Employment law update

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Remedies in unfair discrimination dismissals

In *Arb Electrical Wholesalers (Pty) Ltd v Hibbert* [2015] 11 BLLR 1081 (LAC), Mr Hibbert contended that he was forced to retire at the age of 64. He contended that his retirement was not in accordance with s 187(2) of the Labour Relations Act 66 of 1995 (LRA) as he had not agreed to retire at that age. He therefore claimed that he was dismissed and that his dismissal was automatically unfair as it was based solely on his age. He instituted a claim in the Labour Court (LC) for an automatically unfair dismissal in terms of the LRA and for this he sought 24 months' compensation. He also claimed damages and compensation for the alleged unfair age discrimination in terms of the Employment Equity Act 55 of 1998 (EEA).

The LC, per Lagrange J, held that there was no agreement that Hibbert would retire at the age of 64 and that the respondent had unilaterally decided to retire him when he reached that age. In the circumstances, Hibbert's dismissal was automatically unfair. The court accepted that this amounted to unfair age discrimination.

As regards the remedy to which Hibbert was entitled, the LC held that he could not claim compensation under both the LRA and the EEA. Furthermore, the court was of the view that the unfair discrimination Hibbert complained of was not the most egregious type of automatically unfair dismissal and an award for compensation equal to 24 months' remuneration would, therefore, be excessive. Therefore, taking into account Hibbert's own expectation that he would have retired at the age of 65, the court awarded him compensation equal to 12 months' remuneration.

The LC recognised that while compensation may not be awarded under both the LRA and the EEA, the position is different when it comes to damages. This is because the EEA specifically empowers the LC to make an award for damages in the case of unfair discrimination claims, while the LRA does not recognise damages claims. However, in order to be successful with a damages claim, the employee must prove that he suffered damages and must prove the quantum of damages suffered. In this case, Hibbert failed to prove his damages and the court was accordingly unable to hold the respondent liable for damages.

Arb Electrical appealed and Hibbert cross-appealed. The Labour Appeal Court (LAC), per Waglay JP, Ndlovu JA and Coppin JA, summarised the law on remedies in the case of unfairly discriminatory dismissals as follows:

- The primary remedy in the case of a dismissal is reinstatement. Reinstatement *must* be ordered unless the exceptions set out in s 193(2) apply.
- Reinstatement implies being placed back in employment from the date of dismissal and the employee is, therefore, entitled to his full salary from the date of dismissal to the reinstatement date. With regard to re-employment, this can be ordered from any date after the date of dismissal.
- Payment from the date of dismissal to the reinstatement date (or in respect of back-dated re-employment) is not *compensation* for purposes of the LRA. It is payment of the salary the employee would have received had he not been dismissed unfairly.
- Under the LRA, where reinstatement or re-employment is not ordered, compensation may be ordered. Such compensation is not aimed at making good any patrimonial loss the employee had suffered. It is monetary relief for the injured feeling, humiliation and impairment of the human dignity that the employee suffered at the hands of the employer.
- Compensation under the LRA must be just and equitable. In determining the amount of compensation that may be ordered, factors such as the nature and seriousness of the infringement, the circumstances in which it took place, the behaviour of the employer and the extent of the complainant's humiliation or distress would be relevant.
- Compensation under the LRA is limited to 12 months' remuneration in the case of 'ordinary' dismissals, and 24 months' remuneration in the case of discriminatory dismissals.
- The EEA permits the payment of compensation, as well as damages. Damages may be awarded in respect of patrimonial losses suffered and proved. Compensation is monetary relief for the affront of human dignity arising from the unfair discrimination suffered by the complainant. The amount of compensation that may be awarded in terms of the EEA is not limited and must be just and equitable.
- There is no bar to an employee to claiming compensation under the LRA for an automatically unfair dismissal based on having been discriminated against, and to claiming compensation under the EEA for having been unfairly discriminated against. The employee may bring these claims in the same action.
- Where the employee's dismissal is found to have been automatically unfair in terms of the LRA and that he had been subjected to unfair discrimination under the EEA, the court must ensure that the employer is not penalised twice for the same wrong. In seeking to determine compensation under the LRA and the EEA, the court must not award separate amounts as compensation, but must consider what is just and equitable for the indignity the employee has suffered.
- If the claim is under the LRA only, the court must determine the amount of compensation that is just and equitable. If this amount exceeds the limits in s 194, the amount must be reduced accordingly. The amount does not have to be reduced if the claim is both under the LRA and

the EEA, because the EEA prescribes no limit to the amount of compensation that may be awarded. This recognises the employee's right to claim under both the LRA and the EEA and at the same time, the employer is not penalised twice for the same wrong, because a single determination is made as to what is just and equitable in the circumstances of the case as a whole.

The LAC then turned to consider the relief ordered by the court *a quo*, namely 12 months' remuneration as compensation. The LAC held that because the court *a quo* exercised its discretion in determining 'just and equitable' compensation, it was not open to the LAC to interfere, unless the discretion was not properly exercised. The LAC held that the court *a quo* had properly exercised its discretion with reference to all the relevant facts and that the compensation amount of R 420 000 was therefore not unreasonable. As regards the claim for damages, LAC noted that Hibbert had failed to prove his patrimonial losses and in the circumstances, the court *a quo* was correct in not awarding any damages under the EEA. The appeal and the cross-appeal were accordingly dismissed.

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Question:

My colleague has an award for compensation issued in her favour in the amount of R 119 000 based on unfair dismissal. The arbitrator, in his ruling, did not specify as to whether such compensation was subject to tax (South African Revenue Service (Sars)) deductions or not.

The respondent requested a tax directive in respect of that amount, which provided that the applicant was supposed to pay R 29 000 plus at that time. Six months later, the respondent did not make any payments, either to Sars or the applicant. The respondent then asked for another tax directive, this time around the tax directive was with penalties and standing at R 51 000 plus.

The matter was referred to the Labour Court (LC) seeing that the respondent was reluctant to pay and such arbitration award was made an order of the LC. Despite such court order, the respondent still failed to pay, until the applicant instituted contempt proceedings the LC, where the respondent argued that it was not in contempt, that it has paid the applicant an amount of R 51 000 after tax deductions.

Despite no proof to substantiate such averments, through production of tax directives and payment into the applicant's bank account, the judge found the respondent was not in contempt and dismissed the contempt application.

The first question is: Is an award for compensation subject to tax, and my second question would be, on whose account must the penalties from Sars be imputed?

Answer:

I have researched the labour journals and could not find any information in respect of why or under what circumstances Sars would penalise a person. While I suspect the answer may be found in the relative legislation dealing with income tax, I am nevertheless hesitant to speculate over your second question. For this reason I shall only deal with the first part of your question.

In answering this question I shall refer to the LC's decision in *Penny v 600 SA Holdings (Pty) Ltd* (2003) 24 ILJ 967 (LC) per Francis J.

The facts in that matter are similar to the circumstances you have presented. The employee was awarded compensation in the amount of R 312 000, the employer deducted R 131 040 to pay to Sars and, a further deduction, which is not relevant for the purpose of this article and made a tender to pay the employee the balance. The employee rejected the tender and made an application to the LC in terms of s 158(1)(*c*) of the Labour Relations Act 66 of 1995, to enforce the award.

At proceedings the employee argued that compensation awarded in terms of s 194 of the LRA does not attract tax as compensation is not income but rather it takes the form of damages.

In addressing this argument the court held:

'An employer has a statutory obligation in terms of the Income Tax Act 58 of 1962 (the Income Tax Act) to deduct the required tax from any remuneration which it pays to an employee. Gross income is defined in s 1(*d*) of the Income Tax Act as:

"Any amount, including any voluntary award, received or accrued in respect of the relinquishment, termination, loss, repudiation, cancellation or variation of any office or employment or any appointment (or right or claim to be appointed) to any office or employment. Provided that ... ."

Part 1 of sch 4, item 1 defines remuneration as:

'Means any amount of income which is paid or is payable to any person by way of any salary, leave pay, allowance, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise and *whether or not in respect of services rendered*,' [my emphasis].

In terms of sch 4 item 2(1) of the Income Tax Act, an employer who —

'pay or becomes liable to pay any amount by way of remuneration to an employee shall, unless the Commissioner has granted authority to the contrary, deduct or withhold from that amount by way of employee's tax an amount which shall be determined as provided in paragraphs 9, 10 and 12 whichever is applicable, in respect of liability for normal tax of that employee'.

The 'Commissioner' referred to is a Sars Commissioner and not a Commission for Conciliation, Mediation and Arbitration (CCMA) Commissioner.

Therefore, it is implied that any compensation awarded to an employee for an unfair dismissal or unfair labour practice is always subject to lawful tax deductions. It is only Sars, in terms of a directive, which can calculate the correct amount which needs to be deducted.

Moving away from your specific query but in keeping with the general scheme of the question, the same principle applies to compensation owing to an employee in terms of a settlement agreement. However, parties can agree that the amount contained in the agreement is nett of tax and that the employer will be liable to pay the taxable amount to Sars directly.

By way of an example, let us assume an employee earns R 100 per month gross tax and pursuant to the employee's claim for unfair dismissal, parties agree that the employer will pay the employee three months' salary equating to R 300. The parties can further agree that the R 300 is nett tax, which means the employee receives the full amount and the employer, over and above making the R 300 payment to the employee, will pay into Sars the appropriate amount of tax, which the R 300 attracts. If we assume for argument sake that the tax on R 300 is R 75 then this would translate to the employer paying the employee the full R 300 and further pays Sars

R 75, thus the employer total monetary liability is R 375. This principle was confirmed by the LC in *Motor Industry Staff Association and Another v Club Motors, A Division of Barlow Motor Investments (Pty) Ltd* (2003) 24 ILJ 421 (LC).

The court did, however, say that under the above circumstances the parties must specifically record that the amount set out in the settlement agreement is nett of tax and that the employer will be responsible to pay Sars the appropriate tax on the quantum. In the absence of such a clause, the amount contained in the agreement will be gross tax and subject to lawful tax deductions in accordance with the provisions of the Income Tax Act referred to in the *Penny* matter.