LABOUR LAW UPDATE

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CASE 1

Clash of Cultures

CASE SYNOPSIS:

Kievits Kroon Country Estate v Mmoledi (875/12) [2013] ZASCA 189 (29 November 2013) deals with the interesting cultural diversity in South Africa and how accommodating or not one needs to be.

We all know the facts of this matter at this stage – involving an employee taking leave due to being booked off by a sangoma for premonitions she was experiencing, which led to her having to undergo sangoma training. This leave being taken despite this leave being turned down by the employer.

The SCA noted that the CCMA commissioner considered that there was a cultural chasm between Mr Walter (the employer) and the employee. Because of this he was not able to understand the significance of her request to be released from duty to attend the traditional healer's course.

If he had understood the request, so the commissioner reasoned, he would have regarded her condition as a disease that would have qualified her for sick leave. And because the respondent genuinely believed that her health would be in danger if she did not heed the call from her ancestors to undergo training to become a traditional healer, which Mrs Masilo (the sangoma) confirmed, she had no option but to defy heremployer's instruction to report for duty. She had thus proved, said the commissioner, that 'her absence from duty was necessitated by circumstances beyond her control'. Her dismissal was therefore substantively unfair. The decision of the CCMA was confirmed by the Labour Court as well as the Labour Appeal Court. The SCA found that it was apparent from the employee's evidence at both the disciplinary hearing and at the CCMA that she believed that she was ill. Her employer seems to have understood that her experiences bore some cultural significance – hence Mr Walter's willingness to accommodate her on two occasions. But he did not understand this as some form of illness.

The Court went further to find that "Before us it was contended that the respondent was not honest in relying on the note from the traditional healer in her claim to be ill and attempting to justify her refusal to obey the order. The difficulty with this submission, as I have mentioned earlier, is that this evidence went unchallenged. It follows that the criticism of counsel for the appellant that the commissioner misconstrued the nature of the inquiry has no merit.

CASE 1 continues….

It is also significant that Mr Walter testified that the respondent would not have been dismissed if she had produced a certificate from a medical practitioner, instead of the traditional healer, as proof of her illness.

But had he understood it to be equivalent to a medical certificate, or tried to understand its importance by asking the respondent to explain its meaning, instead of summarily rejecting it, he may well have accommodated her request. Further the appellant could have explored with the respondent alternatives to her taking leave at that time, such as her attending the course when it was convenient to accommodate her request if possible.

It should be mentioned that an employer is not expected to tolerate anemployee's prolonged absence from work for incapacity due to ill health. And it may,if it is fair in the circumstances, exercise an election to end the employment relationship.

But that was not the situation in this case.

The commissioner's conclusion that the respondent was justified in disobeying the employer's instruction is supported by the evidence."

The Court therefore concluded that the employer's appeal be dismissed with costs.

WHAT THIS MEANS TO YOU?

Ensure that your rules are clear with regards to which certificates will serve as proof of absence. The moment you allow a particular type of reasoning for absence and are lenient, it is hard to justify acting contrary to the earlier action.
Interrogate the reasoning for the absence provided by the employee. Do not just reject same out of hand.
Be consistent, be tolerant of diversity, but ensure that standards are kept consistently, irrespective of race or culture.
Please note though that this case does not suddenly create the rule that traditional healers' certificates are to be accepted from now on.

CASE 2

Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical, Energy, Paper, Printing, Wood and Allied Workers Union (2013) 22 LAC 10.5.1

CASE SYNOPSIS:

After the respondent experienced a decline in profits of one of the divisions, it devised a "10 point plan" which involved, inter alia, the implementation of a continuous shift pattern.

The respondent's members did not accept the change, and issued a notice of intention to commence a strike. The respondent replied with a notice informing them that retrenchment was contemplated, and inviting them to formal consultations under the auspices of the CCMA. Those employees who accepted the changes continued working, and those who did not were retrenched without severance pay.

The Labour Court held that there was a valid reason for the retrenchments, but noted that the alternatives offered would have meant that the workers' overtime pay would have been reduced. That court, accordingly, found that the retrenched employees' rejection of the new shift pattern was not unreasonable, and that they were entitled to severance pay.

The Court noted that it had been previously held that the purpose of section 41(2) of the Basic Conditions of Employment Act, which provides for payment of severance pay for retrenched employees, is aimed at assisting employees who have lost their jobs through no fault of their own.

Where an employer arranges alternative employment and employees reject the alternative for no sound reason, they forfeit their right to severance pay. There is no basis on which employees can claim both severance pay and alternative employment.

In this case, the employees were offered either the same salary or slightly higher salaries, while some wages were cut only marginally. They would all have saved on commuting costs. The Court held that the rejection of the new shift system by those of the employees who would have received increased or similar wages was unreasonable, and section 41(4) of the Basic Conditions of Employment Act applied to them.

As to those whose overall remuneration would have been reduced, the Court noted that it is difficult to demarcate precisely when an offer to avoid retrenchment can reasonably be rejected and severance pay claimed. However, in this case the workers had relied on the loss of overtime pay, to which they had no right.

The appeal was upheld.

Summary source : IRNetwork

WHAT THIS MEANS TO YOU?

Again a clear illustration that one can still do a "Fry's Metal" under current legislation and a reminder again of the principles taken into account in determining forfeiture of severance where a reasonable alternative to retrenchment is rejected.