LATEST DEVELOPMENTS IN THE EMPLOYMENT ENVIROMENT

Prepared by Pushpa Naidu

Litigation Consultant

Legal Service

September 2011.

Contents

FIXED TERM CONTRACTS

- **GENERAL PRINCIPLES**:
- A fixed term contract of employment is a contract, the duration of which is determined in advance by agreement between the parties.
- The period for which the contract will remain in force can be determined either by reference to a specific date, or by the occurrence of a specific event-e.g. the completion of a project for which the employee's services were engaged.
- When the date arrives or the event occurs the contract expires in accordance with the intention of the parties. When the contract expires as intended by the parties' dismissal will not be said to occur.
- A fixed term contract may be terminated by either party before the expiry date if the other repudiates or commits a material breach
- The question that is constantly being debated on is whether an employer can prematurely terminated a fixed term contract for *operational requirements*.
- This question was answered in the ***Labour Appeal Court in the case of Buthelezi v Municipal Demarcation Board (2004)25 ILJ 2317 (LAC).***
- Mr. Buthelezi was on a five year contract. The employee restructured its operations. Mr. Buthelezi applied for a post in the new structure, he was unsuccessful. The company retrenched him. The Labour Appeal Court held that:

  > "the dismissal was unfair. The Court stated that there is no unfairness in the rule that the parties to a fixed term contract should be held to such contract for the duration of the term of the contract even where the employer wants to restructure its business before the expiry of the term. If an employer chooses to enter into a fixed term contract, it takes the risk that it might have needed to dismiss the employee midterm, but is prepared to take the risk. If the risk materializes it cannot be heard to complain".

- **Thus the principle in the case is that there is no right to terminate fixed term contracts on notice unless the terms of the contract provides for it**.
- NB: It is important to have a premature termination clause in fixed terms contracts.

RESIGNATION

- **GENERAL PRINCIPLES**

- The act of resignation is a procedure which involves giving notice that one of the parties in an employment relationship intends to terminate that relationship.

- The reasons for resigning are usually:- the employee has found another job, is unhappy in that job that s/he wants to leave regardless of alternative employment, sometimes a spontaneous reaction to a disagreement in the workplace and sometimes to avoid pending disciplinary action.

- A resignation is a unilateral termination of a contract of employment by the employee.

- The employee must evince a clear and unambiguous intention not to go on with the contract of by words or conduct that would lead a reasonable person to believe that the employee harboured such intentions.

- Notice of termination of employment given by an employee is a final unilateral act which once given, cannot be withdrawn without the employer's consent.

- Consequently it is not necessary for the employer to accept any resignation that is tendered by an employee or to concur in it, nor is the employer entitled to refuse to accept or decline to act on it.

- A resignation must be communicated to the employer to be effected.

- What constitutes effective communication?

- In the case of ***Sihlali v SA Broadcasting Corporation Ltd (2010) 31 ILJ 1477***. the court held that a resignation by sms is a resignation submitted in writing.

- **The facts of the case**: The Applicant was employed by the SABC as a legal advisor in terms of a fixed term contract. The contract commenced in 2006 and was automatically terminate on 31st July 2009. In or about 2007, certain allegations concerning the Applicant appeared in the press. The SABC then notified the applicant that he would be suspended and a disciplinary hearing will be held. The Applicant upon hearing this sent a sms to the SABC's executive officer indicating that he "quits with immediate effect".

  After several weeks the Applicant wanted to revoke the resignation and return to work to 'clear his name and reputation' by attending the disciplinary hearing.

- The court held that , ' however noble his motives to go back to work was , it could not in law serve as a basis to resurrect the applicant's contract of employment some six weeks after its termination in circumstances where its demise has been brought about by the applicant's voluntary and deliberate conduct. The court was satisfied that the sms sent by the employee was a clear unequivocal statement of his intention to terminate his employment.

- **Can an employee resign to avoid disciplinary action?**

  Yes, as stated earlier a resignation is a unilateral act. The employer cannot refuse a resignation. In cases when the employee has committed a misconduct and resigns it is best not to let the employee work the notice period. It is advisable to waive the notice period and request the employee to leave immediately.

- The employee cannot compel an employee to attend a disciplinary hearing after the employee has left its employment. The employer lacks jurisdiction.

- An employer can hold an enquiry while the employee is serving notice; the hearing however must be finalized before the employee leaves the employment.

- If the conduct is serious (fraud, theft etc) it is also advisable to report the matter to the police for further investigation.

  Can an employer communicate to future employers that there was a disciplinary action pending?

- Yes, as long it is made clear to the future employer that a hearing was not held and no findings were made. The certificate of termination however will reflect as a resignation.

NOTICE PERIOD

- **GENERAL PRINCIPLES**

  Most contracts of employment stipulate notice period. The University's conditions of service stipulate notice periods as follows:

- **<u>During probation</u>**:

  one (1) week written notice during first 6 months

  two (2) weeks written notice during the following 6 months

  one (1) months written notice at any time after the above time periods.

- **<u>Academic staff after confirmation</u>**

  Three (3) months written notice by either party to be effective either 30th June or 31st December. Thus the last working day must be 30th June or 31st December whichever is applicable.

- **<u>Support Staff</u>**

  One (1) calendar months written notice unless the letter of appointment stipulates a different notice period.

- **How is a calendar month calculated**?

  An employee can resign any day of the month but a calendar months notice will only be calculated from the first of the next month e.g. an employee resigns on 16th January and in terms of their contract they are required to give one (1) calendar months notice. The notice period will start on 1st February.

- The contract of employment does not terminate on the date the notice is given but when the notice period expires. In the case of ***<u>Lottering & Others v Stellensbosch Municipality (LC)</u>*** the court held that if an employer waives any part of a notice, the contract terminates when the employee leaves work (i.e. at the commencement of the waived period).

- If the employee having resigned does not work the notice period, the employer is not obliged to pay the employee on the principle of no work no pay.

- If proper notice is not given that constitutes a breach of contract entitling the employer to either hold the employee to what is left of the contract or to cancel it summarily and sue for damages.

SUSPENSION

General Principles:

- Suspension is the term used in the employment context to describe situations in which an employer declines to accept an employee's service, but does not terminate the contract.
- Employers suspend employees for various reasons, but usually the intention is to temporarily remove the employee from the workplace pending disciplinary action (preventive suspension).
- A suspension would be unfair if it is imposed for an unreasonable period and action has been taken by the employer.

  The only rationale for suspension is the reasonable apprehension that the employee will interfere with investigation or repeat the misconduct. It follows that it is only in exceptional circumstances that an employee should be suspended pending a disciplinary enquiry. Suspensions have a detrimental impact on the affected employee and may prejudice his or her reputation, advancement, job security and fulfillment. It is therefore necessary, that suspensions are based on substantive reasons and fair procedures are followed prior to suspending an employee. ***SA Post Office Ltd v Jansen van Vuuren NO & others (2008) 17 LC***
- **Procedure to be followed in suspensions:**

  it is now settled law that an employee has to be heard before being suspended.

  - Thus a notice must be forwarded to the employee, which contains the reasons for suspension.
  - The employee must be given an opportunity to respond to such allegation.
  - A neutral person must then determine if the employee should be suspended.

- The employee is suspended with full pay and benefits.
- An employer cannot request an employee to take special leave if it wishes to suspend an employee.

- At the University only the Vice Chancellor or his nominee can suspend an employee.

PROMOTION

- **General Principles**

  Under the common law employees have no legal entitlement to be promoted to higher posts.

  Employers are free to choose whom to appoint, which posts to create, who will fill them and whom to appoint to vacancies.

  The Labour Relations Act 1995, however, now stipulates that an unfair labour practice can relate to promotions.

  A lateral transfer is not a promotion. It is normally to an elevated higher post.

  Promotions, normally but not necessarily involve an increase in salary, it always entails an increase in responsibility and status.

  An unfair labour dispute must relate to a failure or refusal to promote the employee to an existing vacancy; a demand that the employer upgrade the employee's present post , or create a higher post is not a dispute relation to promotions.

- Employees complaining about an unfair labour practice in respect of promotion must prove the following:

  i. that a post exists for which they were contenders;

  ii. That the post was of higher status than the posts the employee occupied at the time;

  iii. That the employer refused to place the employee in that post.

- The emphasis is not on the promotion (or non promotion) but on the conduct relating to it.

- A dispute concerning promotion must be between an employee seeking promotion and his and her own employer. Job hunters can never be candidates for promotion.

  Employers can also be guilty of unfair conduct if they give employees' a legitimate expectation that they will be advanced and then without adequate reason, frustrates that expectation.

- A legitimate expectation arises when the employee acquires a reasonable impression from the employer's words or conduct that he or she will be promoted.

- Such an impression may arise from a prior promise, which may fall short of a binding agreement, or past conduct.

- In the case of ***PSA v Department of Correctional Services [1998] 7 BALR 854 CCMA*** **,** the arbitrator held that by allowing employees to act in higher post for considerable periods, it had

given them a legitimate expectation that they would ultimately be promoted to those posts. However when employees seek to rely on a legitimate expectation they must prove that the promise was given by a person with authority to bind the employer, or that the circumstances were such that they indeed gave rise to a reasonable anticipation of a promotion.

- It would amount to unfair conduct is an employer advertises a position setting our prescribed minimum qualifications and then to appoint a person who did not possess that qualifications or to create a position for a specific person without advertising according to its policies and procedures.

- In the case of ***SAPS v Safety and Security Bargaining Council & Others (LC no: P426/08 judgment date 27/10/2010),*** the court held that the following principles apply when determining an unfair labour practice relating to promotions:

    1. There is no right to promotion in the ordinary course, only a right to be given a fair opportunity to compete or a post. An exception will only exist if there is a contractual or statutory right to promotion;

    2. Any conduct that denies an employee a fair opportunity to compete for a post constitutes an unfair labour practice;

    3. If the employee is not denied the opportunity of competing for the post, the only justification for scrutinizing the selection process is to determine whether the appointment was arbitrary or motivated by an unacceptable reason;

    4. The corollary of this principle is that as long as the decision can be rationally justified, mistakes in the process of evaluation do not constitute unfairness justifying an interference with the decision to appoint.

    5. There is no right to promotion in the ordinary course. The appropriate remedy, as a general rule is to set aside the decision and refer it back with or without instructions to ensure that a fair opportunity is given. Since the interest is the opportunity to compete, it follows that the appropriate remedy rather than appointing the applicant to the post or to compensate (there being no loss). There are two exceptions. The above principle does not apply to discrimination or victimization cases in respect of which different and compelling constitutional interest are at stake. It also does not apply if the applicant proves that but for the unfair conduct s/he would have been appointed.

CASE STUDY

- **Transnet Freight Rail v Transnet Bargaining Council and Others (2011)**

  Facts: The employee was employed from 27 May 2002 until her dismissal on 29th May 2009. At the date of dismissal, she was employed as a yard official which involves marshalling and coupling of trains, and is a safety critical position. Due to the nature of the work the offence of being under the influence at work constitutes a serious misconduct in terms of Transnet's disciplinary code.

  On 24th May 2009, being the date upon which she committed the misconduct resulting in her dismissal, the employee had a valid serious written warning for being under the influence of alcohol at work which had been issued on 28th may 2008 and was valid for 12 months.

  At the arbitration hearing both the procedural and substantive fairness of her dismissal was challenged on several grounds including that she had not been afforded rehabilitation in terms of its Employee Assistance Programme (EAP).

- **Arbitration**: The Arbitrator held that the chairperson of the enquiry was well versed with the employer's EAP and the employee's problems and could have recommended counseling as a form of action to address misconduct. There was also no evidence that the employee could not be trusted or that her worked had been affected and thereby caused an irretrievable breakdown in the relationship. The arbitrator thus reinstated the employee and ordered her to submit to rehabilitation in terms of its EAP policy.

  Labour Court: The Labour Court reviewed the case and overturned the arbitrator's decision and confirmed the employee's dismissal as fair. The Court asked the question: Whether alcohol abuse should be treated as a misconduct rather than incapacity.

- **Principles of the Case**: Where an employee is suffering under incapacity as a result of their alcoholism the employer is obliged to counsel and assist the employee in accessing treatment for the disease. Alcoholism is a disease and this disease results in the incapacity of the employee If an employee reports for duty under the influence of alcohol and has been exclude from the incapacity classification of alcoholism that employee can be charged misconduct and a disciplinary hearing can be held.

- **Principles of the Case:** The Court held that once a commissioner finds that an employee is not an alcoholic s/he is required to consider whether a finding of guilt is fair and whether the sanction applied by the employer is reasonable and justified in the circumstances. In order to do this the commissioner is required to apply the law relating to misconduct and not incapacity.

- **Warning**: The Court held that an employer is always entitled to take into account the cumulative effects of these acts of negligence, inefficiency and/or misconduct. An employer is always entitled to look at the cumulative effect of the misconduct of the employee