EVERSHEDS SUTHERLAND

4/2020

Edition 1

Newsletter

South Africa

Employment law newsletter

April 2020

Editors' comments

Welcome to our first Employment law newsletter

Employment law update: 2019 case roundup and new legislative amendments in 2020

2019 is gone but not forgotten! While 2019 may have come and gone, it did leave with us some interesting legal points for various employers and employees to bear in mind in their 2020 ventures. To this end, our employment law team has prepared a case roundup of some interesting and enjoyable judgments which were handed down during the course of 2019.

That said, 2020 has already brought with it some new amendments to the law. These amendments concern an update to the variety of parental leave benefits available to employees, as well as the national minimum wage. These amendments feature in this write up too.

For any queries which you may have, please do not hesitate to contact our employment law team for assistance.

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Guilty, But Not As Charged

In the recent case of *EOH Abantu (Pty) Ltd* v *CCMA & 2 Others* [2019] ZALAC 57 ("**the EOH case**") the Labour Appeal Court ("**LAC**") was tasked with determining whether an employee's dismissal was fair in circumstances where the charge sheet issued to him did not accurately reflect the misconduct perpetrated by him.

It is well-established that a fair procedure must be followed when disciplining an employee. This includes, among other things, notifying the employee of the allegations against him/her using a form and language that the employee can reasonably understand. These allegations are ordinarily outlined in what is commonly referred to as a "charge sheet". But what happens when an employer charges an employee with "theft", but finds him/her guilty of, and fires him/her for, "unauthorized borrowing"?

In the EOH case, EOH charged its employee with:

"*theft, fraud, dishonesty or unauthorized removal of any material from the Bank* [Westbank, being EOH's client] *in that you dishonestly distributed the Westbank Microsoft office license keys".*

The Chairperson of Danney's (the employee's) disciplinary hearing found that intention had not been proved (in respect of the misconduct for which he was charged) but found Danney guilty of gross negligence. Danney was not charged with gross negligence. After the matter was referred to the CCMA and the Labour Court, respectively, those forums found that Danney's dismissal was substantively unfair in that dishonesty had not been proved and gross negligence was not a competent verdict on the charge. The matter subsequently went on appeal to the LAC.

The LAC disagreed with the CCMA and Labour Court. In doing so, it held that fairness requires that an employee must be made aware of the charges against him. The charges should be precisely formulated. However, the LAC noted that employers embarking on disciplinary proceedings are not always skilled legal practitioners and sometimes define or restrict the alleged misconduct too narrowly or incorrectly. Provided:

1. a workplace rule which the employee knew, or reasonably ought to have known, has been contravened; and
2. no significant prejudice flowed from the incorrect characterization,

that contravention could form the basis for discipline and an appropriate disciplinary sanction may be imposed. Differently put, there is no requirement that competent verdicts on disciplinary charges should be mentioned in the charge sheet, subject to the general principle that the employee should not be prejudiced.

In this case, on Danney's own version, he was guilty of negligence. He wrongfully distributed intellectual property belonging to one of EOH's main clients. This had the potential of causing reputational harm to EOH. He misappropriated the client's intellectual property in a way that could have damaged its relationship with EOH. The LAC held that, given the nature of the offence, Danney's seniority and role and his short tenure at EOH, EOH justifiably lost trust in him and dismissal was an appropriate sanction in the circumstances.

Although this case provides that chairpersons, arbitrators and our courts should not adopt a formalistic approach when considering whether employees are guilty, as charged or otherwise, employers should still be careful when drafting charge sheets. If the employee is prejudiced because the charges are not formulated properly, the employer may be faced with a finding of substantive unfairness.

No Pre-Suspension Hearing Needed

In February 2019, the Constitutional Court handed down a judgment confirming that an employer is not required to give an employee an opportunity to make representations before being suspended by the employer as a precautionary measure.

In the case of *Allan Long v South African Breweries (Pty) Ltd* (CCT61/18) [2019] ZACC 7, Long was suspended pending an investigation into allegations against him regarding gross irregularities in his management of SAB's fleet. The need for an investigation arose as a result of a fatal motor vehicle collision which revealed that many vehicles in SAB's fleet were not roadworthy, nor were they licensed properly.

Long was suspended on 21 May 2013, charged with, among other things, dereliction of his critical duties on 19 August 2013, and ultimately dismissed on 14 October 2013.

In an unfair suspension referral to the CCMA, the Commissioner tasked with hearing that dispute held that while there was a valid reason to suspend Long, he had not been given an opportunity to make representations to show why he should not be suspended; and his suspension was for an unreasonably long period, to such an extent that it had become punitive. In the circumstances, the CCMA found that Long's suspension period was unfair and awarded him 2 months compensation.

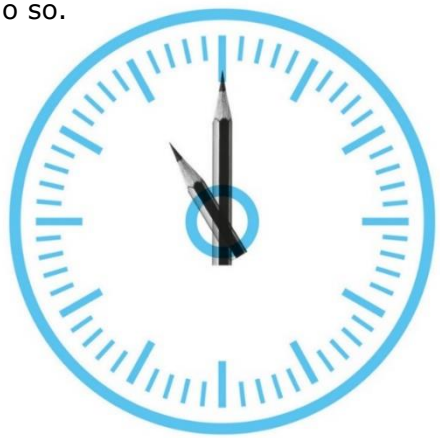
The Labour Court disagreed with the CCMA and held that where a suspension is precautionary, there is no requirement that an employee be given an opportunity to make representations before being suspended.

The Constitutional Court unanimously agreed with the Labour Court's findings. In assessing whether a precautionary suspension is permissible, the Constitutional Court agreed that the fairness thereof is assessed by considering:

1. Whether there is a fair reason for the suspension; and
2. Whether it prejudices the employee.

Having regard to the facts of this matter, conducting an investigation was considered by the Constitutional Court to be a fair reason for suspending the employee as it is necessary to protect the integrity of the investigation. Regarding the potential prejudice suffered by the employee, the Constitutional Court held that where the suspension is on full pay, such prejudice is ameliorated.

In light of this judgment employers should consider reviewing and amending their disciplinary procedures if those procedures prescribe that a pre-suspension hearing must take place before an employee is suspended. Such provisions in a disciplinary procedure are unduly onerous on employers and prescribe another unnecessary box to tick before suspending employees where there are fair grounds to do so.



Strike, You're Out of a Bonus!

An employer may feel indebted to employees who choose to abstain from striking and may wish to reward them for doing so. Is an employer allowed to do this?

The Labour Court in *National Union of Mineworkers obo Members v Cullinan Diamond Mine, A Division of Petra Diamond (Pty) Ltd* (JS102/14) [2019] ZALCJHB 43 was tasked with considering this question.

National Union of Mineworkers ("**NUMSA**") embarked upon a strike at Cullinan Diamond Mine ("**the Mine**") after wage negotiations failed. Not all employees employed by the Mine participated in the strike. Some continued to work and production at the Mine continued at a reduced rate. The Mine's managers warned employees that annual production bonuses may not be paid to them as a result of the strike which would impact on production.

Management decided not to pay annual performance bonuses. However, it rewarded certain employees who continued to work during the strike with a bonus termed "*exceptional performance reward or bonus*".

NUMSA saw the exceptional performance bonus as a contrived annual performance bonus which excluded those employees who participated in the strike. NUMSA argued that the Mine's actions contravened both the Labour Relations Act ("**the LRA**") and/or the Employment Equity Act ("**EEA**") in that the Mine discriminated against the employees who participated in the strike for exercising their right to do so in terms of the LRA. According to NUMSA, the differential treatment was unfair and was based on an arbitrary ground.

The Court held that in order to find in NUMSA's favour, its members must have been differentiated for having participated in the strike. If there was another reason for differentiation, then the striking employees' rights in the LRA would not be infringed. NUMSA failed to show a causal link between the non-payment of a bonus, on the one hand, and participation in the strike, on the other. The bonus payments made to those employees who continued to work were not discriminatory because:

- The annual performance bonus was discretionary in nature, meaning that the employees did not have a right to it.
- To be eligible for an exceptional performance bonus employee must have:
  - (i) contributed to the Mine's production achievement; and
  - (ii) performed exceptionally. This was different to the criteria for the annual performance bonus. NUMSA's members did not contribute to the Mine's achievement, and they did not perform exceptionally.
- An employer is not obliged to pay a striking employee for services he/she does not render during a strike. The corollary of this is that paying a non-striking employee does not offend the LRA.
- An employer must still run its business, even in a strike situation. If it devises a mechanism to stay afloat and reward those who assisted it to do so, such actions would not offend the LRA.
- It is illogical to suggest that policies which reward exceptional performers should be put on hold because other employees are exercising their right to strike.

This is a positive judgment for both employers and employees alike in that it allows employees who deserve reward for good work to receive such reward, even if others choose to strike, rendering their production levels lower and, consequently, rendering them ineligible for reward.

However, employers must be mindful that their actions could come under scrutiny if a causal link between employees exercising their right to strike and the non-payment of bonuses is capable of being shown.

I Will Subpoena You! Can the Labour Court Set Aside Subpoenas in the CCMA?

It is not uncommon for employers engaged in CCMA proceedings with former employees to be faced with a number of subpoenas calling on, perhaps, senior management (and all and sundry) to attend at the arbitration hearing for questioning. This, of course, can be extremely disruptive to operations and is often employed as a tactic by former employees seeking to advance their case and to exert undue pressure on employers.

Unsurprisingly, one employer turned to the Labour Court in *South African Broadcasting Corporation (Soc) Limited and Others v Mkhize and Another* (J1726/19) [2019] ZALCJHB 223 (16 August 2019) to have these subpoenas set aside.

In essence, it was the SABC's case that the subpoenas were "*an abuse of process and therefore irregular and invalid*". The SABC argued that there would be no purpose in questioning very senior members of its management and that it would be "*highly prejudicial for these individuals to spend two days at the CCMA under subpoena*".

Judge Van Niekerk explained that the Director of the CCMA (or nominee) who receives a written motivation for the issuing of a subpoena is required to satisfy him or herself that the procedural requirements have been met and a proper case has been made out, which would ordinarily require "*a close scrutiny of the motivation and a consideration of any potential for abuse of process*".

Cutting to the chase, Judge Van Niekerk asked the parties on what basis they had approached the Labour Court for such an order. The reason for this is that where the CCMA Director's decision is not rational or reasonable, the aggrieved party has the remedy of review in the Labour Court and, furthermore, any abuse of this process could be taken up directly with the presiding Commissioner either prior to or during the commencement of any arbitration hearing. These avenues were not followed. Hence, the application to the Labour Court was unsuccessful.

In taking the advice of the learned Judge, employers would do well to advise individuals who have been subpoenaed to attend the arbitration. Thereafter, these individuals would be free to seek direction from the arbitrator as to why they should be present in the first place. As held by the learned Judge, the presiding arbitrator would be entirely within his or her rights to vary the terms on which the subpoena was issued, having regard to the circumstances of the case. It is highly recommended that you seek and obtain legal advice on how to deal with subpoenas.

Nothing Like a Mother's Love….Or is There? It is Time to Look at the Expanded Scope for Parental Leave

The year 2020 has commenced with significant amendments to the Basic Conditions of Employment Act 75 of 1997 ("**BCEA**"). As of 1 January 2020 the BCEA has expanded the scope of parental leave.

Historically, section 25 of the BCEA afforded only female employees, who were birthmothers, four-months unpaid maternity leave. It was only this category of parent who could take leave to care for and bond with their child. However, with the expansion of the scope of parental leave now operative in our law, the introduction of sections 25A, 25B and 25C provides for parental leave, adoption leave, and commissioning parental leave.

Parental leave and adoption leave

According to section 25A, an employee who is a parent of a child (other than the mother) is entitled to at least ten consecutive days of parental leave.

Section 25B provides that an employee who is an adoptive parent is entitled to at least ten consecutive weeks of adoption leave.

In circumstances where an adoption is made by two adoptive parents, the BCEA further provides for one adoptive parent to apply for adoption leave and the other to apply for parental leave, thereby allowing both parents leave simultaneously.

Commissioning parental leave

Section 25C allows for an employee who is a commissioning parent through a surrogate motherhood agreement to ten consecutive weeks of commissioning parental leave, which may commence on the date that the child is born through a surrogate motherhood agreement.

Similarly, to section 25B, if there are two commissioning parents to the surrogate motherhood agreement, one parent may apply for commissioning parental leave and the other for parental leave.

Paid or unpaid leave?

It is important to take note that parental, adoptive and commissioning parental leave are all forms of unpaid leave. That said, employees are eligible to apply to the Unemployment Insurance Fund for income replacement benefits for that period of leave. It follows that an employer is not legally obliged to remunerate employees during this period. The employer can, however, elect to provide paid parental, adoptive and commissioning parental leave as a benefit.

In view of the above, it is important that employers take heed of the new rights afforded to (parenting) employees and, if and to the extent necessary, amend their workplace policies accordingly.

The New (New) National Minimum Wage – a Legislative Increase

Employers and employees take note! With effect from 1 March 2020, the South African national minimum wage saw its first increase following amendments being made to the National Minimum Wages Act ("**the Act**"), which came into force last year.

What has changed?

The national minimum wage has increased from R20.00 to R20.76 for all workers for each ordinary hour worked. That said, there are exceptions. Specific increments to hourly wages have been specially determined for, among others, the following categories of employees:

- Farm workers - R18.68 per hour from R18 in 2019; and
- Domestic workers - R15.57 per hour from R15 in 2019.

What do the increases to the national minimum wage mean for employers and employees?

As a result of the amendments, employees, on the one hand, are entitled to increases to their hourly wages as provided for in the Act. On the other hand, employers are required to adhere to the amendment, and pay their employees accordingly.

What are the consequences for an employer who does not pay the increased hourly wages to employees?

Should employers fail to comply with their obligations in terms of the Act, it could result in the employer concerned being (i) issued a compliance order by a Department of Labour inspector and (ii) fined as set out in the Basic Conditions of Employment Act ("**the BCEA**").

The BCEA stipulates that employers who fail to pay their employees the increased hourly wages may well be ordered to pay the worker either twice (i) the value of the underpayment or (ii) the employee's monthly wage, whichever amount is the greater. The BCEA does not stop there. Should there be further contraventions by an employer to pay the national minimum wage to their employees, the fine can be increased threefold in accordance with the aforementioned calculation of penalty.

Employers and employees should seek and obtain legal advice should they have any queries in respect of the new national minimum wage.

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