinum Ltd and others* (2012) 33 ILJ 329 (LAC) to note that the seniority of the perpetrator and the victim must be considered.

On application, the arbitrator found, in respect of the first ground for unfair discrimination, that there was no evidence that the Manager voluntarily touched the employee's hair. The employee had conceded that her hair may have been touched due to the vehicle's movement. Additionally, at the time of the alleged conduct, the employee failed to show any indication of discomfort and did not note that it bore a sexual connotation.

The Commissioner further found that the Manager merely comforted the employee in respect of the second incident as she was crying due to criticism from her colleague.

Therefore, it was held that the employee had not been sexually harassed, confirming the internal investigation report.

In respect of the second ground for unfair discrimination, the CCMA lacked jurisdiction to determine whether the intimidation and/or victimisation of the employee amounted to discrimination.

Aadil Patel

It was held that the employee had not been sexually harassed, confirming the internal investigation report.

Sexual Harassment

Employers can be held vicariously liable for failure to comply with the Code and failure to act when an employee makes an allegation as to sexual harassment.

Liberty Group Ltd v MM [2017] 10 BLLR 991 (LAC)

Aggrieved, the employer appealed to the LAC on the basis that the sexual harassment claim was fabricated as a means of extorsion.

SUMMARY OF THE FACTS

The employee resigned from the employer after being sexually harassed by her manager. The employee raised the issue with the employer. She was merely referred to the sexual harassment policy and told to consider whether the manager's conduct amounted to sexual harassment. The employee then submitted a letter of resignation.

No action was taken after her complaint. She submitted a second resignation letter. An investigation into the manager's conduct was then initiated. However, the employee refused to co-operate on the basis of the employer's delay and inaction. Following the investigation, the manager was suspended.

The employee referred an unfair discrimination dispute to the CCMA, and then to the LC. The employee testified that she resigned because she was sexually harassed on four occasions in 2009 by her manager.

The LC held that the employee had established that she was sexually harassed, and that the employer was vicariously liable for the manager's conduct in terms of section 60 of the EEA. As sexual harassment constitutes a ground for unfair discrimination in terms of the Amended Code of Good Practice on Sexual Harassment, it was found that she had been unfairly discriminated against. Compensation of R250,000.00 was awarded to the employee.

Aggrieved, the employer appealed to the LAC on the basis that the sexual harassment claim was fabricated as a means of extorsion.

SUMMARY OF THE FINDINGS OF THE COURT

The LAC confirmed the judgment of the LC.

Firstly, in determining whether harassment constituted discrimination, the LC held that harassment is a form of discrimination under the EEA and the Code. The employer is liable where sexual harassment occurs. The LC clarified the interpretation of section 60(4) of the EEA to mean that employers are required to ensure the offending employee 'did not' act in contravention of the EEA. It cannot be limited to an interpretation that employers are only liable for failure to prevent future acts of harassment.

Sexual Harassment*...continued*

Employers can be held vicariously liable for failure to comply with the Code and failure to act when an employee makes an allegation as to sexual harassment.

Liberty Group Ltd v MM [2017] 10 BLLR 991 (LAC)

Secondly, in determining whether the employee had been sexually harassed, the LAC confirmed that she had been sexually harassed. The employer's grounds for appeal lacked factual substantiation and were meritless.

It held that the requirements for vicarious liability for the employer are as follows:

- the sexual conduct complained of must have been committed by another employee;
- the alleged conduct constituted unfair discrimination;
- the alleged conduct occurred at the workplace;
- the alleged conduct must be brought to the employer's attention immediately;
- the employer must have been aware of the incident of sexual harassment;
- the employer must have failed to consult all the relevant parties and failed to take the necessary steps to eliminate the conduct or comply with the Code; and
- the employer must have failed to take all reasonable and practical measures to ensure that the employee did not act in contravention of the EEA.

The LAC further noted that the requirement for a complainant to report sexual harassment 'immediately' depends on the facts of each case and necessitates that the employer is placed in a position to act. Accordingly, the employee had reported the harassment to a responsible manager, which was sufficient. The employer was in a position to act on the harassment but failed to take the steps required in terms of section 60(2) of the EEA to ensure discontinuation of the harassment. The employer merely referred the employer to the sexual harassment policy and did not assist in filing a formal complaint or initiate an investigation. Thus, the employer was liable for the manager's conduct.

Aadil Patel

The employer merely referred the employee to the sexual harassment policy and did not assist in filing a formal complaint or initiate an investigation.

Employment Equity Act non-compliance

A practical test to assess the lawfulness of affirmative action measures: Is the decision rational? If it is rational, is it unfair when considering internal and external factors?

Ethekwini Municipality v Nadesan & Others (2021) 42 ILJ 1480 (LC)

The workplace requires the balancing of interests in relationships and its very rarely about the assertions of individual rights.

SUMMARY OF THE FACTS

The employer advertised for the position of Senior Storekeeper: Fire and Emergency Service, which has been vacant for a period of one year. The employee applied for the position and was unsuccessful despite being the highest scoring candidate. The selection panel held that the employee was not successful as Indian males were over-represented in the occupational level. The employer re-advertised the position on the basis that it was finding a suitable candidate from an under-represented racial and gender demographic. The employee claimed that he was unfairly discriminated against and referred his matter to the CCMA. The CCMA found in favour of the employee.

SUMMARY OF THE FINDINGS OF THE COURT

The LAC held that viewing restitutionary measures through the lens of the EEA makes a difference, as it is easy to mistake employment equity plans as constitutionally mandated tools in a designated employer's hand to ensure equity as opposed to statutorily mandated tools to achieve equitable employment practices and representativity in the workplaces.

The workplace requires the balancing of interests in relationships and its very rarely about the assertions of individual rights.

The LC held that when an adjudicator is tasked with an unfair discrimination dispute, he/she should satisfy themselves that the decision was rational. The line can be difficult to draw between rationality and fairness. The court applied this test to the case at hand and applied the rationality leg of the test. It held that the employer had no African females at the occupational level required, for this reason it would have made no sense to re-advertise the post one more time as a means to achieve their equitable representation. For this reason, the decision to decline the appointment and re-advertise was irrational. The appeal was dismissed with costs.

Anli Bezuidenhout

Racist remarks made whilst off duty

May an employee be disciplined for off-duty misconduct relating to racism?

Makhoba v Commission for Conciliation, Mediation & Arbitration & others (2022) 43 ILJ166 (LC)

SUMMARY OF THE FACTS

The employee was employed as a general worker. A member of the public alerted the employer to the fact that the employee had posted a comment on the Eyewitness Facebook page that all "*Whites mz b all killed*" (all whites must be killed). The employee was charged with making a racist comment on social media and acting contrary to the interest of the company. The employee was dismissed and referred the matter to the CCMA. The Commissioner found that the employee's dismissal was both procedurally and substantively fair. The employee reviewed the decision of the Commissioner at the LC.

SUMMARY OF THE FINDINGS OF THE COURT

The LC held that an employer can exercise discipline over an employee for off-duty misconduct if there was a connection between his conduct and the employment relationship. Although the employee did not have access to a computer or the internet in his daily tasks, the link remained as the employer employs people of all races and cannot be expected to continue to employ an employee that called for the killing of one race group. It is the responsibility of the employer to ensure the safe working environment of its employees. In this instance, the conduct of the employee went further than racism as it incited racial hatred against one racial group. The court held that the seriousness and gravity of offences related to racism and racial hatred cannot be over emphasised. Employers have a duty to protect its employees from all types of harm whether physical or emotional. Employers can be held liable for failing to take action against an employee who is guilty of such conduct.

Anli Bezuidenhout

Employers can be held liable for failing to take action against an employee who is guilty of such conduct.

Racial and sexual harassment

To decide whether the terms "*peach*" and "*boer*" had sexual and racist connotations.

Mametse v African Rainbow Life 2022 (2) BALR 166 (CCMA)

SUMMARY OF THE FACTS

The employee was employed as business development manager. The employee was dismissed for calling a female colleague a *"peach"* whilst speaking to a client on the telephone and embarrassing the company by calling the CEO a "*boer*" during a call with a client.

SUMMARY OF THE FINDINGS OF THE CCMA

The Commissioner held that the female colleague had taken offence to the term *"peach"*. The term *"peach"* commonly refers to a woman's buttocks. This comment was not an appropriate comment to make towards any colleague. The employee made the female colleague uneasy and embarrassed and placed the employer in a vulnerable position.

The Commissioner held that comments uttered by the employee were unnecessary and not the purpose of the telephone conversation with the client. The Commissioner held that the comment of "*boer*" made the client feel uneasy. The Commissioner held that such comments are not comments that can be tolerated in the workplace and finds no place in the working environment. The Commissioner held the conduct of the employee was a serious act of misconduct and potentially placed the employer at risk.

The Commissioner found the employee's dismissal procedurally and substantively fair.

Anli Bezuidenhout

The Commissioner held that comments uttered by the employee were unnecessary and not the purpose of the telephone conversation with the client.

Mandatory Vaccination Policy

Is dismissal of an employee who refuses to vaccinate fair?

Theresa Mulderij v Gold Rush Group GAJB 24054-21

The CCMA found that the dismissal of the employee was fair.

SUMMARY OF THE FACTS

The employee was employed by the employer as a Business Related and Training Officer until her services were terminated on the ground of incapacity. The employer adopted a mandatory vaccination policy for the workers in its employ. The employee failed to comply with the mandatory vaccination policy. The employee was invited to a hearing relating to the non-compliance with the policy.

At the hearing, the employee was found to be permanently incapacitated based on her decision not to get vaccinated, and by implication her refusal to participate in the creation of a safe working environment. The employee was dismissed.

The employee made an unfair dismissal referral to the CCMA following the dismissal.

SUMMARY OF THE FINDINGS OF THE CCMA

The CCMA recognised that incapacity is a legitimate ground for dismissal. The CCMA found that the evidence led by the employee was reliant mostly on section 12 of the Constitution. This section provides that every person has the right to bodily and psychological integrity, which includes the right make decisions concerning reproduction; to security and control over their body; and not to be subjected to medical or scientific experiments without their informed consent.

The CCMA considered that the prescribed processes under legislation were followed to adopt the mandatory vaccination policy the employee was given the opportunity to apply for an exemption under any of the allowed grounds of exemption. The employee applied and the committee found that due to her work nature, requiring her to encounter fellow employees, exposes her to high risk of infection.

The CCMA relied on the writing of judge Roland Sutherland, the deputy Judge President of the of the Gauteng Division of the High Court. The Judge held that the correct question to ask in such circumstances, is whether an individual is sufficiently civic minded to appreciate that a duty to of care is owed to colleagues and others with whom contact is made to safeguard them from harm. He further wrote that if one wishes to be active member of a community then the incontrovertible legitimate interest of the community must trump the preferences of the individual.

Based on the writing of Judge Sutherland, the CCMA held that the need for the community to get vaccinated and protected against the virus, should trump the employee's right to bodily and psychological integrity as envisaged in section 12 of the Constitution.

The CCMA found that the dismissal of the employee was fair.

Thabang Rapuleng and Kamogelo Matsobane Mothibe

Mandatory Vaccination Policy

Is an employee entitled to a claims dispute in terms of section 73A of BCEA for monies used for COVID-19 tests required by the employer?

Cousins v Bill Buchanan Association [2022] 1 BALR 46 (CCMA)

SUMMARY OF THE FACTS

The case dealt with claims lodged by the employee under section 73A of the BCEA, relating to unpaid leave, COVID-19 tests and loss of income on her business.

The employee was required to submit COVID-19 test results to be permitted to return to work after reporting sick. The employee claims to have taken eleven COVID-19 test, each costing R850, and the employer only paid for one test, thus the employee claimed R8,500.

The employee accordingly referred the claim to the CCMA as a claim under section 73A of the BCEA.

SUMMARY OF THE FINDINGS OF THE CCMA

The CCMA found that in terms of section 73A of the BCEA, any person earning within the threshold may refer to the CCMA a dispute concerning any failure to pay any amount owing in terms of the BCEA, National Minimum Wage Act 9 of 2018, a contract of employment, a sectoral determination, or a collective agreement.

The CCMA held that the monies for COVID-19 test as claimed by the employee are not within the scope of section 73A of the BCEA. The CCMA accordingly dismissed the application insofar as it related to claims for monies used for COVID-19 tests.

The Commissioner reiterated that section 27 of the OHSA 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.

Aadil Patel

The CCMA held that the monies for COVID-19 test as claimed by the employee are not within the scope of section 73A of the BCEA.

Mandatory Vaccination in the Workplace

Can you dismiss pending the implementation of a vaccine mandate?

Zaphia September v Inyoni Empowerment [2022] JOL 17051 (CCMA)

SUMMARY OF THE FACTS

The employee was employed as a Preferential Procurement Manager on 8 September 2021. She was employed subject to a three month probation period. Also, her contract of employment stated that the employer was considering implementing mandatory vaccination policy. The clause was brought to the employee's attention.

On 7 December 2021, she informed the employer that she unwilling to vaccinate. In response, the employer advised her that her employment would not be confirmed after the probation period because she refused to vaccinate. The following day, her contract was terminated on two weeks' notice. The notice of termination was withdrawn, and her probation was extended to 28 February 2022 when the mandatory vaccination policy would take effect.

The employee declined the withdrawal of the notice of termination and served the remainder of the two weeks' as per the termination notice. The employee referred the unfair dismissal dispute to the CCMA.

SUMMARY OF THE FINDINGS OF THE CCMA

The CCMA stated that it is established that when an employee resigns, but later seeks to withdraw the resignation, they need the consent of the employer. Similarly, where the employer has terminated the employment relationship by issuing a notice of termination, the employer seeking to retract the dismissal can do so only with consent of the employee, and since the employee did not consent to the retraction of the notice of termination, there was indeed a dismissal.

The CCMA found that the even where a company has complied with all legal requirements to implement mandatory vaccination policy, an employee cannot be dismissed for refusal to vaccinate before the mandatory vaccination policy takes effect.

The CCMA confirmed that vaccination status plays a role in determining the competency of an employee to do their job and this may be considered when decided whether to confirm appointment of an employee on probation. However, the employer is not entitled to terminate services of an employee for refusal to vaccinate, until such time that the employer has implemented the mandatory vaccination policy.

The CCMA concluded that the dismissal was substantively and procedurally unfair.

Aadil Patel

The CCMA concluded that the dismissal was substantively and procedurally unfair.

Mandatory Vaccination in the Workplace

Whether the suspension of an employee who refuses to vaccinate constitutes unfair labour practice.

Kok v Ndaka security services [2022] 4 BALR 377 (CCMA)

SUMMARY OF THE FACTS

The employee was employed as a Safety Practitioner by the employer, a private security company. The employer makes use of an office of Sasol premises and runs operations on the Sasol site. The employee was instructed to only return to work after vaccinating or alternatively providing weekly negative COVID-19 test results. This was preceded by the decision of their client, Sasol Ltd to require 100% vaccination rate.

The employee was invited to a meeting with the employer and informed that his access will be blocked if he does not comply with the requirements as explained. The employee was informed on 22 November 2021 that he has been suspended for an alleged misconduct.

SUMMARY OF THE FINDINGS OF THE CCMA

The CCMA firstly qualified the blocking of the employees' access as a "*suspension*" and thus granting the CCMA jurisdiction to determine the matter.

The CCMA stated that the employer undertook three different risk assessments and complied with all the department's requirements. The CCMA found that the employer had tried to accommodate employees who wished not to vaccinate, but within the reasonable means. However, since the employee in this matter was no longer willing to submit the weekly COVID-19 tests, the employer could no longer reasonably accommodate him. The CCMA concluded that following al the meetings and pleading taken up with employee to vaccinate or provide the test results, fair process was followed for the suspension.

The CCMA considered the Constitution in deciding whether the reason for the suspension was fair. The employee submitted that he is protected against the mandatory vaccination by section 12 of the Constitution which states that every person has the right to bodily and psychological integrity. The Commissioner found that section 36 of the Constitution provides for the limitation of the rights contained in the Bill of Rights, however, such

Mandatory Vaccination in the Workplace

Whether the suspension of an employee who refuses to vaccinate constitutes unfair labour practice.

Kok v Ndaka security services [2022] 4 BALR 377 (CCMA)

limitation must be within the confines of the law. On this leg, the CCMA found that there were reasonable and justifiable grounds for limiting his right to bodily an psychological integrity as envisaged in section 12 of the Constitution.

The CCMA considered the Consolidated Directive dated 11 June 2021. The Commissioner found that section 3 of the Consolidated Directive provided for a risk assessment and plans form protective measures.

This required the employer who planned to adopt mandatory vaccination policy to undertake a risk assessment which complied with the listed requirements. Annexure C of the Consolidated Directive provided the guidelines to employers and other parties in determining the fairness of a mandatory vaccination policy and its implementation. The Commissioner found that the employer had complied with the requirements as prescribed under the Consolidated Directive.

Lastly the Commissioner considered the OHSA 85 of 1991. The Commissioner considered that OHSA imposes a statutory duty on all employers to take reasonably practicable measure to ensure a healthy and safe workplace. The Commissioner found that adoption of a mandatory vaccination policy was the only avenue through which the employer could create a healthy and safe workplace.

The CCMA found that the suspension was fair and did not constitute an unfair labour practice.

Aadil Patel

The CCMA found that the suspension was fair and did not constitute an unfair labour practice.

Discipline and Dismissal

Dishonesty – Does lying about sick leave warrant dismissal?

Woolworths (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others [2022] 3 BLLR 296 (LAC)

The employer then appealed the decision to the LAC.

SUMMARY OF THE FACTS

The employee applied for paid sick leave for one day. On return to the office, he informed his manager that he attended a rugby match whilst on sick leave, but maintained that he was not well.

The employer instituted disciplinary action, found the employee guilty of misconduct and dismissed the employee.

The employee then referred an unfair dismissal dispute to the CCMA. The CCMA noted that the employee did not hide the fact that he attended a rugby match, and he had a clean disciplinary record. Additionally, he was not charged for dishonesty and thus the employment relationship had not broken down. The dismissal was held to be procedurally and substantively unfair, and the CCMA ordered retrospective reinstatement. Aggrieved by the CCMA award, the employer launched a review application before the LC.

The LC held that whilst the dismissal was procedurally fair, it was substantively unfair because the employer failed to prove that, 1) the employee was dishonest; and 2) there was an expectation for him to return to work if his condition had improved.

The employer then appealed the decision to the LAC.

SUMMARY OF THE FINDINGS OF THE COURT

The LAC accepted that the employee was found guilty of abusing authorised sick leave. However, it found that the CCMA and LC erred in finding that the employee was not dishonest. They had adopted a lenient approach to dishonesty and to the determination of whether the employer-employee relationship had broken down, which was unacceptable.

It was palpably clear that the employee was dishonest. Even on the employee's own version. Whilst he was not charged with dishonesty, the

Discipline and Dismissal*...continued*

Dishonesty – Does lying about sick leave warrant dismissal?

Woolworths (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others [2022] 3 BLLR 296 (LAC)

LAC noted that "*manifestly, he acted dishonestly in absenting himself from work on the basis that he was too ill to perform his duties but then travelled for at least an hour to support his local rugby team, knowing full well that he would be paid for the day.*"

The fact that he applied for sick leave to attend a rugby match was by implication dishonest conduct which negatively impaired the relationship of trust between the employer and employee. Therefore, the Commissioner's finding that he had not been dishonest was manifestly wrong and fell to be set aside.

Turning to whether the trust relationship between the employer and employee had broken down, the LAC found that 1) the employee's dishonest conduct negatively impacted on the relationship; 2) the employee had been disciplined on previous occasions, for late-coming and absence from work; and 3) the employer was entitled to require the employee to act with integrity and abide by the employer's policies, procedures, and codes.

Thus, the LAC found that the relationship of trust had broken down.

Tamsanqa Mila and Gaby Wesson

The LAC found that the relationship of trust had broken down.

Discipline and Dismissal

Does a proposed severance package constitute a settlement agreement?

Perumal v Clover SA (Pty) Ltd [2021] 11 BLLR 1143 (LC)

The employer instituted disciplinary action against the employee for failing to report for duty and dismissed him.

SUMMARY OF THE FACTS

During pre-retrenchment consultations, the employee was informed via a section 189 notice that he was to be retrenched with severance pay, which was later withdrawn on the basis that it was issued in error. The employer decided not to retrench the employee, however the employee contended that the letter was a binding agreement. He did not report for duty, he was paid his salary, and he wanted the employer to comply with the "*agreement*". The employee refused to abide by the employer's instruction to return to duty.

The employer instituted disciplinary action against the employee for failing to report for duty and dismissed him. The employee then applied to the LC to have the "*agreement*" made an order of court in terms of section 158(1)(c) of the LRA.

SUMMARY OF THE FINDINGS OF THE COURT

The LC held that in terms of section 158(1)(c) of the LRA, it has the power to make an arbitration award or settlement agreement an order of court. If a settlement agreement does not satisfy the criteria in section 158(1A) of the LRA, it does not constitute a settlement agreement. A settlement agreement must be in writing and in settlement of a dispute that a party may refer to arbitration/adjudication under the LRA, in terms of section 158(1A) of the LRA.

The issue was therefore whether the "*agreement*" met the criteria of a settlement agreement in section 158(1A) of the LRA, and whether it could be made into a court order.

In applying the criteria, the LC noted a preliminary point that the employer had not retrenched the employee. The employer made it clear to the employee that he was not terminated, the section 189 notice was withdrawn, and he was instructed to return to work. Thus, there was no "*dispute*" to be settled. As a result, the agreement could not be made an order of court. The LC upheld the dismissal and held that the employee was to blame for his actions.

Tamsanqa Mila and Gaby Wesson

Discipline and Dismissal

Is your charge sheet clear?

Sol Plaatje Municipality v South African Local Government Bargaining Council and others [2021] 11 BLLR 1096 (LAC)

SUMMARY OF THE FACTS

The employees were dismissed by the employer following charges pertaining to 1) dismantling an air conditioner (company property) in the workplace; 2) attempting to sell the parts to a scrap metal dealer; and 3) threatening a security guard.

The matter was thereafter referred to the bargaining council. The Commissioner found the employees were not guilty of the charges. He reasoned that the employees did not go through with the misconduct, they merely attempted to commit the misconduct. The employees were reinstated with retrospective effect.

The employer reviewed the award, however, it was unsuccessful. Aggrieved, the employer appealed on the grounds that the probabilities were that the employees had dismantled the equipment with the intention of misappropriating the parts and selling them and that the award was unreasonable.

SUMMARY OF THE FINDINGS OF THE COURT

The LAC considered the manner in which the charges were drafted and reiterated the principle that disciplinary proceedings charges need not be drafted with the precision of those in criminal matters and that an unduly technical approach to the former should be avoided. If the main charge of misconduct is not proved, an attempt to commit the misconduct framed in that charge suffices.

The LAC held that the LC ignored this principle despite the evidence from the employer that the employees had dismantled the air conditioner, unlawfully removed its parts and were apprehended outside a scrap yard. No regard was paid to the employees' attempt to intimidate a security guard who was safeguarding the parts. As a result, the LAC held that the employees acted in concert and overturned the decision of the LC and the CCMA.

Tamsanqa Mila and Gaby Wesson

Disciplinary proceedings charges need not be drafted with the precision of those in criminal matters.

Retrenchment

Does severance pay include acting salary?

Sibanye Gold Ltd v Commission for Conciliation, Mediation and Arbitration and other [2021] 11 BLLR 1153 (LC)

When severance pay exceeds the statutory minimum, section 41(2) of the BCEA does not apply.

SUMMARY OF THE FACTS

The employee was retrenched. He was paid a severance package comprising of 1) a removal allowance; 2) an option to purchase a company house at a discount; 3) two weeks' pay for his eight years of service; 4) a month's notice pay; and 5) a training allowance. His basic salary was R17,553, and his acting allowance whilst acting as a shift boss, was R15,562. In total, the employee earned R33,115.00 during his acting stint. However, the employer paid him a severance pay calculated on his basic salary.

The employee referred the dispute to the CCMA. The CCMA agreed with the employee and held that the employer ought to have paid his severance pay on his acting salary instead of the basic salary. Aggrieved by the Award, the employer reviewed the award at the LC.

SUMMARY OF THE FINDINGS OF THE COURT

The LC held that the matter turned on the correct interpretation of section 41(2) of the BCEA. That section provides that retrenched employees must be paid severance pay of at least one week's remuneration per completed year of service. Section 35(1) provides that an employee's wage must be calculated in terms of the number of hours the employee ordinarily works. The provisions are silent on the formula to calculate the severance pay, where there is an acting allowance and basic salary.

The LC relied on *SATU (obo Van As and others) v Kohler Flexible Packaging (Cape) (a division of Kohler Packaging Ltd)*, to find that the LAC had decided that shift allowances were excluded from the definition of remuneration in the aforementioned provisions and that section 41(2) of the BCEA applied only to cases in which retrenched employees received less than the statutory minimum of one week per year of continuous service. If the employee's argument were to be accepted, section 41(2) of the BCEA would apply to any severance pay, irrespective of whether the amount paid exceeded the minimum stipulated in the provision. This was not the intention of the legislation – rather it creates a statutory minimum that has to be paid when an employee is dismissed for operational requirements. The LC noted that the provision's reference to "*at least*" must mean "*not less than*". Therefore, when severance pay exceeds the statutory minimum, section 41(2) of the BCEA does not apply.

The LC held that the severance pay was contractually agreed to on the basis of basic salary and as it exceeded the statutory minimum, section 41(2) of the BCEA did not apply. Therefore, the acting shift allowance was not the basis to calculate severance pay. The LC thus held in favour of the employer.

Tamsanqa Mila and Gaby Wesson

Retrenchment

Compensation under LRA not intended to recompense dismissed employee for patrimonial loss, but for injury to dignity.

Total South Africa (Pty) Ltd v Meyer and others [2021] 8 BLLR 795 (LAC)

SUMMARY OF THE FACTS

The employee was employed by Total SA (the employer) in May 1987. In 1993, he was seconded to Total Coal, a subsidiary. Years later, Total SA sold Total Coal to Exxaro.

The employer informed the employee that there were no suitable positions for him at the employer, and thus he faced retrenchment. His severance package was calculated at R2,9 million. His retrenchment came into effect at the end of 2014, and he entered a new contract with Total Coal from 1 January 2015. His previous years of employment were not recognised in the new agreement.

The employee challenged his retrenchment on the grounds that it was substantively and procedurally unfair. At the CCMA, the employee's retrenchment was held to be substantively and procedurally fair.

The employee reviewed the award at the LC. The LC held in favour of the employee, and it noted that no joint consensus-seeking process took place wherein alternatives/means to avoid the dismissal were discussed. Thus, the retrenchment failed to comply with section 189 of the LRA. Maximum compensation was ordered.

The employer then appealed the matter to the LAC.

SUMMARY OF THE FINDINGS OF THE COURT

At the LAC, the employer argued that the LC erred in ordering the maximum compensation. It was argued that his severance package of R2,9 million should have influenced the value of the compensation awarded, as this was four times the severance payable in terms of the BCEA. On this basis, it was manifestly unfair not to consider the quantum of the severance package when the court awarded maximum compensation.

At the CCMA, the employee's retrenchment was held to be substantively and procedurally fair.

Retrenchment...*continued*

Compensation under LRA not intended to recompense dismissed employee for patrimonial loss, but for injury to dignity.

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The LAC held that compensation *"cannot be equated to the staunching of patrimonial loss suffered by an employee as a consequence of an unfair dismissal"*. Compensation constitutes a payment *in lieu* of an impairment of an employee's dignity. Thus, compensation is not equated to the amount awarded in respect of patrimonial loss suffered by an employee, but a monetary representation of the breach of the employee's rights.

It also held that the quantum of the severance pay may, depending on the facts, constitute a factor to be considered in the assessment of what constitutes *"just and equitable"* compensation in terms of section 194 of the LRA.

The LAC ultimately reduced the compensation to six months on the basis that the case did not involve the kind of egregious conduct by an employer which would justify a maximum award of compensation.

The principle from this case is that compensation in the hands of the employee cannot be equated to patrimonial loss but constitutes solatium for the indignity suffered due to unfair dismissal.

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Compensation constitutes a payment *in lieu* of an impairment of an employee's dignity.

DEFINITIONS

ABBREVIATION	FULL REFERENCE
BCEA	Basic Conditions of Employment Act 75 of 1997
BCEAA	Basic Conditions of Employment Amendment Act 7 of 2018
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CODE	The Code of Good Practice on the elimination of violence in the workplace
COIDA	Compensation for Occupational Injuries and Diseases Act 130 0f 1993
COVID-19	SARS CoV-2 Virus
Constitution	Constitution of the Republic of South Africa Act 108 of 1996
DOH	Department of Health
Department	Department of Employment and Labour
DMA	Disaster Management Act 57 of 2002
EEA	Employment Equity Act 55 of 1998
LAC	Labour Appeal Court
Labour Court Rules	Rules for the Conduct of Proceedings in the Labour Court
LC	Labour Court
Minister	Minister of Employment and Labour
OHSA	Occupational Health and Safety Act 85 of 1993
Prescription Act	Prescription Act 68 of 1969
POPI	Protection of Personal Information Act 4 of 2013
Regs	Regulations
SCA	Supreme Court of Appeal
SA	Republic of South Africa

MARKET RECOGNITION

Our Employment Law team is externally praised for its depth of resources, capabilities and experience.

Chambers Global 2014–2023 ranked our Employment Law practice in Band 2 for employment. *The Legal 500 EMEA 2020–2023* recommended the South African practice in Tier 1, and our Kenyan practice in Tier 3 for employment.

The way we support and interact with our clients attracts significant external recognition.

Aadil Patel is the Practice Head of the Employment Law team, and the Joint Sector Head of the Government & State-Owned Entities sector. *Chambers Global 2015–2023* ranked him in Band 2 for employment. *The Legal 500 EMEA 2021–2023* recommended Aadil as a leading individual for employment and recommended him from *2012–2020.*

The Legal 500 EMEA 2021–2023 recommended Anli Bezuidenhout for employment.

Jose Jorge is the Head of the Consumer Goods, Services & Retail sector, and a director in our Employment Law practice. *The Legal 500 EMEA 2020–2023* recommended Jose for employment.

Fiona Leppan is the Joint Head of the Mining & Minerals sector, and a director in our Employment Law practice. *Chambers Global 2018–2023* ranked her in Band 2 for employment. *The Legal 500 EMEA 2022–2023* recommend Fiona for mining. *The Legal 500 EMEA 2019–2023* recommended her as a leading individual for employment, and recommended her from *2012–2018.*

Chambers Global 2020–2023 ranked Gillian Lumb in Band 3 for employment. *The Legal 500 EMEA 2020–2023* recommended her for employment.

Chambers Global 2021–2023 ranked Imraan Mahomed in Band 2 for employment and in Band 3 from *2014–2020. The Legal 500 EMEA 2020–2023* recommended him for employment.

The Legal 500 EMEA 2023 recommended Phetheni Nkuna for employment.

The Legal 500 EMEA 2022 recommended Desmond Odhiambo for dispute resolution.

Hugo Pienaar is the Head of the Infrastructure, Logistics, and Transport sector, and a director in our Employment Law practice. *Chambers Global 2014–2023* ranked Hugo in Band 2 for employment. *The Legal 500 EMEA 2014–2023* recommended him for employment.

The Legal 500 EMEA 2023 recommended Thabang Rapuleng for employment.

The Legal 500 EMEA 2022–2023 recommended Njeri Wagacha for employment. *The Legal 500 EMEA 2023* recommends Njeri for corporate, commercial/M&A.

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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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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CLIFFE DEKKER HOFMEYR

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KIETI LAW LLP, KENYA