Employment Law News

Welcome to the second edition of Bowman Gilfillan's 'Employment Law News'. In our monthly newsletter, we will be keeping you updated on developments in labour legislation, case law and other newsworthy issues.

'Employment Law News' is a **free** monthly newsletter on labour issues, published by Bowman Gilfillan Inc. and edited by Shelley Wilson. **Feel free to forward it to anyone who you think may find it useful**.

Should you have any queries arising out of the contents of the newsletter or should you require employment law advice, please do not hesitate to contact any of the attorneys in our employment law department on (011) 881-9800.

edition # 2
4 June 2004

In this Newsletter

WHAT'S HAPPENING IN THE EMPLOYMENT LAW DEPARTMENT

- John Brand has been contracted by the International Labour Organisation to design a 3 day training course for Labour Court judges throughout the developing world on 'Conciliation for Labour Court Judges'.
- The firm formally launched its Forensics Unit earlier this month. At present, the unit comprises Dave Loxton, Claire van Zuylen and Thabang Masingi. More about them and their work in a later edition of this newsletter.
- Mike Wagener has been promoted to Senior Associate. Mike practises in the firm's Cape Town office.
- At the end of April 2004, a baby giraffe was born at the Johannesburg Zoo. It was the first giraffe to be born at the Zoo in 30 years. The Zoo is one of our clients and Jerry Kaapu is the relationship partner. We were invited to name the new baby "Jerry Giraffe". Unfortunately, before the naming ceremony could take place, the baby giraffe died.

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DEVELOPMENTS IN LEGISLATION

As reported in our previous newsletter, the *Broad-Based Black Economic Empowerment Act 53 of 2003* came into operation on 21 April 2004.

Broad-Based Black Economic Empowerment was partly born of the State's constitutional mandate to achieve equality through, among other things, economic initiatives. Consequently, the state has over the last ten years undertaken various initiatives to deal with the legacy of apartheid and create equal participation of all citizens in the economy. One of the most recent economic initiatives was the adoption of the Broad Based Black Empowerment Act 53 of 2003 ("the BEE Act"). This note gives a broad outline of the BEE Act.

The broad policy objectives of the BEE Act are to create a framework for genuine participation of black people in the economy and facilitate economic growth, social development and enterprise development. The term "black people" refers to Africans, Coloureds and Indians.The BEE Act envisages that BEE will

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The Team

Directors

John Brand
Robin Carr
Graham Damant
Karen Fulton
David Geral
Jerry Kaapu
Dave Loxton
Eric Truebody
Chris Todd
Bob von Witt (Cape Town)
Shelley Wilson

Senior Associates

Jessica Davey
Roz Davey
Talita Laubscher
Richard Moultrie
Henry Ngcobo
Tembeka Ngcukaitobi
Mike Wagener (Cape Town)

Associates

Francisco Khoza
Ndumiso Ncube
Sanguita Popatlal

Don't Miss

The 17th Annual Labour Law Conference to be held at the Sandton Convention Centre from 30 June 2004 to 2 July 2004.

John Brand, Tembeka Ngcukaitobi and Chicco Khoza have been invited to speak at the Conference.

not be achieved only through the redistribution of existing wealth, but also through true economic growth and the creation of new enterprises.

BEE is defined through three core elements, namely direct empowerment through ownership and control of enterprises and assets; human resources development (which includes employment equity and skills development); and indirect empowerment through preferential procurement and enterprise development.

In order to ensure continuous monitoring and evaluation of progress in achieving BEE, the BEE Act envisages the establishment of a BEE Advisory Council. The objectives of the Council will be to advise government on BEE, review progress in achieving BEE and facilitate partnerships between organs of state and the private sector.

In terms of the BEE Act, the Minister of Trade and Industry will issue codes of good practice on BEE. These codes will set targets (including numerical targets) to achieve BEE and the period within which such targets should be achieved.

The government will use the "balanced scorecard" approach to measure compliance with the BEE Act. The scorecard will measure each state and public entity's contribution towards the key economic empowerment indicators, which are ownership, human resources development and indirect empowerment through procurement and enterprise development. Furthermore, organs of state and public entities will also ensure compliance with BEE when awarding licenses, awarding tenders, preferential procurement and partnership with the private sector.

There are three main reasons for using the scorecard approach to measure compliance with BEE, namely reducing the risks presented by fronting and window-dressing; inclusion of all economic participants in the economic empowerment process; and effective measurement and monitoring of the economic empowerment process.

There are no punitive measures for non-compliance with the BEE Act. However, as already mentioned, compliance with the BEE Act will be a factor to be taken into account by organs of state in, for instance, awarding of licenses, awarding of tenders, preferential procurement, and partnership with the private sector. Furthermore, private enterprises have to comply with sector-specific charters, for instance, the Financial Services Charter, the Mining Charter and the Charter for the South African Petroleum and Liquid Fuels Industry.

Finally, it seems that the drafters of the BEE Act were mindful to ensure that the implementation of BEE is underlined by the following critical principles: responsibility, equity, inclusivity, security, proportionality, accountability and flexibility.

by Chicco Khoza

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IMPORTANT CASES

- *Department of Justice v CCMA & Others* [2004] 4 BLLR 297 (LAC)
- *Khula Enterprise Finance Ltd v Madinane & Others* [2004] 4 BLLR 366 (LC)
- *Denel (Pty) Limited v D P G Vorster (5 March 2004, as yet unreported)*
- *Branford v Metrorail Services (Durban) & Others* [2004] 3 BLLR 199 (LAC)

Appointments and promotions

In *Department of Justice v CCMA & Others* [2004] 4 BLLR 297 (LAC), the Labour Appeal Court considered an appeal against a Labour Court decision in terms of which an application for review of a CCMA award was dismissed. In particular, the court considered the scope of item 2(1)(b) of Schedule 7 of the Labour Relations Act (LRA) (now section 186(2)(a) of the LRA). In terms of this section, unfair conduct in relation to promotion constitutes an unfair labour practice.

Upon the retirement of the Chief State Law Adviser, the position was advertised. The respondent employee, Mr Bruwer, the Deputy State Law Adviser at the time, applied for the position. The selection committee interviewed four shortlisted candidates, including Bruwer, but was not comfortable in recommending any of them for the position. The post was re-advertised and still no suitable candidate could be found. The committee then recommended to the Minister of Justice to appoint a Mr W on a fixed-term contract pending the appointment of a suitable candidate on a permanent basis. Bruwer referred a dispute to the CCMA alleging that the Department of Justice had committed an unfair labour practice by failing to appoint him as Chief State Law Adviser. The CCMA commissioner upheld Bruwer's claim and ordered compensation in an amount of R50 000.

Aggrieved by this decision, the Department of Justice applied for the review of the CCMA award. The Public Servants' Association, on behalf of Bruwer, brought a counter-review application to set aside the

Making headlines...

The Constitutional Court recently dismissed an application for leave to appeal directly to it in a case involving alleged unfair discrimination. Dr Dudley, a black woman, alleged that she was the victim of unfair discrimination when she was not appointed to the position of Director: City Health for the City of Cape Town. A white man, Dr Toms, was preferred for the job. Dr Dudley claimed that the appointment was tainted by unfair discrimination and violated the provisions of the Employment Equity Act. In particular she contended that the City was obliged to give her preference on the grounds of her race and gender.

When the matter first came before the Labour Court, Tip AJ departed from an earlier decision of the same court (*In Harmse v City of Cape Town*) and agreed with the City's contention that the Employment Equity Act does not give individuals a right to preferential treatment on the grounds of race or gender. Dr Dudley then approached the Constitutional Court to challenge this decision.

The Constitutional Court refused her leave to appeal at this stage. It ruled that disputes arising under the Employment Equity Act should first be resolved by the Labour Courts, which included the Labour Appeal Court. Despite the importance of the issues, the Constitutional Court considered that it was not in the interests of justice to allow Dr Dudley direct access to the court before the Labour Appeal Court had expressed its views on those issues. The Constitutional Court nevertheless considered the questions raised by the appeal to be important, and made it clear that it was not expressing any views at this stage on the merits of the competing arguments of Dr Dudley and the City of Cape Town.

CCMA's decision not to order Bruwer's promotion and to set aside the award for compensation instead. The Labour Court dismissed the Department of Justice's review application but also set aside the compensation order. The Labour Court did not substitute a remedy. The Department of Justice appealed.

The Department of Justice raised the point that the CCMA did not have jurisdiction to hear the dispute on the basis that the dispute did not relate to "promotion" but to an "appointment" to the post. Furthermore, the Department of Justice contended that, since its defence was based on, amongst other things, affirmative action and the promotion of representivity, the CCMA lacked jurisdiction and the dispute had to be determined by the Labour Court.

The Labour Appeal Court disagreed and dismissed the point. The court confirmed that where an employee's "appointment" to a position would have amounted to such employee being appointed to a higher rank, that constitutes a "promotion" and a resultant dispute can be categorised as an unfair labour practice-dispute relating to promotion. The court further stated that, by virtue of the CCMA's obligation in terms of the Constitution to promote the spirit and objects of the Bill of Rights, the Department of Justice's affirmative action defence did not oust the CCMA's jurisdiction in this matter.

Considering the merits, the court observed that the dispute before the CCMA was that Bruwer was not appointed to the post of Chief State Law Adviser and that this constituted an unfair labour practice. The dispute was not that Bruwer's non-appointment on the temporary basis was unfair. However, it was common cause that, at the time of the arbitration, the post had not been filled on a permanent basis. Bruwer had applied for appointment to the permanent position and he could in fact have ended up being appointed. There was no evidence before the commissioner that the Department of Justice had taken a final decision not to appoint Bruwer. Accordingly, the CCMA award did not bear any relation to the evidence that was before the commissioner. The appeal was accordingly upheld and the commissioner's award was set aside with costs.

Procedural fairness

In *Khula Enterprise Finance Ltd v Madinane & Others* [2004] 4 BLLR 366 (LC), Madinane, a senior employee of Khula, was called before a disciplinary inquiry on charges of misconduct. The disciplinary inquiry was chaired by an independent advocate and, after having been found guilty of the allegations, Madinane was dismissed. He referred an unfair dismissal dispute to the CCMA and alleged, amongst other things, that his dismissal was procedurally unfair because Khula had failed to appoint a chairperson in terms of its disciplinary code. The code provided that "an appropriate level of manager acceptable to both parties shall chair the enquiry". Madinane alleged that by appointing an independent advocate, Khula contravened its own code and that this resulted in the proceedings being unfair. The CCMA arbitrator agreed and held that Madinane's dismissal was unfair. Khula applied for the review of the arbitrator's award.

The Labour Court held that the mere fact that Khula deviated from its disciplinary code did not in itself render the proceedings unfair. There were sound reasons for appointing an independent advocate to chair the hearing, such as that the most senior levels of management were personally involved with the matter. The disciplinary code was merely a guideline and the real question was whether the process that was followed was, in fact, fair. The arbitrator failed to appreciate this. This failure constituted a gross irregularity which justified the review and setting aside of the award.

Damages claim against employer for breach of employment contract

Although a dismissal may be fair even though it was not carried out in accordance with the terms of the employer's disciplinary code and procedure in terms of the unfair dismissal provisions in the Labour Relations Act, this same non-compliance may constitute a breach of contract entitling the employee to claim damages.

In a decision of the Supreme Court of Appeal in *Denel (Pty) Limited v D P G Vorster (5 March 2004, reportable)*, the employer was accused of unilaterally substituting the disciplinary procedure, as outlined in its disciplinary code, with an alternative procedure in dismissing the employee. The employee sought damages in the High Court against the employer party for breach of the employment contract. There was no dispute in respect of the substantive grounds for summarily dismissing the employee.

The SCA held that the procedure provided for in the disciplinary code was incorporated into the employment contract and was a fair one. Therefore, the employee was entitled to insist that the employer abide by its contractual undertaking in that regard. Given that the terms of the employer's disciplinary code were expressly incorporated into the employee's terms and conditions of employment and therefore of contractual effect, the SCA concluded that the employer terminated the employee's employment in breach of the terms of the employment contract.

The SCA awarded costs of the appeal in favour of the employee. The SCA could not determine the amount of damages payable (if any), as an enquiry had to be held in order to determine whether the employee's position would have been different if the employer had fulfilled its contractual obligations. The case was remitted to the High Court to decide this question.

Double jeopardy?

In *Branford v Metrorail Services (Durban) & Others* [2004] 3 BLLR 199 (LAC), the Labour Appeal Court considered whether a dismissal is unfair if an employee is subjected to two disciplinary hearings for the same offence.

The employee was charged for fraudulent petty cash claims amounting to R834.00. The employee's manager furnished the employee with a written warning. Subsequently, the employer revoked the warning and held a disciplinary enquiry in respect of the same issue, which led to the employee's dismissal. The arbitrator found the dismissal to be unfair since the employee had been disciplined twice for the same offence. (This concept is known as "double jeopardy".)

The Labour Court found, on review, that the arbitrator acted irregularly in failing to recognise that, in certain circumstances, it may be fair for an employer to discipline an employee more than once for the same offence.

Aggrieved by the Labour Court's decision, the employee appealed to the LAC. The LAC held that a second enquiry against an employee is permissible when the circumstances are such that it is fair to do so. Therefore, the arbitrator was incorrect in concluding that the dismissal of the employee was unfair merely on the basis of the second enquiry itself. The arbitrator's misconception of the law in failing to recognise this principle amounted to a gross irregularity, as the employer was denied the opportunity to have the fairness of the dismissal considered.

The LAC held that despite the competing interests of the employer/employee relationship, the concept of fairness applies to both employer and employee. The court therefore concluded that an employer is entitled to hold a second disciplinary enquiry when it is fair to do so, and such fairness is to be determined by the circumstances of each individual case.

**Some of these summaries were reported in the April edition of DE REBUS, the South African Attorneys Journal, by Talita Laubscher, a senior associate in Bowman Gilfillan's employment law department*

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A 'HEADS UP' ON...

Legal representation in the CCMA

A judge of the Labour Court recently pointed out that the rules of the CCMA *"have, since July 2002, variously been withdrawn, replaced, and corrected and, the corrections themselves appear to stand in need of correction"*. If you have been following the saga of the CCMA rules relating to legal representation, be assured that we are almost as frustrated as you are!

Before the LRA was amended in 2002, there was a general, but qualified, right to legal representation in all arbitration proceedings. The 2002 amendments to the LRA repealed the sections of the LRA dealing with legal representation. In order to fill the gap, the CCMA promulgated rules in July 2002. Rule 25 dealt with legal representation. These rules had two problems: firstly they were "ultra vires" because they were passed a few days before the empowering LRA sections came into force and secondly, they specifically referred to the repealed sections of the LRA. In October 2003, the CCMA published another set of rules. Although this set was not ultra vires, it still referred to the repealed sections in footnotes. Finally, in December 2003, rule 25 was amended again. (There were one or two further minor amendments in April 2004). The position regarding legal representation at arbitration now may be summarised as follows:

- Legal representation is allowed for the argument of preliminary points (e.g. jurisdiction);
- Legal representation is allowed for alleged constructive dismissals and operational requirements dismissals;
- Legal representation is allowed for unfair labour practice claims; and
- In misconduct and incapacity dismissals, legal representation is prohibited, unless the parties and the commissioner all agree to allow it, or the commissioner, after considering the specified factors, decides that it is unreasonable to expect a party to deal with a dispute without legal representation.

Legal representation remains prohibited at the conciliation stage.

Richard Moultrie & Robyn Hugo

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GETTING TO KNOW US

Talita Laubscher

Talita, a senior associate, obtained a B Iuris degree *(cum laude)* and an LLB degree *(cum laude)* from the University of the Free State and an LLM degree from the University of Emory, Atlanta (USA).

Talita was admitted as an attorney in 2001 and has since worked exclusively in employment law. Talita works closely with Karen Fulton and Shelley Wilson and has particular interest and expertise in issues such as discrimination, sexual harassment and HIV in employment. Talita publishes an Employment Law Update in the monthly editions of De Rebus, the South African attorneys' journal. She is also a contributor to Employment Equity Law, a text book on employment equity.

When she is not working, Talita performs as a soloist (soprano) from time to time.

Francisco ("Chicco") Khoza

Chicco, an associate, has a BA (Law) from the University of Swaziland, an LLB and an LLM (in Employment Law) from Rhodes University.

Chicco lectured at the Faculty of Law at Rhodes University (1998-2000) in the areas of commercial and labour law before joining Bowman Gilfillan. He has done work and has an interest in the following areas: general employment law; employee benefits (pensions and medical aid issues); occupational health and safety; and drafting of workplace policies (i.e. employment equity, occupational health and safety policies; disciplinary codes). He is also a contributor to the Social Security Law textbook published by Butterworths. Chicco works closely with Graham Damant.

When he is not working, Chicco is a firm Formula 1 fan and a Ferrari supporter.

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