Navigating the complexity of dismissals, resignations and retrenchments in a Covid world

South Africa's labour laws are constantly evolving, and as with any legislation, they are often open to interpretation, and therefore to contention. While every incident is resolved individually, and decisions are based on the facts and the merits of the case, it is often helpful to look at past and current Employment Law updates in terms of CCMA rulings, as well as case law from the Labour Court, Labour Appeal Court and Constitutional Court where applicable. These set a precedent and offer guidance which can often give a general idea of how a case could be expected to unfold. With the economy in a state of turbulence resulting from the unprecedented Covid-19 pandemic, there has been much upheaval and disruption. Many businesses have been forced to let employees go, while in other cases, employees have resigned, which has caused an increase in the number of labour law-related referrals. The latest Employment updates to existing case law can help employers and employees understand what they might expect in the event of a dispute.

Separation agreements

When termination of the employment relationship occurs upon agreement, by the employer and employee, and is captured in writing, this is typically termed a 'mutual separation agreement' (MSA). A mutual separation agreement is when there is no dispute over the termination of the employment contract. When retrenchments take place, a separation agreement in terms of a severance package can be negotiated and this is known as a 'voluntary severance package' (VSP). This would then include all statutory payments, as well as any amount negotiated over and above the statutory benefits. In some instances, issues that may arise out of MSAs or VSPs are that employees will agree to the separation initially and even sign an agreement and then refer the matter claiming to have been coerced or

pressured into accepting the terms. When this is taken to court, the agreement will be examined with the other facts of the case to determine a fair outcome.

In the case of *Chikwangu v Screening and Earthworks (2021) 30 CCMA 7.1.1. and 1 BALR 17 (CCMA)*, the company was negatively affected by the level 5 lockdown regulations imposed by the government in 2020 due to the Covid-19 pandemic. As a result, they did not have sufficient work available for all their staff, and several employees were retrenched, during which, they signed separation agreements that included severance packages. Following this, one employee referred the matter to CCMA for unfair dismissal. The result was that the commissioner found the terms and conditions of the separation agreement to be clear and stated that there was no dismissal considering the signed separation agreement.

Resignations

There is often contention over whether employees can resign with immediate effect, or whether they are obliged to carry out a notice period. This is important in instances where disciplinary proceedings are initiated. For example, when employees are called to attend disciplinary hearings, is it possible for them to resign immediately to avoid possibly being found guilty and dismissed? The latest update in case law supports that employees must uphold the notice period and can therefore be disciplined during this period, even if they claim immediate resignation.

In the case of *The Standard Bank of South Africa Limited v Nombulelo Cynthia Chiloane (case nr: JA85/18) [2020] ZALAC (5 November 2020)*, the employee was issued with a notice to attend a disciplinary hearing and resigned with immediate effect. The company proceeded with the hearing and subsequently dismissed her. Initially, the Labour Court stated that the resignation was valid, and the dismissal was nullified. However, on appeal, the Labour Appeal Court upheld the terms and conditions of the employment contract and stated that the notice period of four weeks was still applicable. Organisations are therefore within their rights to proceed with hearings after an employee resigns.

Communication is key

When it comes to employment law, each case is unique and is based on its own merits. Case law supports this, but also provides precedent around which future decisions can be based. The starting point of any dismissal, resignation, or retrenchment, especially now in a turbulent climate, is consultation with the employee or employees in question. The Labour Relations Act supports this as well. In addition, it is essential to consult with employees and representatives on any changes to terms and conditions of employment, as well as any changes or amendments to and policy, both to discuss the impact it will have on employees, as well as to highlight the changes so that impact, as well as any risk can be mitigated. At all stages, communication is the key to minimising friction in the workplace and hopefully avoiding any unnecessary legal action.

Solutions for Employers

A business can partner with a temporary employment service (TES) that has expert resources to navigate dismissal complexities and specialised nuances that can make or break a case. Any terminations, whether through retrenchments, resignations or otherwise, sometimes impacts business continuity. A good TES has the expertise and resources to advise, plan and execute fair dismissals, as well as recruiting suitable resources for replacement at the same time. This can afford businesses the opportunity to focus on their core business, or in the case of restructuring, focus on their business strategy and viability rather than the onerous human resource component attached to it.