

Employment Law Department E-mail Flyer – March 2010

**INTRODUCTION**

This flyer contains important information relating to resignations, the payment of death benefits to minors, the sanction of dismissal and the jurisdiction of the CCMA at conciliation.

The articles have been kept short and to the point for easy reading.

Should you have any questions please do not hesitate to contact one of us.

**BEWARE THE PASSAGE OF TIME!**

On the 18<sup>th</sup> February 2010 the Constitutional Court in the matter **Billiton Aluminium SA Limited t/a Hillside Aluminium v CCMA and Others** handed down a judgment dealing with the court's obligation to fashion a just and equitable remedy for successful litigants by having regard to facts that occurred after the decision appealed against or taken on review.

In this case, the employee, Mr Khanyile, was dismissed in 2001. The matter eventually found its way to the Constitutional Court and was heard on the 19<sup>th</sup> November 2009.

At the Constitutional Court, the employer argued that an order of reinstatement to a date eight years earlier was not just and equitable (as required in terms of section 172(1)(b) of the Constitution) particularly as the employee had earned income during the period.

This argument was not raised at the Labour Appeal Court nor did the employer present any evidence in the arbitration raising the issue of the inappropriateness of reinstatement to the date of dismissal as a remedy.



The sole basis for raising the point before the Constitutional Court, was the systemic delay in the dispute resolution process.

The Constitutional Court accepted that Constitutional issues may be raised if systemic delays impact on the appropriateness or otherwise of reinstatement as a remedy for unfair dismissal. The court pointed out that the problem in this matter is that these issues were not raised in the Labour Court. The Constitutional Court also pointed out that it is desirable that courts of the first instance (eg. Labour Court) should consider these types of issues and be afforded an opportunity of bringing their expertise to bear on these issues. It is undesirable that the Constitutional Court should sit as a court of first and last instance without any possibility of a further appeal on these issues.

There was no explanation before the court why these issues were never raised in the Courts below and on that basis the Constitutional court held that it was not in the interest of justice to grant leave to appeal. In other words grant the relief sought by the employer.

This judgment confirms the importance of leading this type of evidence at the CCMA and if necessary the Labour Courts. Section 174 of the LRA provides that the Labour Appeal Court has the power to receive further evidence on the hearing of an appeal. However, the further evidence will only be allowed in exceptional circumstances and after a proper explanation why the evidence was not led earlier. The court pointed out that any appeal process carries its own risk and one must argue whether or not reinstatement is the appropriate relief as soon as it becomes appropriate to do so. It would not be logical to allow delays caused by unsuccessful appeals to render reinstatement inappropriate.

Employers are warned to place evidence of changed circumstances before the court.

Michael Maeso

## **DEATH BENEFITS FOR MINOR BENEFICIARIES – FACTORS WHICH MUST BE CONSIDERED**

Human resources officials and retirement fund trustees, when exercising their statutory discretion, are frequently faced with the question of whether to pay the death benefit in respect of a deceased former employee to the caregiver (or legal guardian) of a minor beneficiary or to make payment to a beneficiary fund on behalf of the child. The Pension Funds Adjudicator has required that the following considerations be taken into account in order to ensure that this discretion is exercised in a just and equitable manner.



- The caregiver's ability and qualifications to manage the financial affairs of the minor beneficiary
- The health of the caregiver
- The higher returns which could be earned if the caregiver responsibly invests the death benefit
- If the minor beneficiary is very young there may be a need to protect a small portion of a large benefit by paying a portion of the benefit to a beneficiary fund for future needs, such as education.
- The caregiver has a common-law right to administer monies on behalf of the minor, and should only be deprived of this right when an investigation clearly shows that the caregiver is neither qualified nor competent to do so.

As the decision regarding the method of paying a death benefit can be challenged in court or the Office of the Pension Funds Adjudicator, it is important for such trustees or officials to keep a written record of the deliberations (including consideration of the above factors) and investigation which lead to the decision.

Carlyle Field

### **WARNING : ESSENTIAL EVIDENCE FOR A FAIR DISMISSAL**

Every employer reading this article is advised to pay serious attention. There has been a recent important development relating to a requirement of vital evidence which has been set out in a judgment by the Supreme Court of Appeal.

It may have an impact on every dismissal for misconduct.

***Edcon v Pillemer NO & Others*** requires employers to prove by the leading of evidence that the misconduct committed by the employee has led to a break-down of the trust relationship. This is so even in cases of dishonesty, where one would probably assume that dismissal would be justified and fair, without the need to prove the breakdown itself.

Thus, a fundamental aspect of proving a fair dismissal, if applying the principles of the Edcon case, is proving the breakdown of the trust relationship between employer and employee.



In this regard, the court stated that it is insufficient for an employer to merely state that the trust relationship has broken down – evidence must be presented depicting the circumstances of the case which led up to the breakdown of the trust relationship. Oral evidence by a superior of the charged employee who is in a position to actually testify to the breakdown of the trust relationship must be provided. Documentary evidence or the evidence of another employee will be insufficient.

In **Edcon**, the employer only led the evidence of the investigator, who was told about the allegations against the employee. This was held to be inappropriate and insufficient evidence. Another factor to be presented in evidence is the position and duties of the employee. The adverse consequences, direct or indirect, of retaining the employee must also be shown.

Thus, an employer must ensure that damage to the trust relationship as a result of the employee's misconduct together with the other factors mentioned above are proven in order to satisfy a commissioner that the continuation of the employment relationship is intolerable and that accordingly the sanction of dismissal is fair.

Cherié Vere

## **RAISING A JURISDICTIONAL POINT AT A CCMA CONCILIATION**

The CCMA Rules previously provided that the CCMA may conciliate matters only if it has jurisdiction. An amendment to the CCMA Rules in 2003 attempted to narrow the jurisdictional requirement.

This amendment did not solve any problems. Parties remained uncertain as to whether a conciliating commissioner could determine a jurisdictional point (e.g. whether the Applicant was an employee) and if a ruling was made, the status of that ruling. This ultimately resulted in a number of costly review applications being launched in the Labour Court causing further delays to the resolution of labour disputes.

The Labour Court has shed light on these murky waters in the recent cases of ***Strautmann v Silver Meadow Trading 99 (Pty) Ltd t/a Mugg and Bean Suncoast*** and ***EOH Abantu (Pty) Ltd v CCMA*** which both dealt with the point being raised at conciliation that the CCMA did not have jurisdiction because the claimant was not an employee.



What these cases say is that a conciliating commissioner is required to do no more than determine whether the allegation is made that the respondent is an employer and that the referring party was an employee who was dismissed by the respondent. If these averments are challenged, the conciliating commissioner is obliged in the absence of a settlement to issue a certificate indicating that the dispute remains unresolved. If the employer wishes to proceed with the challenge to CCMA jurisdiction it must do so at arbitration, where the issues may be canvassed through the leading of evidence.

Melisa Quattrocchi

## "I QUIT"- THE LAW ON RESIGNATIONS

It is not unusual for an employee to resign in the heat of the moment and after having calmed down and reconsidered the resignation attempted to then withdraw the resignation.

The Labour Court (in an unreported judgement *Mafika v SABC LTD* (case number J700/08)) has recently considered and confirmed the legal principles applicable to resignations. Clients are advised to keep the following principles in mind when confronted with an employee who attempts to withdraw his/her resignation:

- a resignation is a unilateral termination of a contract of employment by the employee i.e. the acceptance of the resignation of the employer is not a requirement;
- however, once an employee resigns, the resignation cannot be withdrawn by the employee without the employer's consent;
- it is not necessary for an employer to accept any resignation that is tendered by an employee, nor is an employer entitled to refuse to accept a resignation;
- a resignation is established by clear and unambiguous words or conduct by an employee;
- there is no requirement that an employee disclose a reason for the resignation; and
- a resignation tendered by way of sms is considered a valid form of resignation.

Keeping the above principles in mind, the Courts generally look for unambiguous, unequivocal words that amount to a resignation. In other words an employee has to act in such a way as to lead a reasonable person to the conclusion that an employee does not intend to fulfill his/her part of the contract.

Siobhan Viljoen



## **JOB INTERVIEW : A FAILURE TO DISCLOSE PREVIOUS MISCONDUCT**

It is accepted that an employee may be disciplined for acts of misconduct committed outside the workplace. But what is the position regarding acts of misconduct committed before the contract of employment is concluded? To what extent is an employee under a duty to disclose such acts of misconduct?

In the recent case of *IMATU Obo Damane / City of Cape Town* an employee employed in the motor licensing department committed acts of misconduct in relation to the drivers' license department in that he obtained his driver's license fraudulently. The issue was whether his employer, the department of motor licensing, had the jurisdiction to discipline him for that misconduct once it came to the department's attention. Unsurprisingly the arbitrator held that the misconduct affected the employment relationship.

The arbitrator, therefore, found that the employer had jurisdiction to discipline the employee. However he also said that the employee had violated his duty to disclose the fraud that he had committed when he was interviewed for the job by the employer in the motor licensing department.

Perhaps one may argue on the basis of this case that all employees have a duty to disclose all acts of misconduct committed before the commencement of the employment relationship. However, when one analyses the facts of the case and the basis of the arbitrator's decision, it seems clear that the comments made in this case apply only to public employees because of their position as such.

The arbitrator did not say that the employee was obliged to disclose every act of misconduct that he had ever perpetrated. It was only those acts of misconduct that were committed against other branches of government that had to be disclosed.

Thus, it appears that the principles set out in that case do not apply to the same extent to ordinary employees employed in the private sector, regardless of whether such privately employed people are employed in companies with several workplaces. Employees in the private sector do not have a similar constitutional obligation as public employees.

Yet, as far as ordinary employees are concerned, it should be noted that the Labour Court has held that a material misrepresentation by an employee, either by act or omission, in a job interview may entitle the employer to dismiss the employee for such an act of misconduct.

Vuyo Mkwibiso



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## CONTACTS

Should you require additional information on employment law, please contact any one of our following team members:

Michael Maeso	+27 31 302 0320	<a href="mailto:maeso@wylie.co.za">maeso@wylie.co.za</a>
Samantha Davidson	+27 31 302 0376	<a href="mailto:davidson@wylie.co.za">davidson@wylie.co.za</a>
Martin Oosthuizen	+27 72 264 6788	<a href="mailto:oosthuizen@wylie.co.za">oosthuizen@wylie.co.za</a>
Verlie Oosthuizen	+27 31 302 0267	<a href="mailto:oosthuizen@wylie.co.za">oosthuizen@wylie.co.za</a>
Siobhan Viljoen	+27 31 302 0431	<a href="mailto:viljoen@wylie.co.za">viljoen@wylie.co.za</a>
Melisa Quattrocchi	+27 31 302 0280	<a href="mailto:quattrocchi@wylie.co.za">quattrocchi@wylie.co.za</a>
Cherie Vere	+27 31 302 3284	<a href="mailto:vere@wylie.co.za">vere@wylie.co.za</a>
Carlyle Field	+27 31 302 0223	<a href="mailto:field@wylie.co.za">field@wylie.co.za</a>
Vuyo Mkwibiso	+27 31 302 0261	<a href="mailto:mkwibiso@wylie.co.za">mkwibiso@wylie.co.za</a>

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