Employment law update

Talita Laubscher *BIur LLB (UFS) LLM* (*Emory University USA*) is an attorney at Bowman Gilfillan in Johannesburg.

Monique Jefferson *BA (Wits) LLB (Rhodes)* is an attorney at Bowman Gilfillan in Johannesburg.

Agreements in full and final settlement

In *Ferguson v Basil Read (Pty) Ltd* [2013] 3 BLLR 274 (LC) the applicant, Ferguson, was faced with potential retrenchment and, as an alternative to retrenchment, signed an agreement with the respondent company in full and final settlement of all claims he might have arising from the termination of his employment.

As part of this settlement, Ferguson received two weeks' severance pay, one month's notice pay and an *ex gratia* payment of R 5 000.

Subsequent to entering into the settlement agreement, it came to Ferguson's attention that the company had commenced a new building project at Saldanha. Ferguson claimed that the settlement agreement he entered into was null and void as he had concluded the agreement based on a misrepresentation by the company that there was no work for him. He accordingly claimed that he was dismissed, that such dismissal was substantively and procedurally unfair and that he was entitled to compensation equal to 12 months' remuneration.

Ferguson alleged that the reason for him entering into the settlement agreement was that, on 26 February 2010, he was advised by the company's employee relations manager and the building contracts director that the Saldanha project had been cancelled and that he would, therefore, be retrenched. He argued further that, even if he had not been told that the project was cancelled, there was misrepresentation by omission in that he was not informed that the project would go ahead at a later stage and that there would potentially be work for him in the future.

The employee relations manager denied that he had told Ferguson that the project had been cancelled, but admitted that he met with Ferguson on 26 February 2010 to consult with him on the perceived need for retrenchment, possible alternatives and possible ways to avoid dismissal. He contended that Ferguson understood that there was no work for him and chose to enter into a settlement agreement instead of proceeding with a consultation process. The company submitted that, while it was true that it had been awarded a contract to build a plant at Saldanha, the work on this project had not commenced at the time Ferguson's employment came to an end, as the company was awaiting the results of an environmental impact assessment, and thus there was no certainty that there would be work for Ferguson in the future.

The Labour Court, per Steenkamp J, found that it was probable that Ferguson was

given the impression that he would be used on the Saldanha project. However, it was common cause that the project had not yet started and it could have created no more than a *spes* (hope) on the part of Ferguson. The court further held that, on the evidence before it, it was probable that Ferguson had been informed that there was no work for him at the time and thus the respondent needed to consult on the possibility of his retrenchment.

The court referred to the legal principles regarding misrepresentation and found that, for Ferguson to succeed with his claim, he would have to show that a false representation of fact was made, which was relied on and was material in the sense that it would have induced a reasonable person to enter into the agreement. Further, the false representation must have been intended to induce the person to whom it was made to enter into the agreement. Steenkamp J concluded that, on a balance of probabilities, Ferguson was not informed that the project had been cancelled. Therefore, there was no misrepresentation on which Ferguson acted when he entered into the agreement. In the circumstances, there was no dismissal, as Ferguson had voluntarily entered into an agreement to terminate his employment.

The claim was thus dismissed, with no order as to costs.

Promotion

The individual employees in *City of Cape Town v South African Municipal Workers' Union obo Sylvester, Mngomeni and Akiemdien and Others* [2013] 3 BLLR 267 (LC) applied for the position of senior foreman in the City of Cape Town's (the city's) department of solid waste management cleaning, but were unsuccessful.

At the time the matter came before the Labour Court, the case for Sylvester and Akiemdien was withdrawn as the city had undertaken to appoint them. The case therefore only concerned Mngomeni, who had scored 9 out of 20 for his written assessment, whereas the requirement was that he should have scored a minimum of 12 out of 20.

The employees had referred an unfair labour practice dispute related to promotion and, in terms of the arbitration award, the city was ordered to appoint the employees to the position of senior foreman with effect from 1 April 2010, with back-pay, by no later than 1 December 2010.

In making the award, the commissioner recorded that the city had conceded that Mngomeni had the relevant qualifications for the position and that he had been acting in the post for some time. The commissioner therefore held that it appeared that Mngomeni was 'good enough' to act in the role but not to be appointed permanently. This, the commissioner held, amounted to an unfair labour practice.

The city applied for the review of the award on the basis that, *inter alia* –
• there was no evidence to suggest that the city had acted in bad faith;

• the award did not explain why acting in a position gave an employee an entitlement to be appointed permanently;
• the commissioner disregarded the correct legal position that the city as employer had the managerial prerogative to make permanent appointments; and
• the commissioner committed a clear error of law in arrogating to himself the mantle of appointing authority.

The Labour Court, per Rabkin-Naicker J, held that it was incorrect to apply the standard of administrative review to the case at hand. Rather, fairness to both parties was the applicable yardstick and this the commissioner had applied. The commissioner had found that, in a situation where the post remained vacant for five years, the employee acted in that post without complaint and there was no evidence on how the assessment was marked or how the applicable pass mark was chosen, it was unfair not to appoint him permanently. The court held that this decision was reasonable and, hence, there was no basis for review. The application was dismissed with costs. The city was ordered to implement the award in respect of Mngomeni within 15 days of the order.