

the aftermath of sidumo v rustenburg platinum mines ltd

edwin ellis

In the aftermath of the *Sidumo v Rustenburg Platinum Mines Ltd* Constitutional Court judgment there has been much speculation and debate on the ability of the CCMA to determine the fairness of a disciplinary sanction. The Constitutional Court judged that the “reasonable decision maker test” should be applied by the CCMA in determining the fairness of a sanction imposed on an employee by an employer. In essence the CCMA needs to determine ‘what is a fair sanction in the circumstances?’ This has left many employers unsure and concerned about their own ability to determine the sanction in misconduct cases and, specifically, in dismissing employees.

Hullet Aluminum (Pty) Ltd v Bargaining Council for the Metal Industry and 2 others is the first case decided after the Constitutional Court’s decision to have to deal with the issue. These were the facts. The employer had a policy which granted its employees a privilege of purchasing parcels of scrap products from it. The policy set out certain procedures to be followed whenever an employee wished to purchase scrap products. One of the employees of Hullet Aluminum, Ms Ramlakan, on an occasion approached a Mr Cassim who was busy supervising the loading operations and requested him to pack two kilograms of “employee’s sales” which she wanted to send to her daughter in Pretoria. Coincidentally Mr Cassim is a relative of Ms Ramlakan. During the course of that day one of the packers from the loading operation brought a sealed box to her, which she states she thought to be the “employee’s sales” that she had ordered. She labeled the box for the attention of

her daughter who was employed with one of Hullet Aluminum’s clients and also marked it for the client.

As it turned out the box contained goods of a value far in excess of what was allowable under Hullet Aluminum’s policy and Ms Ramlakan was charged with dishonesty wherein the following considerations were brought to bear:

“there has been much speculation and debate on the ability of the CCMA to determine the fairness of a disciplinary sanction”

- “Employee’s sales” were, according to the policy, provided in open boxes and the sealed box that Ms Ramlakan received was accordingly not in line with the policy.
- There was no clear explanation as to why she marked the box for the attention of one of Hullet Aluminum’s clients.
- There was no satisfactory explanation as to why Ms Ramlakan did not pay for the goods at the time that they were dispatched.

Ultimately the employer charged Ms Ramlakan with dishonesty and she was found guilty. Mr Cassim in turn was charged with a transgression of

Hullet Aluminum’s policy, found guilty and, because it was a less serious offence, he was given a final written warning and received a suspension. The matter proceeded to the CCMA where on the facts presented the Commissioner found Ms Ramlakan to have been guilty of dishonesty but decided that the sanction of dismissal was not fair taking into consideration:

- the fact that Mr. Cassim had not been dismissed;
- the employee’s years of service with the company;
- that the policy concerning the sale of scraps to employees was not always strictly adhered to by the company.

Hullet Aluminum took this award on review to the Labour Court in Durban. The Labour Court firstly considered the impact that *Sidumo v Rustenburg Platinum Mines Ltd* has had on the functions of the CCMA and in doing so highlighted two issues that the Labour Relations Act requires the CCMA to determine in assessing whether or not dismissals are fair. The first enquiry is a factual one concerning whether or not the misconduct was committed. In conducting this enquiry the CCMA acts in a manner similar to a court. The second enquiry that the CCMA must conduct is that of determining the fairness of the dismissal. In conducting this enquiry the Commissioner must take into account the reasonableness of the rule breached by the employee and the circumstances of the infringement. In arriving at a decision whether or not the dismissals are fair, the Commissioner must exercise a value judgment. Some of the relevant

factors in exercising such a value judgment would be:

- the harm caused by the employee's conduct;
- whether the breach of procedure might be avoided through training or counseling;
- the length of service of the employee;
- the impact and effect that a dismissal would have on the employee.

The court then placed itself in the shoes of the Commissioner and determined that the decision arrived at was not a reasonable one. There were essentially three main considerations that resulted in this outcome.

1. The Commissioner's reliance on the fact that Mr Cassim did not suffer a similar fate to that of Ms Ramlakan was, according to the Labour Court,

misplaced. Consistency did not come into play in this situation seeing as Mr Cassim's situation was clearly distinguishable from that of Ms Ramlakan and ultimately he was, even on Ms Ramlakan's version, charged with a lesser offence. Furthermore, the court took into consideration that Mr Cassim showed remorse for his conduct and apologized for his breaches of the company's policies.

2. This then brings us to the second issue the Labour Court emphasized, being that Ms Ramlakan at no stage showed any remorse for her conduct despite the fact that both Hullet Aluminum and ultimately the Commissioner had found her guilty of dishonesty.
3. Finally, the Labour Court once again emphasized the grim light in which dishonesty is viewed. The Labour

Court stated that the presence of dishonesty tilts the scales to the extent that even the strongest mitigating factors, like long service and a clean disciplinary record, are likely to have a minimal impact on the sanction to be imposed. In other words no matter how many mitigating factors there are, the relationship is unlikely to be restored once dishonesty has been established, in particular in a case where the employee shows no remorse.

What this case clearly does, is reiterate that there are boundaries within which the CCMA and its commissioners must apply the reasonable decision maker test. In instances where their value judgments are not reasonable the Labour Court will set them aside on review. That is what happened in this case where the CCMA award was found to be unreasonable and grossly irregular and was set aside.

UIF contributions confusion

karen michael

On 28 August 2007 the Minister of Labour published a notice in the Government Gazette increasing the maximum income threshold for UIF benefits from R11 662 per month to R12 478 per month effective from 1 October 2007. Following publication of this notice, SARS informed all employers that UIF contributions had to be increased from that date and employers and employees have since been paying the increased contributions over to SARS.

However, the Minister of Finance has now published a notice in the Government Gazette on 31 January 2008 stating that section 6(1) of the Unemployment Insurance Contributions Act ("UIC Act") does not apply to the portion of an employee's remuneration that exceeds R12 478 per month effective from 1 February 2008.

So what is the purpose of this latest notice and why is the Minister of Finance telling us something that we already know?

An error arose as a result of confusion between the Unemployment Insurance Fund Act ("UIF Act") and the UIC Act. Whereas the UIF Act provides for the payment of UIF benefits, it is the UIC Act that regulates the contributions paid by employers and employees to the Unemployment Insurance Fund.

In terms of section 6(2) of the UIC Act, it is stated that the Minister of Finance may by notice in the government gazette determine the maximum amount of income that will limit the amount of UIF contributions payable. The last notice by the Minister of Finance in accordance with this section was published on 23 June 2006 and set the maximum amount of income for the purposes of the UIC Act at R11 662 per month. No further notices were published by the Minister of Finance amending this amount.

"an error arose as a result of confusion between the Unemployment Insurance Fund Act and the Unemployment Insurance Contributions Act"

The notice by the Minister of Labour on 28 August 2007 was published in terms of section 12(3)(a) of the UIF Act and when read with Schedule 2 of the Act, this section empowers the Minister of Labour to amend the maximum monthly

rate of remuneration for the purpose of amending the scale of benefits payable in terms of the Act. The amendment of the maximum amount of income by the Minister of Labour was therefore limited to the UIF Act and of no force and effect in relation to the UIC Act and the determination of UIF contributions.

This problem was raised with Department of Labour officials and it was pointed out that in the past there had always been a corresponding notice issued by both the Minister of Finance and Minister of Labour when amending the maximum income threshold but this time around, the Minister of Finance appeared to have slipped up.

In the absence of the required notice in terms of the UIC Act, the result was that employers and employees were not legally required to increase their UIF contributions to accord with the maximum income amount of R12 478 per month set by the Minister of Labour. Any increased payments made on this basis accordingly constituted overpayments entitling employers to refunds together with interest. There was also the risk that employees could claim the excess amounts deducted off their remuneration from their employers.

On the other hand, employers who stopped making contributions and deducting the

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employer options when overtime is required

keren machanik*

Can you continue to expect employees to work overtime for more than three hours per day when they have been doing so for years and your business needs require this? In the case of *Maneche & others v CCMA & Others* the Labour Court considered this question. Mushroom season came and like every other year, Northern Cape Farmers (a mushroom farming operation) expected their employees to work overtime on picking days. Ordinary hours of work commenced at 07h30 and continued until 17h30 whereafter employees worked overtime until the day's work was complete. On this particular day, employees left work at 20h30, well before the day's work was complete, on the basis that their three hours' overtime had been exhausted and they were not prepared to work beyond that. They were promptly dismissed for insubordination.

In terms of section 10 of the BCEA, an employer can enter into an agreement with employees to work overtime. Total hours cannot exceed 12 on any day and overtime is further limited to ten hours per week. In this case, the employees were already working more than three hours overtime per day during season and had been doing so for years. Was the employer therefore justified in dismissing these workers when they refused to work in excess of the prescribed overtime limit in terms of their agreement?

When the matter came before the CCMA, the employer argued that as the employees had always worked overtime on picking days and had always put in the hours until packing was complete,

an agreement existed between the parties to this effect and their dismissal was therefore fair. The CCMA agreed with the employer's version. However, the employer's triumph was short lived. The Labour Court disagreed with the CCMA and held that although there seemed to be a practice in place that employees worked excessive overtime during critical picking periods, the provisions of the BCEA could not be replaced by a workplace rule or practice which would "undermine the very fabric of the Act". Northern Cape farmers could therefore not rely on the argument that their peak period required employees to work beyond the hours prescribed by law. Employees were duly re-instated with effect from the date of their dismissals.

"BCEA provisions cannot be replaced by a workplace rule or practice that would undermine the Act"

Does this then mean that an employer can never expect employees to work more than three hours overtime per day with a maximum of 10 hours per week? Well, not necessarily. The overtime regulation does not apply to "*work which is to be done without delay owing to circumstances where the employer could not reasonably have expected to make*

provision and which cannot ordinarily be performed by employees during their ordinary hours of work" [section 6(2) of the BCEA]. Therefore, if the work performed at Northern Cape Farmers was emergency work or work which was unforeseen, the Court may have found in the employer's favour. However, the Court held that Northern Cape Farmers were quite aware of the overtime required during their picking season and the day on which the employees refused to continue working beyond the overtime permitted by law was a day on which overtime could have reasonably been expected. The employer could therefore not rely on the provisions of section 6(2).

The Court also pointed out that the employer had failed to avail itself of various other options available to it under the BCEA to ensure work was completed that day and could have easily accommodated its operational demands by recognising or implementing these alternatives to deal with the critical period at hand. If the employer had been a bit more creative in dealing with the demands of its peak season, it could have entered into an agreement with its employees for a compressed working week, different shifts or even averaging of hours (by way of a collective agreement), thereby protecting employee's rights and its operational requirements during peak season. All these options are readily available to employers to legitimately deal with busy workload periods in their business. However, they must be incorporated into workplace agreements before you can use them.

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UIF contributions confusion (continued from page 2)

karen michael

increased amounts off employees' salaries faced the risk of SARS (incorrectly) holding them accountable for the increased amounts together with interest, penalties, interest on the penalties and fines and/or imprisonment.

When the problem was pointed out, the Department of Labour undertook to

liaise with the Minister of Finance to correct the situation. This is therefore the reason why the Minister of Finance has published the notice on 31 January 2008 increasing the maximum income threshold under the UIC Act. Employers and employees are now legally obliged to pay the increased amounts.

However, it is to be noted that the Minister of Finance has only increased the income threshold effective from 1 February 2008 and not 1 October 2007. As a result, the increased payments made by employers and employees during the period between these dates still constitute overpayments and still hold the consequences as explained above.

dismissing an employee who has HIV/AIDS can't be dressed up as misconduct

annie erwin*

The decision of the Labour Court in the recent case of *Bootes v Eagle Ink Systems Kwazulu Natal (Pty) Ltd* is instructive for employers dealing with HIV-positive employees. Mr Bootes was subjected to a disciplinary hearing at which he was charged with three counts of misconduct, found guilty on two and thereafter dismissed. But he did not go quietly, and referred a dispute to the Labour Court claiming that his dismissal was automatically unfair as the true reason for the dismissal was not misconduct at all but on account of his HIV/AIDS status.

The Labour Court had to grapple with the different versions put forward by the employer on the one hand and the employee on the other, with the onus on the employer to prove that the true reason for the dismissal was misconduct. On the facts, the Labour Court concluded that the employer had in fact proved the allegations of misconduct and that the employee was indeed guilty of a breach of good faith which had resulted in a breach of trust. However, the enquiry did not stop there. At the time of his dismissal, Mr Bootes had been diagnosed with full-blown AIDS and, prior to the disciplinary hearing, the employer had tried to persuade him to go on early retirement. Added to that, the disciplinary hearing had only been scheduled more than three months after management

learned of Mr Bootes's misconduct. Moreover, the Court felt that dismissal was not an appropriate sanction and that the misconduct alone could not have justified the employee's dismissal. In the circumstances, the employer had failed to discharge its onus of proving that the dismissal was not discriminatory. The only conclusion to be drawn was that Mr Bootes was dismissed because the employer did not want to continue employing a person suffering from AIDS. It had embarked on the misconduct proceedings as justification for a pre-determined dismissal.

“employers need to be deterred from discriminating against employees on the basis of their HIV status”

In making its finding, the Court noted that justifying discrimination against people on the ground of their HIV status is a hard row to hoe and that it was therefore not surprising that employers

would rather try to disguise the real reason for dismissing an HIV/AIDS-affected employee. However, the Court found that “camouflaging discrimination under the cloak of misconduct is one of the most insidious forms of unfair labour practices”.

In assessing the amount of compensation to be awarded, the Court took into account, amongst other things, that the employee's dignity had been impaired by the abusive disciplinary inquiry and the dismissal, that HIV remains a highly stigmatised infection that continues to marginalise its weak and vulnerable victims, and that employers need to be deterred from discriminating against employees on the basis of their HIV status. It awarded compensation equivalent to 16 months remuneration – a sum of R332 365. It is certain that this figure would have been even higher were it not for the fact that Mr Bootes had in the meantime found alternative employment. In addition, the employer was ordered to pay the employee's legal costs.

The lesson is a salutary one and employers are cautioned to proceed with care and sensitivity when dealing with HIV-positive employees.

*annie erwin has joined our corporate commercial department from 1 march 2008



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employee tax issues

by hanneke farrand and dawn webber*

The Minister of Finance presented his Budget Speech on 20 February 2008, with a number of significant changes and proposals affecting individual taxpayers and employees. For the tax year ending 28 February 2009 the minimum tax threshold will increase from R 43 000 to R 46 000 where a person is below the age of 65, and from R69 000 to R 74 000 if aged 65 and over. The upper tax bracket will increase from R 450 000 to R 490 000. The primary tax rebate will be increased from R7 740 to R 8 280, while the secondary rebate will increase from R 4 680 to R 5 040. The effects of the changes amount to tax relief for individuals of approximately R7.2 billion. For example, a taxpayer who earns taxable income of R 400 000 per annum and is under the age of 65 will save approximately R4 655 in tax, and pay tax at an average rate of approximately 28% of his/her earnings.

The interest and dividend income exemption will increase from R18 000 to R 19 000 for individuals younger than 65, and from R26 000 to R 27 500 for individuals aged 65 and older.

The annual exclusion threshold for capital gains will increase from R 15 000 to R 16 000.

Medical aid contributions

The monthly tax-free amount in respect of medical aid contributions will increase from R 530 to R 570 per month for the first two family members, and from R 320 to R 345 for each additional beneficiary.

Encouraging employer sponsored education

In order to encourage employer-sponsored education, where an employee earns up to R 100 000 per annum (previously R 60 000), the employer may provide a bursary to a relative of such employee of up to R 10 000 per year (previously R 6 000), on a tax-free basis.

Travel allowances – cost tables updated

Many employees use their own vehicles for business purposes and receive a travel allowance from their employer in respect thereof. When completing the annual tax return and justifying the amount of the allowance, many taxpayers revert to the SARS' deemed cost tables to undertake such calculations. These deemed cost tables have now been updated to allow for increased fuel prices, interest rates and inflation.

“the minister of finance presented his budget speech on the 20 february with a number of significant changes and proposals”

Providing tax-free accommodation to expatriate employees

There have been significant changes to the provision of tax-free accommodation to expatriate employees in the recent past. Per the legislation effective as of 1 March 2008, an expatriate employee may only receive tax free accommodation for the first 12 months of his assignment, provided that he/she did not spend more than 30 days in South Africa prior to commencing such employment period.

This will significantly increase the tax burden on expatriate employees or on those employers who pay the South African tax costs of their expatriate employees. A further amendment was therefore proposed in the Budget, such that accommodation be provided to expatriate employees on a tax-free basis for a period of 2 years as opposed to 1 year, subject to a limit of the lower of R 25 000 per month or 25% of the expatriate's salary.

A number of other important items for employers and employees to know

- A relaxation of the restrictions relating to broad-based incentive share schemes is expected.
- Employees sometimes receive funds from their employers that may be conditional on certain provisions being subsequently fulfilled (such as repayable maternity leave and retention payments). Current tax law treats such amounts as fully taxable in the hands of the employees, where the repayment of such amounts is not tax deductible for such employees. It is proposed that amendments to the current tax law be made to allow for a deduction in the hands of the employee where such a repayment is indeed required.
- It is proposed that the tax-free incidental personal use of company owned cellphones and computers provided by employers to employees be confirmed.
- It is also proposed that the current tax deductions that employers enjoy in respect of the provision of low-cost housing will be revised, to further encourage such projects.
- It is anticipated that further steps will be taken towards developing a contributory social security system to complement the country's social assistance grants programmes.
- There have been a number of changes to the taxation of lump sum payments received from retirement funds during recent years. It is expected that the taxation of other withdrawals from retirement funds will also be simplified during the course of this year.
- Finally, it is proposed that the tax allowances granted to employers for learnerships and apprenticeships be amended, to take into account longer term apprenticeships focusing on the provision of technical services, inclusive of those provided by electricians, welders, plumbers, mechanics etc.

*This article is contributed by Hanneke Farrand and Dawn Webber of the ENS Tax Department with whom the Employment Law Department works closely when it comes to the remuneration and benefits aspects of employment contracts, remuneration policies, payroll audits, the employment of foreigners etc, as part of our goal to offer integrated solutions to our clients.

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