Employment law update

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Payment for accrued annual leave on termination of employment

In *Ludick v Rural Maintenance (Pty) Ltd* [2014] 2 BLLR 178 (LC) the Labour Court considered the accumulation and forfeiture of statutory annual leave granted in terms of the Basic Conditions of Employment Act 75 of 1997 (BCEA) with reference to two conflicting decisions on this issue.

In the *Ludick* case, the applicant employee had worked for the respondent for 27 months and had not taken any annual leave during this period. The applicant therefore claimed to be paid in respect of all the annual leave that had allegedly accrued to him over the two annual leave cycles on the termination of his employment. The respondent argued that the applicant had no such entitlement as, in terms of its leave policy and the applicant's employment contract, all his annual leave had been forfeited because he had failed to take it.

Van Niekerk J considered the provisions of the BCEA that require an employee, on termination of employment, to be paid in respect of annual leave accrued but not granted before the date of termination, together with a *pro rata* amount for leave accrued in the current annual leave cycle. The applicant argued that he was entitled to accumulate an unlimited amount of annual leave as the BCEA is silent on the issue.

The applicant also argued that s 40(*b*) of the BCEA provides that an employee is entitled to be paid for 'any period of annual leave … that the employee has not taken'. He alleged that the provisions of the employment contract providing for the forfeiture of annual leave were unenforceable as they were less favourable than what is provided in the BCEA.

The applicant further argued that, at the very least, he should be entitled to payment in respect of annual leave accrued during the second annual leave cycle as, in terms of the BCEA, an employer must grant annual leave not later than six months after the end of the annual leave cycle in which it accrued. The respondent argued that the applicant was not entitled to any accrued annual leave pay as such leave due to the applicant had been forfeited in accordance with the terms of his employment contract.

The applicant referred to the case of *Jardine v Tongaat-Hulett Sugar Ltd* [2003] 7 BLLR 717 (LC) in which it was found that statutory annual leave not taken within six months after the end of the annual leave cycle in which it accrued is not automatically forfeited nor is any right to accrued annual leave pay ever forfeited. Van Niekerk J considered this view with reference to a different approach that was followed in *Jooste v Kohler Packaging Ltd* [2003] 12 BLLR 1251 (LC) in which it was held that an employee could only be paid on termination of employment in respect of statutory annual leave that had accrued in the annual leave cycle immediately preceding that during which the termination took place and all other annual leave is forfeited.

Van Niekerk J found that the purpose of the BCEA is to ensure that employees take the annual leave that they are entitled to and this purpose would be circumvented if employees were permitted to accumulate annual leave indefinitely and wait to claim payment on termination. He found that where employees are frustrated from taking annual leave they should then invoke the enforcement provisions of the BCEA.

Van Niekerk J found that there was no reason to depart from the decision in the *Jooste* case where claims for accrued annual leave pay were limited to annual leave not taken in the current annual leave cycle and the immediately prior annual leave cycle. Van Niekerk J stated that, in terms of the BCEA, an employer is obliged to grant employees leave before the expiry of the six-month period following the annual leave cycle in which it accrued.

This does not mean that the employee has the right to take leave at any time in that period. Once annual leave has accrued the timing of leave should be the subject of agreement between the parties. In the absence of agreement, the employer may decide the timing of annual leave and provisions in an employment contract entitling the employer to determine the timing of annual leave were therefore enforceable.

Van Niekerk J found, however, that the forfeiture of annual leave was a separate issue to the timing of the annual leave. In this regard, Van Niekerk J held that an employee does not forfeit annual leave or the right to be paid *in lieu* of annual leave on termination of employment if the annual leave is not taken within the six-month period following the annual leave cycle in which the leave accrued. But this applies only to statutory annual leave in the current annual leave cycle and the immediately preceding annual leave cycle.

Practitioners should note that the balance of authority from the Labour Court now, *inter alia*, suggests that:

- Untaken statutory annual leave from the current annual leave cycle and the immediately preceding leave cycle is not forfeited and must be paid out on termination.
- Statutory annual leave from prior leave cycles is forfeited and an employee has no right to be paid in respect of such annual leave, unless of course the employee's employment contract or the employer's leave policy permits such accumulation and payment.

• Annual leave must be taken by agreement between the employer and the employee and failing agreement, the employer may determine the time when the employee must take leave.
• If an employee is frustrated from taking leave, he or she must use the enforcement mechanisms contained in the BCEA. Employees earning below the income threshold prescribed in the BCEA (currently R 193 805) may accordingly seek enforcement through the labour inspectorate, and employees earning above this threshold may seek specific performance through the Labour Court.
• Leave granted in addition to an employee's BCEA/statutory entitlement is not subject to the limitations prescribed by the BCEA and may be subject to whatever conditions are determined by the employer. Such additional leave could therefore be accumulated or forfeited as determined by the employer, and the employer may regulate payment in respect of additional annual leave in the manner it deems appropriate.

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Question:

Does an employer have the right to dismiss an employee in the middle of a disciplinary inquiry without the chairperson's verdict with the employer stating that the reasons provided for the dismissal were that the chairperson would have found the employee guilty and would have dismissed him or her anyway and also the employer saying that it had difficulties in finalising the disciplinary hearings?

Answer:

While I understand what you seek advice on, I think the more appropriate question is whether the employee would be successful in claiming an unfair dismissal should an employer act in the manner and under the circumstances you have mentioned.

One should remember there is nothing in law preventing an employer from dismissing an employee for any reason he or she thinks fair or in accordance with any procedure he or she thinks is reasonable. Whether or not the employer's subjective views will stand the test of fairness is a different issue and will be decided by an independent third party, either by the Commission for Conciliation, Mediation and Arbitration (CCMA) or by the Labour Court.

I will therefore answer your question by focussing on what recourse the employee could possibly have under the circumstances you have described.

First, let us assume that having been dismissed before the inquiry was concluded, the employee refers an unfair dismissal dispute to the CCMA.

The employee has a right to challenge the substantive fairness of his or her dismissal (ie, whether the employer had a fair reason to dismiss the employee) and the procedural fairness of the dismissal (ie, whether the dismissal was in accordance with a

fair procedure). In terms of s 192 of the Labour Relations Act 66 of 1995 (LRA), once a dismissal is common cause, the inquiry turns on whether the employer can prove the substantive and procedural fairness of the dismissal (this as opposed to whether the employee can prove the dismissal was substantively and procedurally unfair).

Substantive fairness

Arbitration at the CCMA is a *de novo* hearing, meaning the hearing starts afresh with the arbitrator sitting as chairperson tasked with deciding the fairness of the dismissal. As mentioned, the onus of proving the fairness of a dismissal rests with the employer, thus he or she will begin by leading evidence first. Thereafter the employee will lead evidence in support of his or her case. Once both parties have led their respective cases, the arbitrator will make a decision.

The reason I am mentioning these points is because unless the employer knows what the employee's defence or explanation is with regard to the reason for his or her dismissal (which would normally have been set out by the employee at an internal inquiry); the employer runs the risk of becoming aware of such version only at the arbitration and, if the employee's explanation is accepted, further runs the risk of the dismissal being found substantively unfair. By way of example, let us assume that an employee working in a supermarket was charged for unauthorised possession of company property when found with a packet of tablets that the employer sells. At the internal inquiry the employer leads uncontested evidence that the employee was found in possession of the tablets and that the store sells the very same type of tablets. Without affording the employee an opportunity to defend himself or herself, the employer, for some reason, makes the decision that the employee is guilty and dismisses him or her.

The employee then refers a dispute to the CCMA and at arbitration the employer leads the same evidence that was led at the inquiry, however, when it is time for the employee to raise his or her defence, he or she produces a till slip from a chemist indicating that he or she bought the tablets on the same day he or she was found to be in possession of them and further that the till slip indicates that the purchase was made at 13:30, which was during his or her lunch time.

As the employer cannot dispute these facts, the arbitrator finds the tablets did not belong to the employer and hence the dismissal was substantively unfair and awards the employee retrospective reinstatement. Had the employer concluded the internal inquiry, he or she would have become aware of the employee's defence and would have taken a more informed decision. Failure to do so in this example resulted in the employer having to reinstate the employee and paying his or her normal salary from the date of dismissal to the date of reinstatement.

Procedural fairness

In terms of procedural fairness, the first question is whether the employer was obliged, in terms of an employment contract or collective agreement or past practice, to have a formal hearing before dismissing the employee. In the absence of such an obligation, the only duty an employer has in terms of procedure is to give the employee an opportunity to be heard before making a decision.

In *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA) the court said the following with regard to a pre-dismissal hearing: '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 a dismissal.'

While one should be alive to the fact that subsequent SCA decisions have found that one cannot read, as a tacit term in an employment contract, that an employee has a right to a pre-dismissal hearing and that such right exists only in statute, this debate does not detract from the advice I am offering for the simple reason that the aforementioned example is with regard to an employee challenging his or her dismissal at the CCMA and is not suing in terms of breach of employment contract in a court of law.

Returning to our example, let us assume the employer does have an obligation to set down and conduct a formal hearing. Should the employer dispense with the inquiry without completing this formal process, any subsequent dismissal would be seen as procedurally unfair.

Similarly, if the employer is not obliged to conduct a hearing as described above, then the question is whether or not the employer gave the employee an opportunity to be heard before dismissing him or her. It can hardly be said that the employee in the example above, was given an opportunity to be heard when the employer dispensed with the inquiry in the middle of the process. If found the opportunity was not given, the dismissal would be seen as procedurally unfair.

To summarise, given the risks the employer runs, both from a substantive and procedural point of view, and taking into account the remedies open to employees if their dismissals are found to be unfair, my advice would be that it is never a good idea for an employer to dismiss an employee before the internal inquiry is concluded.
If the employee is the cause for delaying the finalisation of the inquiry, then the employer has available the option of placing the employee on unpaid suspension pending the conclusion of the inquiry. In this way the employer is not prejudiced by an employee who intentionally delays the finalisation of the inquiry with the aim of prolonging their employment for financial reasons.

Do you have a labour law-related question that you would like answered? Please send your question to derebus@derebus.org.za