

## Misuse of legal technicalities endangers tightrope balance



Labour law gives the employee the onus of proving that he/she was dismissed. Therefore, if the employee cannot prove the existence of an alleged dismissal his/her claim of unfair dismissal must fail.

However, in some cases the question as to whether the employer's actions constitute dismissal is not easily answered. This is particularly so in a case where an employer claims that the employee's employment was terminated by the operation of law. That is, the employer could claim that the employment was terminated because an existing law prohibited the continuation of the employment, thus imposing a termination that was out of the hands of the employer.

In the case of *Bithrey vs the Department of Health, Gauteng* (Lex Info, 7 October 2024. Case number JR1478/22, Labour Court) Bithrey was appointed as a registrar at the beginning of 2017 on the basis that she would do clinical work at one of the employer's hospitals and would, for a period of 5 years, be enrolled at Pretoria University. Her contract contained no end date but the employer claimed that Bithrey, by operation of law (Health Professions Council regulations) had only been appointed for a 4-year period.

After 4 years the employer notified the employee that her post was coming to an end on 31 December 2021 on the basis that the Health Professions Act prohibited the continuation of employment of employees after 4 years unless an extension of employment had been approved.

The employee lodged an unfair dismissal dispute with the public health bargaining council. The arbitrator found that the post of registrar was temporal and to be occupied by a registrar in training. The arbitrator

ruled that the employee had not proved that she had been dismissed because she had not been appointed permanently and because a registrar has to vacate the post if she has not passed her academic study course after 4 years; and Bithrey had not, by 31 December 2021 completed her 5-year course.

On review the Labour Court found that the employer's claim that Bithrey's employment had been terminated by operation of law was invalid and that the employer had created the problem by its failure to ensure that the employment contract was clearly worded.

The Court found the dismissal to have been procedurally and substantively unfair and ordered the employer to pay the employee eight months' compensation.

This case highlights the need for employers to understand the importance of drafting clear and unambiguous employment contracts as well as the limitations of reliance on legal technicalities such as terminations on the basis of operation of law.