



## Employment Law Department E-mail Flyer – Nov / Dec 2007

As 2007 rapidly comes to an end, we can reflect on an active industrial relations period. Many of you will have been caught up in the "The Year of the Strike". It seems that no industry was spared and statistics have shown that 2007 was the most strike plagued year since the 1994 elections. The public sector strike experienced high levels of intimidation and violence. The motor manufacturing industry managed to conclude their annual negotiations without too much strife – well done to them! However the motor retail industry was not so lucky. The construction industry involved in building the world cup stadia across the country have learnt how strict deadlines always play into the hands of unions. Union members' expectations are going to have to be carefully managed in this industry, particularly as the trend in 2007 was to settle wages at an average of 2% above inflation with unions demanding double digit increases.

We have also seen an increase in the amount of fraud and white collar crime in the employment context. We have worked very closely with forensic auditors making sure that the evidence and charges that arise from the audit are used to the employer's best advantage when taking disciplinary action. Every business is vulnerable to white collar crime and we urge clients to ensure that proper checks and balances are in place to reduce exposure to these acts.

2007 has also produced a number of important judgments, the most famous being the *Sidumo vs Rustenburg* case, where the Constitutional Court changed the test for review and put to death once and for all, the reasonable employers' test. At a practical level employers will have to be more diligent in the manner in which they present evidence in support of sanction at disciplinary enquiries and at CCMA arbitrations.

Another significant change is that if an employee is reinstated, back pay is paid from the date of dismissal to the date of resuming employment and is not limited to 12 or 24 months. This payment is based on the



employee's total remuneration which would include benefits. In *Republican Press (Pty) Ltd. vs CEPPAWU & Others* the SCA confirmed that any order of reinstatement restores the employment contract as if it had never been terminated and this will include all pay and benefits payable to the employee in terms of that contract. This could create serious practical issues in relation to retirement fund membership where the fund benefits were paid out to the employee upon dismissal and have been spent.

The Department of Labour has launched an onslaught against employers in regard to their employment equity obligations in terms of the Employment Equity Act. There has been a "name and shame" campaign as well as various court orders being obtained against employers. What has become clear however is that the enforcement procedures contained in the Employment Equity Act, namely of obtaining an undertaking and issuing of a compliance order, are not necessarily the prerequisites for the court to issue a fine against the employer. The courts have accepted that any fine imposed must be sufficiently high that it makes commercial sense for employers to comply rather than risk a penalty. Clearly a warning to all employers. You are all advised to ensure that your equity plans comply with the relevant legislation and that you submit your reports timeously.

The Department of Labour is in the process of reviewing the earning threshold in terms of Section 52 of the Basic Condition of Employment Act. Currently that threshold is R115 572.00 per annum and all employees earning more than the threshold are excluded from certain sections of the Basic Conditions of Employment Act, including ordinary hours of work and overtime.

The maximum income threshold of the Unemployment Insurance Fund has been increased to R149 736.00 per annum or R12 478.00 per month or R2 879.53 per week.

Take time to go through the cases summarised in this flyer as we are sure you will find them relevant to your business.

We hope you have a restful break during the holiday period and look forward to seeing you at our annual Breakfast Seminar early next year.

**Michael Maeso**



## **PENSION AND PROVIDENT FUND TRUSTEES MUST ACT INDEPENDENTLY AND IN THE BEST INTERESTS OF THE FUND**

Section 7A of the Pension Funds Act requires every pension or provident fund to have a board consisting of at least 4 trustees, at least 50% of whom the members of the fund shall have the right to elect. A recent decision by the High Court serves as a useful reminder that, although trustees may be appointed by the employer or elected by the members of a fund, all of the trustees are obliged to exercise their own independent judgment as to what constitutes what is in the best interests of the fund and its members. Trustees do not represent the employer or the members or their trade union when carrying out their fiduciary duties as the board of management of the fund.

In *PPWAWU National Provident Fund v CEPPWAWU*, the trade union took a resolution that required trustees, before and after meetings of the board of the fund, to take mandates from the stakeholder group that had appointed them. So, for example, the shop steward trustees had to get mandates from the fund members who had elected them. The union's resolution went on to provide for the union to take disciplinary action against any trustee who failed to adhere to such a mandate. The fund successfully applied to Court for an order declaring the resolution to be unenforceable, contrary to law and/or public policy, and in conflict with the fiduciary duties owed by the trustees to the fund.

In upholding the fund's objection to the resolution, the Court pointed out that the legal principles applicable to the independent judgment to be exercised by fund trustees in determining what is in the best interests of the fund are the same as those which apply to directors of companies. The Court quoted from another judgment as follows: "*take a nominee director, that is, a director of a company who is nominated by a large shareholder to represent his interests. There is nothing wrong with it. It is done every day. Nothing wrong, so long as the director is left to exercise his best judgment in the interests of the company which he serves. But if he is put upon terms that he is bound to act in the affairs of the company in accordance with the directions of his patron, it is beyond doubt unlawful*".

So remember: none of the trustees represent the party which appointed them when the trustees take a decision regarding the fund's affairs, nor may they place the views or interests of such party above the interests of the fund or its members and beneficiaries.

**Samantha Davidson**



## **THE RIGHT TO A FAIR PRE-DISMISSAL HEARING.**

A fair hearing prior to dismissal is a pre-requisite to procedural fairness.

The following Supreme Court of Appeal (SCA) judgment dealt with the issue of what an employer is expected to do when an employee attempts to stall his/her disciplinary hearing. At what point is an employer entitled to proceed without the employee being present at the hearing?

The facts of *Old Mutual Life Assurance Co SA Ltd v Gumbi (2007) 28 IJL 1499 SCA* are as follows:

The employee was charged with misconduct after he threatened his superior with assault. A disciplinary hearing was arranged, however the employee failed to attend. The hearing did continue in his absence and the outcome of such found the employee guilty of the charges for which he was dismissed.

The employee then made representations as to his absence at the hearing including providing the employer with a medical certificate. The employer then decided to reinstate the employee with the view of recharging him.

A second disciplinary hearing was then held. Both the employee and his representative attended. It was evident from the outset of the proceedings that the representative's conduct was aimed at preventing the hearing. The representative raised spurious objections throughout the morning, at which stage the Chairman granted an adjournment for the employee to consult with his representative. That afternoon the representative arrived late at the hearing without the employee. The representative produced a medical certificate alleging that the employee was suffering from severe headaches. Once again the Chairman adjourned the hearing for an hour to enable the employee time to recover. The representative made it clear that neither he nor the employee would return. The hearing proceeded in the absence of both the employee and his representative at which the employee was once again found guilty and dismissed.

The employee then seeking recourse from the courts challenged his dismissal on the basis that he was denied a fair hearing before he was dismissed.

The SCA found that the employee and his representatives were to blame for his absence at the hearing. The Court correctly went on to say, "The right to a pre-dismissal hearing imposes upon employers nothing more than the obligation to afford employees the opportunity of being heard before employment is terminated by means of dismissal. Should the employee fail to take the opportunity offered, in a case



where he or she ought to have, the employer's decision to dismiss cannot be challenged on the basis of procedural unfairness.”

This case affirms the principle that an employee is entitled to a fair pre-dismissal hearing, however where the employee attempts to avoid and evade the hearing giving illegitimate or weak reasons, the employer in these circumstances cannot be held to have committed a procedural irregularity if it proceeds with the hearing in the absence of the employee.

**Siobhan Viljoen**

## **INTERPRETING THE PUBLIC HOLIDAYS ACT**

The Public Holidays Act currently makes provision for 12 public holidays in calendar year. In terms of the Act whenever a public holiday falls on a Sunday, the following Monday shall be a public holiday. When a business operates on a continuous basis there are often collective agreements that will regulate the shift patterns. If the operation is ordinarily open for business on a Sunday but is closed on public holidays then there may be a dispute about what will occur when a public holiday falls on a Sunday and whether the workers will get both Sunday and Monday off work. This is exactly what occurred in the recent Labour Appeal Court decision of *Randfontein Estates Ltd v The National Union of Mineworkers* (Unreported JA29/06).

In this matter the employer had entered into a "continuous operation agreement" with the employees and in terms of that agreement production work would take place seven days a week on all days of the year **excluding public holidays**. It was made clear in the agreement that Sundays were regarded as normal working days but public holidays were not. When Workers Day (1 May) fell on a Sunday in 2005 the Union contended that those employees who were shifted to work on that Sunday were entitled to a paid day's leave as it was a public holiday. However they went further and said that the employees were also entitled to a day's paid leave on Monday 2 May 2005. The employer believed that the employees were obliged to work on the Sunday, however, they were entitled to a day's paid leave for the Monday.

The employer approached the court for a declaratory order but was unsuccessful. The Court found that public holidays that fall on a Sunday do not cease to be public holidays, "...all that happens is that the Monday following becomes an **additional** public holiday."



The employer was unsatisfied with this interpretation and approached the Labour Appeal Court. The Court pointed that the Act does not explicitly state that when a public holiday falls on a Sunday, that **both** the Sunday and the following Monday shall be public holidays.

Finally the Court had to decide which of the following propositions were correct:

1. Whether the employer was right in its contention that the number of paid public holidays provided for in the Act was **limited** to 12 and no more, meaning that a Monday could not be regarded as an additional public holiday; or
2. Whether the Union's argument was valid that there were **at least** 12 public holidays provided for in the Act, implying that a day off on the Monday would be regarded as an additional public holiday.

The Court decided in favour of the Union. They warned employers that when they conclude collective agreements of this nature with employees they must ensure that they specifically agree on the way that public holidays will be dealt with. If they simply rely on the provisions of the Act as this employer did they may be faced with the unexpected and expensive result of additional public holidays that they did not make provision for.

Although we may not agree with this judgment it was handed down by the Labour Appeal Court and it is the law for now.

**Verlie Oosthuizen**  
**Employment Law Department**

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