Case Law Summaries and Articles

2017

Provided by

WERKSMANS
ATTORNEYS

CONTACT

Labour & Employment Team
Johannesburg Office: +27 (0)11 535 8000
Cape Town Office: +27 (0)21 405 5100

Case Law Summaries and Articles 2017

(Labour Law)

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1) WHAT CONSTITUTES THE TRANSFER OF BUSINESS AS GOING CONCERN FOR THE PURPOSES OF SECTION 197?

ISSUE

Whether the Respondent's decision to terminate contracts with two security service providers and the decision to employ the majority of their employees constituted the transfer of business as going concern for the purposes of section 197 of the Labour Relations Act 66 of 1995 ("**LRA**")?

SUMMARY

Termination of a service agreement and subsequent insourcing does not on its own constitute a transfer of a business as a going concern. Several factors must be taken into account in determining whether the business was transferred as a going concern, including whether the new employer takes over employees, whether assets are transferred to the new employer and whether the new employer carries on the same business as the old employer.

COURT'S DECISION

In the case of *Imvula Quality Protection and Others v University of South Africa* (J435/17) [2017] ZALCJHB 310 (31 August 2017) the Labour Court ("**LC**") had to consider this issue. The University of South Africa (UNISA) decided to terminate its contracts with two security services providers ("**the Service Providers**") and partially insource this function. UNISA offered employment to some of the employees of the Service Providers.

The Service Providers contended that the termination of the agreements by UNISA and its offers of employment made to their staff constituted a transfer of a business as a going concern for the purpose of section 197 of the LRA. UNISA contended

that the nature of transaction was such that section 197 did not apply since there was no transfer of a business as a going concern.
The Labour Court noted that for section 197 to be triggered three requirements had to be met –

1. the existence of a transfer;
2. transfer of a business; and
3. the business is transferred as going concern.

Section 197 of the LRA defines "transfer" as "transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern. "Business" is defined as including "the whole or a part of a business, trade, undertaking or service".

Whether there was a transfer of a business as a going concern, the Labour Court held, is determined by several factors, including whether the new employer takes over employees, whether assets are transferred to the new employer and whether the new employer carries on the same business as the old employer.

The Labour Court held that "the termination of a service contract or the appointment of a new service provider does not in itself trigger the application of s197". Section 197 would be triggered when a service contract is terminated (either by insourcing or a change in service providers) and the business supplying the service is transferred from the old service provider back to the client or to the new service provider (as a going concern).
The Labour Court held that this was not the case in the present instance as the Service Providers had not proven that there was a transfer of a business. In reaching its decision the Labour Court noted that it was common cause that the insourcing exercise did not extend to UNISA taking over or otherwise assuming any responsibility for the full business bundle, including

infrastructure, assets, know how, technology and the like. The Labour Court noted that the Service Providers retained all of the other components that go to make up their businesses. They would be free to offer their services to other clients, and to deploy those employees not engaged by UNISA on other sites.

Accordingly the Service Providers' application was dismissed.

IMPORTANCE OF THIS CASE

Section 197 of the LRA provides that if a transfer of a business takes place, the new employer will be "automatically substituted for the old employer in respect of all contracts of employment in existence immediately before the date of transfer".

However, for section 197 to be triggered, three elements must be present, simultaneously. First, there must be a transfer by one employer to another. Secondly, the transferred entity must be a business. Thirdly, the business must be transferred as a going concern.

The termination of a service contract with a service provider and subsequent insourcing of employees does not necessarily mean that such a transaction will fall within the scope of section 197. The circumstances of what and who is insourced will determine whether the client is obliged, in terms of section 197, to take transfer of the employees formerly associated with the provision of those services

By: Jacques van Wyk, Director, Brittany Feldman, Associate and Unathi Jukuda, Candidate Attorney

2) DISMISSING EMPLOYEES WHO EMBARK ON AN UNPROTECTED STRIKE

ISSUE

Whether employees who embark on unprotected strike action may be dismissed for commencing with a strike after being warned by their employer that the strike was unprotected and they would face disciplinary action for doing so.

SUMMARY

Employees who participate in an unprotected strike may be disciplined for doing so. However, this must be done in a fair and consistent manner. Employees who have previously been disciplined for unlawful industrial action may not necessarily be dismissed for subsequently engaging in unlawful industrial action if the subsequent action is "materially different" from the previous action.

COURT'S DECISION

In *SACCAWU obo Mokebe and Others v Pick 'n Pay Retailers (JA36/16) [2017] ZALAC 55 (26 September 2017)*, Pick 'n Pay ("the Employer") and SACCAWU, the trade union representing the employees, were engaged in wage negotiations on a national level. Following a breakdown in negotiations, SACCAWU issued a strike notice informing the Employer that a protected strike would commence at 19h00 on 24 September 2010.

On 24 September, the employees at the Employer's Woodmead store commenced their strike early, at 15h00. Accordingly their strike action was unprotected. The Woodmead employees had been told by their shop steward that the strike would start at 15h00. A delay in SACCAWU giving the Employer the strike notice meant that the strike would only be protected from 19h00,

being 48 hours from the time the strike notice was actually given to the Employer. SACCAWU's attempt to communicate the delayed start time to the Woodmead employees was unsuccessful. The store's management warned the Woodmead employees that the strike could only commence at 19h00 but the employees said they had been told by SACCAWU that there would not be any consequences for them if they commenced the strike at 15h00.

The Woodmead employees commenced their strike at 15h00. These employees were subsequently dismissed by the Employer for embarking on an unprotected strike.

The Labour Appeal Court ("LAC") held that the employees' dismissals were substantively and procedurally unfair. The Employer argued that the employees, who were already on a final written warning for similar prior misconduct, deliberately defied management's instructions to return to work and showed no remorse for their misconduct. The LAC however found that the employees did not deliberately defy management as they believed they were entitled to strike. The LAC took into account the following –

1. management did not issue the employees with an ultimatum;
2. management did not provide the employees with individual hearings as it had agreed to do; and
3. the Employer had been inconsistent in how it dealt with industrial action.

In regards to the third point, the LAC found that the previous action for which the employees were given final written warnings was substantially different from the action for which they were dismissed. It was therefore unfair to impose "the next level of discipline", i.e. dismissal, for the subsequent offence of a different nature. Furthermore, employees at other stores who also

participated in the unprotected strike whilst on previous warnings for industrial action were not dismissed but were issued written warnings.

Consequently, the LAC found the dismissals to be substantively and procedurally unfair.

IMPORTANCE OF THIS CASE

Employers must be consistent when applying company policies and discipline. Employers must adhere to the Code of Good Practice: Dismissals and adhere to the requirement of clause 3(6) which states –

The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.

By: Jacques van Wyk, Director, Brittany Feldman, Associate and Unathi Jukuda, Candidate Attorney

3) THE EMPLOYER'S OBLIGATION TO PREVENT DISCRIMINATORY PRACTICES IN THE WORKPLACE

ISSUE

Whether an employer can be held vicariously liable for failing to take sufficient steps to eliminate unfair discrimination by a group of employees against a fellow employee.

SUMMARY

COURT'S DECISION

In the case of *Biggar v City of Johannesburg (Emergency Management Services) (2017)* the Labour Court ("LC") had to consider this issue.

Mr Victor Biggar (the "Applicant") was employed as a Fire Fighter Emergency Medical Technician ("EMT") by the City of Johannesburg: Emergency Management Services ("Respondent") at Brixton Fire Station ("Brixton"). The Applicant commenced his employment with the Respondent in the year 2000. Throughout his employment he was stationed at Brixton. The Applicant was the first black person to be employed at Brixton as a Fire Fighter and resided in the housing apartments provided by the Respondent together with his family. The Applicant complained of racial abuse from his colleagues. Over the period 2000 to 2008 the Applicant and his family had been subjected to numerous acts of racism by, primarily, three of the Respondent's white colleagues.

The Applicant's children were not allowed to swim in the communal pool or play soccer in the residential complex provided by the Respondent. They were subjected to various forms of racial abuse. The Applicant's son, for instance, was called a k***r and his wife was called a b**ch. The use of the

word K***r was prevalent at Brixton. The Applicant and his family felt belittled and humiliated. The animosity between the Applicant, his family, and his white colleagues, and their family, escalated resulting in numerous fights between them and an attempted murder charge being laid against the Applicant (the Applicant was subsequently cleared of this charge). While the Applicant was charged by the Respondent for this incident, his colleagues were not.

Despite making numerous complaints with the relevant members of the Respondent (no formal grievance was ever laid), the Respondent failed to take steps aimed at sanctioning the perpetrators concerned or preventing further incidents of racism. The Applicant, in frustration, went so far as to report the discrimination he experienced to the media and the Human Rights Commission. The Applicant subsequently resigned on 12 June 2012 and pursued an unfair discrimination claim against the Respondent. He sought compensation.

FINDINGS

In deciding the matter, the LC noted that the employer had an obligation to eliminate unfair discrimination at work. The LC had regard to following relevant provisions of the Employment Equity Act 55 of 1998 ("EEA"):

Section 5 of the EEA provides that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.
Section 6 of the EEA provides that –

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race.

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).
Section 60 of the EEA provides –

(1) If it is alleged that an employee, while at work, contravened any provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this act, the alleged conduct must immediately be brought to the attention of the employer.

(2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.

(3) If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened the provision.

(4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that he did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.

In *President of the Republic of South Africa and another v Hugo* [1998] JOL 1543 (CC) the Constitutional Court contextualised the rationale for the prohibition of unfair discrimination as follows –

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply

inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.

In reaching its decision the LC noted that in this particular case racial abuse and harassment took place over a period of seven years. The Applicant testified that he felt belittled and humiliated by the racist manner in which his white colleagues treated him and his family. The Respondent, on the other hand, resorted to technicalities, instead of firmly dealing with the acts of racism perpetrated against the Applicant and his family.

While the Applicant's supervisor had taken some steps to address the Applicant's complaint the Respondent persisted in its stance that there was no racial discrimination. The Court, therefore, held that the Respondent had taken insufficient steps to prevent such discrimination from continuing. What was required was for the Respondent to act in a decisive manner that would have reflected a clear intention to eliminate any form of discrimination (for instance, by instituting disciplinary action against the perpetrators of the discrimination). This it had failed to do.

Accordingly, the LC found in favour of the Applicant and held that the Respondent unfairly discriminated against the Applicant on the ground of race. The Respondent was ordered to pay the Applicant an amount equivalent to 12 months' remuneration, calculated at the rate of his remuneration at the time of his resignation.

IMPORTANCE OF THE CASE

This case sounds a caution to employers to be proactive when addressing discrimination within the workplace. Failure to do so could result in significant liability being incurred.

By: Andre Van Heerden, Senior Associate; Jacques van Wyk, Director and Unathi Jukuda, Candidate Attorney

4) CV'S AND THE IMPORTANCE OF HONESTY

ISSUE

Whether an employee may be dismissed for misrepresenting his qualifications in his curriculum vitae ("CV").

SUMMARY

COURT'S DECISION

This issue was considered in the case of *LTE Consulting (Pty) Ltd v Commission for Conciliation, Meditation and Arbitration and Others* (JR1289/14) [2017] ZALCJHB 291 (8 August 2017).

LTE Consulting Proprietary Limited ("LTE") appointed Mr Lourens Francois Theron (the "Employee") as its financial manager on 1 December 2009. At the time of his appointment he disclosed in his CV that he was a chartered account and possessed a B.Com degree and an MBA from Wits University. The Employee's CV was before the panel who interviewed him for the position. At the time of his appointment the Employee was about to turn 82 years old. He was, as a result, well past LTE's official retirement age of 65.

Some four years later, there was an attempt to employ the Employee on a fixed term contract as an assistant company secretary. This offer was refused by the Employee. It was at this time that it was discovered that there was no copy of the Employee's B.Com degree, chartered accountant qualification or MBA on record. While LTE's human resources department had requested this information from the Employee, it had yet to be supplied.

Following an investigation it was determined that the Employee was not, in fact, a chartered accountant; nor did he possess a

B.Com or MBA degree. Following a disciplinary enquiry, he was dismissed for gross dishonesty on 20 January 2014.

The Employee, feeling aggrieved by his dismissal, referred a dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA"). The Employee, while admitting he did not have the necessary qualifications, disputed that being a chartered accountant was an express requirement for the job. In any event, so he contended, he had equivalent qualifications and 'prior learning' justifying his appointment.

The presiding Commissioner held that the Employee's dismissal had been substantively unfair and ordered that LTE pay the Employee compensation in excess of R300 000. It appears that the Commissioner reached this decision for the following reasons –

- The Employee's dismissal was a sham designed to, in effect, secure his retirement;
- The Employee's misrepresentations about his qualifications were not material in securing the position of financial manager;
- In any event, the Employee had equivalent qualifications; and
- An assessment of factors in mitigation/aggravation demonstrated that the sanction of dismissal was inappropriate.

LTE took the CCMA decision on review to the Labour Court.

FINDINGS

During the course of the review, the Employee contended, among others, that (a) he was not technically guilty of the charge of misconduct because LTE had not established that he was not 'qualified' to be a chartered accountant and because he had never

confirmed same during his interview and (b) even if he had misrepresented that he was a chartered accountant this was immaterial to his appointment.

The Court held that these assertions lacked merit. In so far as the first point was concerned, by relying on his CV during the interview process the employee had confirmed that he was a chartered accountant. In so far as the second point was concerned, the Court found that being a chartered accountant was a material requirement for the job. Even if it was not, it did not discount the Employee's dishonesty in claiming qualifications he did not possess.

The Court similarly dismissed the Commissioner's reasoning holding that the finding that the dismissal was a sham was unsupported. In addition, the finding that the misrepresentation was immaterial was unreasonable. Even if the Employee possessed equivalent qualifications (which he did not) it would miss the point that he was dishonest about the qualifications he indicated he did possess.

In reviewing the decision, and finding that the Employee's dismissal was substantively fair, the Court had regard to three decisions that fortified its position.

THE DECISIONS, AND THEIR RELEVANT FINDINGS, ARE AS FOLLOWS:

In the decision of *SA Post Office Ltd v Commission for Conciliation, Mediation and Arbitration & Others* (2011) 32 ILJ 2442 (LC) the Labour Court held that –

to place an employee who was guilty of dishonesty back in her position where honesty and integrity are paramount to the execution of duties, is to my mind grossly unreasonable, but more importantly, it cannot be right and proper to reinstate or re-

employ a person in a position that was secured by the making of false statements.

In the decision of *Department of Home Affairs and another v Ndlovu & others* (2014) 35 ILJ 3340 (LAC) the Court held that:

the fact that the misrepresentation in the CV might very well not have induced the first respondent's [employee's] appointment to the post most certainly does not detract from the fact of the first respondent's initial dishonesty. The dishonesty as contained within the CV is ultimately what underpins the first respondent's dismissal.

Finally, in the recent decision of *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO & others* (2017) 38 ILJ 881 (LAC), which concerned a security guard failing to disclose that he had a criminal record some 14 years ago at the time of his appointment, the Court held that *"the false misrepresentation made by the third respondent [employee] was blatantly dishonest in circumstances in which the appellant is entitled as an operational imperative to rely on honesty and full disclosure by its potential employees."*

IMPORTANCE OF THE CASE

This case usefully highlights and summarises the pitfalls for employees should they elect to be dishonest in their CV's. Employees who do so and are outed face the possibility that they will be dismissed for dishonesty.

By: Andre Van Heerden, Senior Associate; Jacques van Wyk, Director and Unathi Jukuda, Candidate Attorney

5) THE PITFALLS OF RESIGNATION

ISSUE

If an employee resigns, then decides to retract her resignation but her employer refuses to allow her to do so, has the employer, in so doing, dismissed the employee?

SUMMARY

COURT'S DECISION

In the case of *Bawsi Agricultural Workers Union of South Africa obo Hansen/Standard Bank of South Africa Ltd (2017) 26 CCMA 7.1.7* the Commission for Conciliation, Mediation and Arbitration ("CCMA") had to consider this issue.

Najwa Hansen (the "employee") was employed as a Customer Care Officer by the Standard Bank of South Africa Ltd ("employer"). The employee's main place of work was the Epping Industria Branch. However, in order to supplement her income, the employee would often work on Sunday at the employer's Promenade Branch. This was acceptable up until January 2016 because both branches belonged in the same cluster.

However, due to a restructuring exercise these two branches no longer formed part of the same cluster. The employee was then instructed not to work on Sunday's at the Promenade Branch. Despite this the employee continued working at the Promenade Branch on Sundays.

When the employer discovered this, it instituted disciplinary proceedings against the employee, at which point the employee elected to resign with immediate effect. Upon tendering her resignation the employer refused to accept her *immediate*

resignation noting that she was required to work out her notice period. The employee proceeded to work out her notice period. She also elected to participate in the disciplinary enquiry. The chairperson of the disciplinary enquiry found the employee not guilty of the charges brought against her. The employer then advised the employee that her notice period of thirty days would expire the following day. In response, the employee sought to retract her resignation, which retraction was rejected by the employer.

The employee referred an unfair dismissal dispute to the CCMA, arguing that the employer did not accept her immediate resignation (ie by requiring her to work out the notice period) and that in the circumstances she had been unfairly dismissed. The Commissioner was called upon to decide whether an unfair dismissal had indeed occurred.

FINDINGS

The Commissioner noted that the only factual dispute between the parties was whether the employer had accepted the resignation, but subject to the condition that a 30 day notice period would apply.

The Commissioner relied on the decision of ***African National Congress v Municipal Manager, George Local Municipality and others*** [2010] 3 BLLR 221 (SCA) wherein it was held that "resignation must be effective immediately or from a specified date, and being a unilateral legal act, it does not need to be accepted by the intended recipient to be effected."
When the employee tendered her resignation it did not matter that the employer sought to place a condition on the resignation, or whether it accepted the resignation or not at all. Resignation is a unilateral act. The employee could have resigned immediately, left the employer's premises and faced the consequence of the employer trying to recover an amount equivalent to her notice

pay. Rather, the employee worked out her notice period. This, however, did not mean that her resignation was no longer effective, it simply meant it would come into effect at the end of the notice period.

In so far as the employee's attempt to retract her resignation is concerned, the Commissioner had regard to the case of ***Lottering and others v Stellenbosch Municipality*** (2010) 31 ILJ 2923 (LC) [also reported at [2010] 12 BLLR 1306 (LC) – Ed], wherein it was held that the withdrawal of resignation cannot have any effect unless the employer consents to such withdrawal.

The Commissioner therefore found that no dismissal had taken place and that the Applicant had no claim as a result.

IMPORTANCE

This case is a caution to employees who wish to tender their resignation. Once the resignation has been tendered the employee's employment will terminate. Should the employee wish to retract their resignation the employer will have to consent.

By Jacques van Wyk, Director, Andre van Heerden, Senior Associate and Unathi Jukuda, Candidate Attorney

6) DISMISSAL FOR POOR WORK PERFORMANCE: THE IMPORTANCE OF SETTING REALISTIC TARGETS AND PROVIDING ASSISTANCE IN THE ACHIEVEMENT OF SUCH TARGETS

ISSUE(S)

The importance of setting realistic targets for employees and providing the employees with resources to reach such targets.

SUMMARY

COURT'S DECISION

In the matter of *Damelin (Pty) Ltd v Solidarity obo Parkinson and others (2017) 26 LAC 8.1.1* the Court had to deal with these issues.

Mr Steve W Parkinson ("employee") was employed as the general manager of Damelin's ("employer") Boksburg campus. He commenced his employment on 3 January 2011. The employer is a company operating in the tertiary education sector and has a number of campuses throughout the Republic of South Africa. The employee's employment contract contained a clause that stipulated that performance goals determined by the employer must be periodically evaluated and that continued non-attainment of performance goals may result in the termination of employment.

The employee was given a target to enrol a specified number of first year students for the year 2012. The Employee queried the above target on the basis that it was based on unrealistic numbers and that by implication the targets were unrealistic / unachievable. The targets were unrealistic in part due to unrealistic calculations and in part due to a narrowing of the

'catchment area' for students arising out of the nearby opening of a campus in Benoni.

Nevertheless, the employer proceeded to issue several threats complaining about the employee's failure to enrol sufficient students for the Boksburg campus. On 25 January 2012 the employer issued a letter to the employee registering its dissatisfaction. The letter cautioned that if the employee's performance did not improve, a disciplinary hearing would be convened against him and his leave would be cancelled. The employee did not reach his targets.

The employee was summoned to a disciplinary hearing and dismissed for poor work performance. The employee then referred an unfair dismissal dispute to the CCMA. The Commissioner found in favour of the employer, upholding the employee's dismissal. The employee sought to review the decision before Labour Court ("LC"). The LC noted that it was incumbent on the employer to prove that the dismissal was substantively and procedurally fair. The LC reviewed the decision of the Commissioner (ie found the Employee's dismissal was unfair). The employer appealed to the Labour Appeal Court ("LAC").

LAC'S DECISION

In deciding the matter, the LAC noted that the employer has the obligation to prove that the employee's dismissal was substantively and procedurally fair. In deciding whether this obligation had been met regard must be had to the applicable provisions of the Labour Relations Act 66 of 1995 ("LRA") as well as the Code of Good Practice: Dismissal ("Dismissal"). The relevant provisions of the Code include the following:

"Any person determining whether a dismissal for poor work performance is unfair should consider –

(a) whether or not the employee failed to meet a performance standard; and
(b) if the employee did not meet a required performance standard whether or not –

(i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
(ii) the employee was given a fair opportunity to meet the required performance standard; and
(iii) dismissal was an appropriate sanction for not meeting the required performance standard."

The LAC noted that whether the employee was given a fair opportunity to meet the standard required depended to a great extent on whether the target was achievable. The employer claimed it was, stating that the fault lay with the employee who was putting insufficient effort into achieving the result required. The employee, in turn, claimed that the target was unachievable.

Having regard to the above, as well as the facts of the matter, the LAC agreed with the LC and held that accepting that the letter date 25 January 2012 constituted a final warning, the period of some 27 days within which to achieve the reduced target set in the letter, given all that preceded it and taking into account that it was not achieved even with assistance afforded by the employer's head office indicated that either the period was too short or that the target was incapable of being achieved. The employer is expected to provide the employee with resources to attain set targets. This it did not do.

IMPORTANCE OF THIS CASE

This case highlights the importance of an employer setting reasonable and achievable deliverables as well as the obligations placed on an employer to assist an employee in reaching established targets.

By Jacques van Wyk, Director, Andre van Heerden, Senior Associate and Unathi Jukuda, Candidate Attorney

7) ENFORCEABILITY OF MEDICAL TESTING AS A CLAUSE IN AN EMPLOYMENT CONTRACT

Pharmaco Distribution (Pty) Ltd v Weideman (JA104/2015) [2017] ZALCJHB 258 (4 July 2017)

ISSUE

Whether an employer can rely on a clause in an employee's contract of employment in terms of which the employee agrees to undergo medical testing when required by the employer to insist that the employee such undergo medical testing.

Whether the dismissal of the employee for failing to submit to a medical examination in such circumstances is automatically unfair in terms of section 187 (1) (f) of Labour Relations Act 66 of 1995 (as amended) (" the LRA").

FACTS AND COURT'S DECISION

On 1 July 2008, Lize Elizabeth Weideman ("the employee") was employed on a fixed term contract as a pharmacy sales representative by Pharmaco Distribution (PTY) Ltd ("the employer"). The employee suffered from bipolar disorder but the condition did not affect her work performance. The employer regarded the employee as an exceptional worker and subsequently offered the employee permanent employment. During January to October 2009 the employee raised various queries and raised a number of grievances in relation to the calculation and late payment of commission due to her. The employer dismissed the employee's grievances but charged her with insolent and insulting behaviour, wilful refusal to carry out a lawful instruction or to perform her duties, intimidation of fellow employees and damaging the reputation of the employer.

A disciplinary enquiry was held and the employee was found guilty as charged and issued with a final written warning. The employee appealed against the finding and sanction but the employer failed to consider the appeal. Instead, on 20 November 2009, the employer summoned the employee to its head office and suspended her with immediate effect. The employer issued a letter to the employee instructing her to attend a medical examination by a psychiatrist on 24 November 2009. The employer further warned her that failure to attend or attendance coupled with sabotage of the examination would constitute a serious offence and would be dealt with as a disciplinary infraction.

The employer, in issuing this instruction, relied on a clause in the employee's employment contract which provided that the employer could require the employee to undergo medical testing.

It emerged that the employer had never instructed any of its other sales staff to undergo medical testing before. The employee, objected to the employer's instruction claiming it amounted to victimisation and was in response to the grievances she had raised. She also requested the employer to withdraw the demand, failing which she would launch an application to the Labour Court to force the employer to do so.

The employer refused to withdraw the demand.

On 24 November 2009, the employee brought an urgent application in the Labour Court in which she sought an order setting aside her suspension and interdicting the employer from instructing her to attend the medical examination. The application was dismissed. The employee failed to attend the medical examination on 24 November 2009. The employer charged the employee with misconduct, proceeded with a disciplinary enquiry on 2 December 2009, found the employee guilty and dismissed her.

The employee disputed the fairness of her dismissal and referred a dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") and eventually to the Labour Court.

RELEVANT STATUTORY PROVISIONS

Section 7(1) of Employment Equity Act 55 of 1998 (as amended) ("the EEA"), provides that "medical testing of an employee is prohibited unless –

- Legislation permits or requires the testing or
- It is justifiable in light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job".

The Labour Court held that the ostensible purpose of the medical examination was not to establish whether the employee suffered from an unknown disease that was affecting her ability to work. On the contrary, the employee's condition was known to the employer and it was common cause that her work performance was not affected. In the circumstances the employer had failed to prove that the instruction was not prohibited.

Accordingly, the Court found that the clause in the employment contract which required medical testing was not justifiable in terms of the prohibitions in section 7 of the EEA.

The employer appealed against the Court's judgment. The Labour Appeal Court dismissed the employer's appeal and determined, in addition, that consent was not a justification as contemplated by section 7 of the EEA and this contention had therefore correctly been rejected by the Labour Court.

Section 187(1)(f) of the LRA deals with automatically unfair dismissals and provides that a "*dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to*

section 5 or, if the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility."

The Labour Court awarded the employee compensation of 12 months' salary and a further award of R15 000 as damages for the unfair discrimination committed against her in terms of section 6 of the EEA. The Labour Appeal Court held that the employee was entitled to 24 months compensation.

IMPORTANCE

Firstly, this case highlights that contractual provisions that seek to introduce medical testing must comply with section 7(1) of EEA.

Secondly, consent is not one of the exceptions contained section 7(1) of the EEA. Therefore, reliance on consent by an employer will not serve as a justification for medical testing in terms of section 7(1).

By Jacques van Wyk, Director and Andre van Heerden, Senior Associate

8) HIGHER QUALIFICATIONS NOT AN AUTOMATIC REASON VALIDATING DIFFERENTIAL PAY BETWEEN EMPLOYEES

ISSUE

Whether the employer had unfairly discriminated against farm-supervisors by grading and paying them less than farm-foremen who performed the same work but who had different academic qualifications.

SUMMARY

COMMISSION'S DECISION

In the matter of *National Education Health and Allied Workers Union obo Sinxo and Others versus Agricultural Research Council 2017 CCMA (26 January 2017)*, the Commission for Conciliation, Mediation and Arbitration ("Commission") had to decide whether farm-supervisors, who were being paid less than farm-foremen, were being unfairly discriminated against in terms of the provisions of the Employment Equity Act 55 of 1998 ("EEA").

Five farm-supervisors were employed by the Agricultural Research Council for a considerable period. A dispute arose after it emerged that the farm-supervisors were being paid significantly less than the Agricultural Research Council's farm-foremen.

Due to an organisational design process farm foremen were subsequently, and after the farm-supervisors had already been employed for a number of years, given a global grade (GG) of nine, which required a tertiary qualification, and farm-supervisors a GG of seven, which required a grade 12

qualification. The Applicants were kept at a GG of five because they not possess a grade twelve qualification.
The farm-supervisors contended that they performed the same work as farm-foremen. They had therefore been discriminated against. In response the employer contended that farm-supervisors could not have been discriminated against because the duties and responsibilities of the two positions were different and the two positions required different qualifications.

COMMISSION'S DECISION

In determining whether the farm-supervisors had been discriminated against the Commission had regard to the provisions of the EEA as well as its regulations.

Section 6(4) of EEA provides that:

"A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination."

Section 6(1) of the EEA, in turn, provides that:

"No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground."

In addition, the regulations to the EEA governing equal work for equal pay, issued on 1 August 2014, describe the criteria and methodology for assessing work of equal value as contemplated

by section 6(4) of the EEA. It provides that a case must be made as to whether work is of equal value, whether there is a difference in terms and conditions of employment, including remuneration, and, if so, whether the difference amounts in unfair discrimination. The regulations must be read in conjunction with section 11 of the EEA.

Section 11 of EEA deals with burden of proof and provides that:

(1) if unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination –

- did not take place as alleged or;
- Is rational and not unfair, or is otherwise justifiable.

(2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that –

- the conduct complained of is not rational;
- the conduct complained of amounts to discrimination; and
- the discrimination is unfair.

Taking the above into account the Commission held that in substance the work performed by the two positions was the same, or substantially the same. This finding was based, particularly, on the positions as they stood at the time of the hearing of the matter. The question then was whether the difference in remuneration was based on fair and rational criteria. The Commission found, in this regard, that although regulation 7 expressly recognizes that qualifications can be a valid basis for differentiation in remuneration it does not automatically make differentiation on such a ground rational and fair.

Rather, what is required is a proportionate analysis in which no one single factor should be given undue weight. Given that the farm-supervisors had actually been performing the work for a number of years, the introduction of the requirement of a qualification may be justified for new entrants into employment but not the farm-supervisors. The Commission found that there was no question that by grading and remunerating the farm-supervisors at a lower level purely because of their academic qualifications impugned their dignity.

Accordingly the Agricultural Research Council was ordered to appoint the five farm-supervisors on the midpoint of GG 7 with effect from the date of the award.

IMPORTANCE OF THIS CASE

This decision highlights the importance of a thorough and careful analysis of payment practices within an enterprise. There must be a valid and rational reason for the differentiation in remuneration where employees are paid different salaries and perform the same or similar work. It may be insufficient to simply rely on one of the justifications provided for in the Regulations where it would be inappropriate in the particular circumstances.

By: **Andre Van Heerden, Senior Associate; Jacques van Wyk, Director**

9) THE VALIDITY OF AUTOMATIC TERMINATION CLAUSES IN CONTRACTS OF EMPLOYMENT

ISSUE(S)

Whether the employee was unfairly dismissed after his appointment letter was automatically terminated because of a provision stating that his offer of employment was conditional on a positive outcome of a vetting process.

SUMMARY

COURT'S DECISION

In the case of *Nogcantsi v Mnquma Local Municipality and others (2017) 26 LAC 8.34.3* the Court had to, among others, consider whether an employee had been unfairly dismissed when his letter of appointment was terminated because he failed to meet a condition contained therein. The letter stated that the offer of employment was conditional upon a positive outcome from a vetting exercise of the employee which was to be conducted after he accepted the offer of employment.

In this case, the employee, after completing an interview with the Mnquma Local Municipality (the "Municipality"), Mr Nogcantsi ("the employee") was handed a written offer of employment which he accepted. The employee was appointed to the position of a 'protection officer' for a fixed period of three years. Clause 1.1 of the employment agreement stated, however, that the offer of employment was subject to a "vetting and screening process" having been completed by the Municipality. If the outcome of the vetting process was negative, the contract of employment would be terminated automatically.

The vetting process delivered a negative result, in particular, negative feedback from the South African Police Services

("SAPS") and the employee's previous employer. The feedback suggested that the employee was deceptive. As a result of the feedback the employment agreement was terminated. The employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA") and, thereafter, the Labour Court. He was unsuccessful in both forums. He then appealed to the Labour Appeal Court.

In the Labour Appeal Court the employee contended that his dismissal was unfair because the contract of employment allowed the Municipality to by-pass the protection provided for in the Labour Relations Act 66 of 1995 ("LRA") by allowing for an automatic termination. He alleged that therefore, the contract was unlawful as it attempted to contract out of the provisions and protection of the LRA.

The Labour Appeal Court dismissed the employee's claim. It rejected his arguments that the Municipality was attempting to contract out of the LRA because the 'trigger' event for the automatic termination of the offer was not the employee's conduct but rather that of a third party. It arose out of the outcome of a vetting process which relied on the provision of information from external parties; in this instance the SAPS. The vetting process was not in the hands or control of the Municipality.

This is different to the situation, for instance, where an employment contract has a provision stating that the termination of an employee's directorship will automatically result in the termination of his employment. This is because the termination of the employee's directorship is something within the control of the employer. An employer who terminates an employee's directorship in such circumstances inadvertently terminates his employment as well. The Labour Appeal Court therefore held that this conditional contract was a commercial reality and was not in conflict with the LRA.

IMPORTANCE OF THIS CASE

The use of automatic termination provisions may be permissible in certain limited circumstances.

By: Andre Van Heerden, Senior Associate; Jacques van Wyk, Director

10) THE BINDING NATURE OF COLLECTIVE AGREEMENTS ON MINORITY UNIONS

ISSUE(S)

Whether a collective agreement concluded between a majority union and an employer, but extended to a minority union, can prevent the minority union from engaging in strike action.
Whether a certificate of outcome, issued by the Commission for Conciliation, Mediation and Arbitration ("CCMA"), is determinative of whether the issue in dispute is or is not capable of being the subject matter of a strike.

SUMMARY

COURT'S DECISION

In the case of *South African Airway (Soc) Ltd v South African Cabin Crew Association and Others (J949/17) 2017 ZALCJHB (10 May 2017)* the Court had to consider the above issues.
South African Airways ("SAA") regulates collective bargaining on an internal central level. To this end a Main Bargaining Forum Constitution ("Constitution") was concluded between SAA and all representative trade unions. The Constitution created a Main Bargaining Forum ("MBF") and a Main Consultation Forum ("MCF"). The MBF dealt with 'substantive issues' whereas the MCF dealt with 'operational issues' (i.e. issues that are, among others, not considered substantive issues or matters of mutual interest).

The term 'substantives issues' was defined in the Constitution as meaning "any matter of mutual interest or any issue relating to employees' terms and conditions of employment or any substantive agreement concluded between SAA and the trade unions or any other issues with financial implications not covered by the employees' contracts of employment."

The recognised trade unions included the National Transport Movement ("NTM"), United Association of South Africa ("UASA"), South African Transport and Allied Workers Union ("SATAWU") and the South African Cabin Crew Association ("SACCA"). The National Union of Metalworkers ("NUMSA"), while not a recognised union, is also involved in SAA.
NUMSA and UASA, acting together, concluded a wage agreement with SAA in the NBF. This wage agreement was a collective agreement for the purposes of the Labour Relations Act 66 of 1995 ("LRA"). The wage agreement was extended, in terms of section 23(1) (d) of the LRA, to the other unions, including SACCA. The wage agreement was applicable from 1 April 2016 to 31 March 2017.

The wage agreement stipulated that "meal issues are an operational cost intended to provide sustenance to employees on official business and it therefore does not constitute a term and condition of employment." As such, 'meal allowance' was to be dealt with in the MCF and not NBF.

The issue of an increase to international meal allowances subsequently became an issue of contention between SAA and SACCA. SACCA approached the CCMA, on 10 June 2016, for a determination as to whether, among others, the collective agreement had been validly extended to it and, if so, whether the wage agreement resolved the conditions of employment dispute between SAA and SACCA. The CCMA agreed that it had. On 14 September 2016 SACCA then referred a refusal to bargain / mutual interest dispute to the CCMA.SAA countered by referring, on the same day, a dispute about the interpretation / application of the wage agreement. The disputes were consolidated. The consolidated dispute was subsequently resolved on the basis that the parties would engage on 'objective discussions' regarding the refusal to increase the international meal allowances. After discussions with SAA proved unfruitful SACCA referred a new mutual interest dispute to the CCMA

regarding an increase to meal allowances. The CCMA issued a certificate of non-resolution declaring the dispute unresolved and that 'strike action was competent.'

On the 26 April 2017 a number of cabin crew, being members of SACCA, ("strikers") commenced strike action after having given notice of same to SAA on 21 April 2017. At this juncture SACCA had complied with the *procedural* requirements to declare a lawful strike as set out in section 64 of the LRA.

In response SAA approached the Labour Court on an urgent basis seeking an interim order that the strike be declared unlawful. The urgent application was unopposed. The order was granted. On 3 May 2017 the Labour Court was concerned with whether the interim order should be confirmed (i.e. made a final order).

By: Andre Van Heerden, Senior Associate; Jacques van Wyk, Director

11) SEXUAL HARASSMENT: EMPLOYERS BEWARE

ISSUE(S)

In what circumstances an employer may be held liable for sexual harassment committed by one of its employees in terms of the Employment Equity Act 55 of 1998 ("EEA").

COURT'S DECISION

In the case of *Liberty Group limited v Margaret Masango* (07 March 2017) the Labour Appeal Court had to determine whether the employer, Liberty Group Limited ("Liberty") should have been held liable for sexual harassment committed by one of its employees. This required a determination of, among others, the legal provisions of section 60 of the EEA.

The facts of the matter are briefly as follows. Ms Margaret Masango ("Masango") was employed as an insurance clerk by Liberty. She lodged a complaint that she had been subjected to sexual harassment by her manager, Mr Andrew Mosesi ("Mosesi"). She alleged that she had been harassed on no less than four separate occasions. Her allegations in this regard were reported to Mr. Haines ("Haines"). Ultimately and despite Haines making the allegations known to Liberty's human resource consultant no action was taken against Mosesi.

As a result Masango tendered her resignation on 28 September 2009. Upon learning of her resignation Ms Nyathi ("Nyathi"), Masango's team leader, contacted her. She was sympathetic to Masango's plight and asked her not to resign so that the matter could be dealt with. Msanago agreed to do so. However, in the following two weeks no steps were taken by Liberty to investigate Masango's complaint of sexual harassment. She then tendered a second resignation on 13 October 2016 and, one week later, referred a dispute to the Commission for Conciliation

Mediation and Arbitration ("CCMA"). It was only after the second resignation letter, and on 26 October 2016, that Mosesi was suspended. Upon the matter being unsuccessfully resolved at the CCMA Masango approached the Labour Court.

Section 6(3) of the EEA provides that "harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in" section 6(1). Item 4 of the Code of Amended Good Practice on the Handling of Sexual Harassment Cases ("Code") establishes the following test for the determination of sexual harassment:

"…unwelcome conduct of a sexual nature that violated the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:

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

The Labour Court found in Masango's favour holding that she had indeed been sexually harassed. The Labour Court also found that Liberty was made aware of the sexual harassment before she had resigned and failed to take the necessary steps at such time. As a result Liberty was held to be liable in terms of section 60 of the EEA. Section 60 of the EEA provides for an employer to be held liable for the misconduct of an employee in certain circumstances. The section provides as follows;

(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention

of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.
(2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.
(3) If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.
(4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.

The Labour Court found that Liberty had failed to take reasonable steps in terms of section 60 of the EEA to protect Masango upon becoming aware of her complaint. Rather, Liberty only took the necessary steps after Masango has tendered her second resignation. As a result, the Court found that Liberty had failed to protect Msanago as required by section 60.

Liberty appealed against the Labour Court's judgement. Liberty alleged, among a number of other grounds of appeal, that the Labour Court misdirected itself by finding that it, Liberty, had failed to take the necessary steps set out in section 60(2) of the EEA. Liberty argued further that the Labour Court had misdirected itself by failing to find that the Liberty did all that was reasonably practicable to ensure that Mosesi, as its employee, would not act in contravention of the EEA.
In setting out the legal principles applicable, the Labour Appeal Court referred to the decision of *Potgieter v National Commissioner of the SA Police Service and Another* (2009) 30 ILJ 1322 (LC) where the Labour Court set out the requirement for employer liability. They are as follows:

(a) The sexual harassment conduct complained of was committed by another employee;
(b) It was sexual harassment constituting unfair discrimination;
(c) The sexual harassment took place at the workplace;
(d) The alleged sexual harassment was immediately brought to the attention of the employer;
(e) The employer was aware of the incident of sexual harassment;
(f) The employer failed to consult all relevant parties, or take the necessary steps to eliminate the conduct; and
(g) The employer failed to take all reasonable and practicable measures to ensure that employees did not act in contravention of the EEA

The Labour Appeal Court applied this test and upheld the decision of the Labour Court and found that Liberty had failed to take the necessary steps to eliminate the conduct as required by section 60(2). In addition, Liberty had failed to do all that was reasonably practicable, as required by section 60(4), to ensure no act in contravention of the EEA occurred.

IMPORTANCE OF THIS CASE

This case highlights the need for an employer to respond appropriately when allegations of sexual harassment have been reported to it by its employees. This requires that an employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of the EEA and the Code. Should the employer fail to do so it may be held liable for the acts of the employee(s) who committed the acts of sexual harassment. Should you require any further information on the processes and procedures available please do not hesitate to contact us.

By: Andre Van Heerden, Senior Associate; Jacques van Wyk, Director and Unathi Jukuda, Candidate Attorney

12) FIXED TERM EMPLOYMENT AND PROCEDURAL FAIRNESS IN LARGE SCALE RETRENCHMENTS

ISSUE(S)

Whether the employees' fixed term contracts had terminated by operation of law having regard to section 196B of the LRA.

Whether the employer should be compelled to reinstate dismissed employees in terms of section 189A (13) of the Labour Relations Act 66 of 1995 ("LRA") pending a fair dismissal procedure.

COURT'S DECISION

In the case of *AMCU and Others v Piet Wes CC and Another* (J2834/16; J2845/16) [2017] ZALCJHB 7 (13 January 2017) a number of employees, all of whom were members of AMCU, had been employed, by two employers ("service providers"), on purported fixed term contracts. The two disputes were consolidated given the similar underlying facts. The service providers provided services to Exxaro Coal Mines as contractors. The employees' fixed-term contracts contained no definite termination date. Instead, the employees' contracts of employment provided that their services would terminate should a third party (which would include Exxaro) terminate its contracts with the service providers The continuation of the employees' contracts, so the services providers contended, were dependent upon their contracts with Exxaro.

Exxaro terminated the services of both service providers. As a direct result the service providers dismissed the employees, claiming their contracts of employment had terminated by effluxion of time. It was common cause that no retrenchment process, as envisaged by section 189A (it being a large scale retrenchment), was followed by the employers. The employees

had not been consulted prior to the termination of their contracts of employment.

As a result AMCU, who represented the employees, launched an urgent application seeking, by virtue of section 189A (13) to compel the employers to re-instate the dismissed employees until such time as the service providers complied with the procedural requirements of section 189A of the LRA. Section 189A requires that employers who seek to dismiss employees for operational requirements properly consult with such employees' trade union on all matters affecting the employees including the reasons for the proposed dismissals, alternatives that the employer considered before proposing that the employees be dismissed, the number of affected employees, the method for the selection of employees for dismissal, the severance pay proposed etcetera. Employers are also obliged to comply with the minimum consultation periods as prescribed within section 189A.

The central question before the Court was whether the employees' contracts of employment terminated by operation of law. Section 189B regulates in what circumstances employees may be employed on a fixed term basis. Importantly, employees may only be so employed for a period in excess of three months (if they earn under the threshold of R205,433.30) if the nature of their work is of a limited or definite nature or there is another justifiable reason for the use of such contracts. An example of a 'justifiable reason' would be the employment of employees for a specific project.

The Court held that the service providers bore the onus of proving that there was a justifiable reason for the use of fixed term employers. The Court held that the reason for using such contracts in this case was insufficient. There was no indication on the facts that a specific project had come to an end. This was not an instance where Exxaro had asked, for instance, that employees be brought in to clean a specific mine. Such an example would

constitute a justifiable basis for employing the employees' on a fixed term basis. The mere cancellation of a service contract by a client (in and of itself) was not a valid ground that the employer could rely on to show a justifiable reason to employ workers on a fixed term contract for more than three months.

Rather, it was clear that the contracts were not intended to be for a fixed term. To make employees' employment contingent upon the whims of a third party would undermine their rights and the protection afforded by the LRA.

As a result the employees' services could only be terminated once the provisions of section 189A had been adhered to. This required, among others, a process of consultation with AMCU (acting on behalf of the affected employees). AMCU were therefore successful in their application.

IMPORTANCE OF THIS CASE

This case highlights the importance of only using fixed term contracts in appropriate, justifiable circumstances. Employers seeking to employ employees on a fixed term basis must do so only upon proper consideration of the provisions of the LRA and once they are assured that the employment of such employees on such basis can be justified.

By Jacques van Wyk, Director and Andre van Heerden, Senior Associate

13) CHRISTMAS AND END-OF-YEAR EVENTS: A RIGHT TO PARTY?

There is no requirement in any South African labour legislation, including the Labour Relations Act, 66 of 1995 and the Basic Conditions of Employment Act, 75 of 1997, that an employer must host a Christmas party or provide an end of year function for employees. The only other source of such an entitlement could be the employees' contracts of employment or letters of appointment, or a policy which refers to a Christmas party or function being held each year as a right on the part of the employees. It would be unlikely for a contractual provision or entitlement to be contractually stated.

Accordingly, provided that no clear contractual right to a Christmas party or year-end function exists in any of the above mentioned documents, employees cannot compel or require the employer to provide them with a Christmas party as a term and condition of employment.

At most, the tradition or practice of hosting such a party could be seen as a work practice. However, recent case law from the Labour Court indicates that it is always within the discretion of the employer to change work practices as it sees fit and at its prerogative, provided that the issue at hand has been consulted on with the affected employees.

If employees are upset about not having an office party thrown for them, there is very little that could be done. The CCMA has limited jurisdiction to entertain a dispute of this nature as it generally only adjudicates disputes about unfair dismissals and unfair labour practices. Although a group of employees or union could demand an office party, and could refer a dispute as a matter of mutual interest about this demand, this process is usually used by employees to obtain the right to strike to try and compel the employer to accede to their demand.

If an employer usually holds a party for staff but will now not be able to do so, it should be open with its employees, and indicate that finances or other relevant circumstances mitigate against the holding of a party, and that for this reason it wishes to do away with a Christmas party. Even if the employees do not agree or feel aggrieved, the employer would be able to take this decision by itself.

If a party is held, staff must ensure that they continue to conduct themselves appropriately. Even if the employer provides alcohol, becoming drunk at the office party would still entitle the employer to discipline employees, and any other inappropriate conduct would still be actionable by the employer. Even if the party takes place outside of office hours and off premises, the event is still one organized by the employer and involves colleagues and co-workers; as such, any conduct at the party can have an impact on the ongoing relationship. As a specific example, an inordinate number of cases of sexual harassment are reported in South African legal digests, arising out of incidents that occur at Christmas parties. The forum of an office party, although a welcome opportunity to socialize and have fun with colleagues, is still a work event and the usual boundaries of respectable interactions with co-workers continue to apply.

By Bradley Workman-Davies, Director and Devon-Lee Andriés, Candidate Attorney

14) END OF YEAR BONUSES - CHRISTMAS WISHES?

At the end of every year, employees look forward to or even financially plan around the receipt of an end of year or Christmas bonus. However, not everyone has a right to a bonus, and the award of a bonus may be subject to the employer's goodwill, or any number of conditions which need to be reviewed and taken into account before an employee is awarded a bonus at the end of year.

Firstly, a bonus may or may not be what is referred to as a thirteenth cheque. A thirteenth cheque is a usually double payment of salary, made in December of each year, to an employee, perhaps as a thank you for good service, or company or employee success and performance during the year. Any employee expecting a thirteenth cheque would need to check his/her individual contract of employment to see if the right to this payment is stated; if not, there is no right under law to this payment and an employer may fairly decide not to pay this amount, even if it has been paid in the past. However, any employee who has habitually received a thirteenth cheque from the same employer would still be entitled to query why it has not been paid now. The employee may have a legitimate expectation of payment, or the practice of payment in the past may even have created a legal right to this payment. But even if there is no legal right to insist on payment, the employer may still be required to justify its decision not to pay – if it is able to demonstrate that there is an objective reason why payment cannot be made or is not justified (such as bad financial performance), and its decision to not pay is not arbitrary, irrational or aimed at a single employee to unfairly treat him/her.

On the other hand, with a performance or other end of year bonus which is contractually stated (either in the contract of employment, or in a company bonus policy) to be subject to the discretion of the company, the most that the employee can hope

for is that the employer will exercise this discretion in his/her favour and award a bonus. Such bonuses are usually linked to company and/or individual performance (rated on achievement of personal goals or targets for the year), and these factors would be taken into account by the employer in deciding whether the employee should receive a bonus. As above, the employer must take the decision in a fair manner and must not take arbitrary or irrelevant factors into account. Its decision can be subject to review, of the employee refers a dispute for unfair labour practice in regard to the provision of benefits, to the Commission for Conciliation, Mediation and Arbitration (CCMA).

An additional element for employees to be aware of, and for employers to take into account, is that under employment equity legislation, employees performing equal work are entitled to equal terms and conditions of employment, which can include bonus payments. Accordingly, unless there is a good reason to differentiate between them, employees who do the same job would be entitled to be equally treated in regard to the award of bonuses.

As with all aspects of the employment relationship, employees are entitled to fair and equal treatment by employers, and all employer decisions, even if contrary to the employee's interest, must be justified on fair and rational grounds.

By Bradley Workman-Davies, Director and Devon-Lee Andriés, Candidate Attorney

