Unlocking Labour Laws

In each edition of *Labour Bulletin* we get a labour lawyer to answer queries from workers and organisers. Here **Jason Whyte** looks at the use of the polygraph in misconduct cases; the meaning of the Sidumo case in dismissal; and what back pay a worker can expect if s/he waits longer than a year for a Labour Court ruling.

Polygraph in action

Something valuable has been stolen in the workplace and my employer insists that I take a polygraph test to prove my innocence. I feel unhappy about this, but I do not want to lose my job. What can I do?

Employers often like to make use of polygraph or 'lie detector' tests in the workplace as a means of identifying employees who have committed misconduct. Employers also assume that the results of a polygraph test will be a 100% accurate and can then be used against the employee in a disciplinary hearing and at the CCMA.

Recent studies show that polygraph tests can often be very inaccurate and can lead to employees being falsely implicated in workplace misconduct. Polygraph tests work by placing sensors on a person's body which then measure breathing, pulse, blood pressure and perspiration.

Unless your employment contract (or a collective agreement with your trade union) states that you must undergo a polygraph test at the request of your employer, you may refuse to do a polygraph test. It will not be fair for your employer to take any action against you for this refusal.

However in the CCMA decision of *Harmse v Rainbow Farms (Pty) Ltd (WE 1728)* the commissioner stated that the refusal to undergo a polygraph test could under certain circumstances indicate a breakdown in the relationship of trust as it raised the employer's suspicions. This argument has now been rejected by other CCMA decisions as it is clearly wrong.

Even if you take a polygraph test and it indicates that you have not answered the questions truthfully, your employer cannot dismiss you automatically. The company must still hold a disciplinary hearing at which other evidence of your guilt is presented for you to challenge. You are also entitled to question the person who did the polygraph test.

Many cases have come before the CCMA on the question of polygraph tests. For example in *Sosibo & others v Ceramic Tile Market (2001) 22 ILJ 811 (CCMA)*, commissioner Rycroft stated that polygraph tests must be treated with extreme caution as they can be inconclusive and unreliable. The employer must present evidence that establishes that the employee was guilty of the misconduct and cannot just rely on the polygraph test.

I have heard that the law on review applications has changed and that it is now more difficult for employers to dismiss employees and more difficult to challenge arbitration awards that employees have won. Is this true?

In a previous issue of *SALB* we reported that the Supreme Court of Appeals (SCA) had found in the matter of *Rustenburg Platinum Mines v CCMA and Others [2006]*

11 BLLR 1021 (SCA) that a commissioner at the CCMA or bargaining council must apply the so-called 'reasonable employer test'. This means that the commissioner had to defer to what the employer considered to be fair and could only intervene if the employer had not applied its own sanction fairly or if the employer's sanction was 'unreasonable'. Unfortunately the SCA did not give any guidance as to how this should be applied in practice.

The CCMA found in this case that it was unfair for the mine to dismiss a security guard, Mr Sidumo, for a first offence given the nature of the offence in question and his length of service. Mr Sidumo was thus reinstated. Applying the reasonable employer test, the SCA found that it was wrong for the commissioner to have intervened and the award was set aside.

The judgment was a major blow for unions and employees as it indicated that it was the employer's prerogative to apply a sanction and that the courts would set aside arbitration awards very easily.

Fortunately the matter was taken on appeal to the Constitutional Court *(Sidumo and another v Rustenburg Platinum Mines Ltd [2007] 12 BLLR 1097 (CC)* and the decision of the SCA was reversed.

The Constitutional Court found that the reasonable employer test had no place in our law and that a commissioner could substitute his or her own decision for that of the employer. The test was what the commissioner considered to be a fair sanction. The subjective feelings of the employer are not relevant.

The second issue that the Constitutional Court clarified was the test for an award being set aside on review. The Court found that the Labour Courts can only review an award if it is a decision that 'no reasonable commissioner' could have made. This is a stricter test and one which will assist trade unions and employees who have won at arbitration. I believe that it will discourage employers from launching review applications in the future.

The result of the Constitutional Court's judgment was that Mr Sidumo was finally reinstated into the mine's employment!

I am currently fighting a case in the Labour Court and it has been two years since my dismissal. If I am reinstated, will I receive back-pay for the whole two years?

Until recently it was assumed that if an employee was reinstated, he would receive back-pay for the entire period between dismissal and reinstatement, unless the arbitrator or judge ruled otherwise (for example where the employee was partly at fault). This would apply even if the period between dismissal and reinstatement exceeded 12 months.

Recently, the Labour Appeal Court came to the conclusion that back-pay for the purposes of reinstatement must be read with section 194(1) of the Labour Relations Act. This meant that any back-pay must be limited to a maximum of 12 months *(Chemical Workers Industrial Union & others v Latex Surgical Products (Pty) Ltd (2006) 27 ILJ 292 (LAC))*.

In another matter *(Republican Press (Pty) Ltd v Ceppwawu & others (2007) 28 ILJ 2503 (SCA))*, 150 employees had been retrenched. Their claim before the Labour Court was upheld and 28 of the employees were reinstated with full retrospectivity to the date of their dismissals. The company then appealed and the matter ultimately came before the SCA. This was not surprising as the employees involved in the dispute had been dismissed more than six years prior to the Labour Court's finding that they should be reinstated, and stood in line to receive six years' back-pay.

The company contended that *CWIU v Latex Surgical* was the correct position in law and that the employees should only have received a maximum of 12 months' compensation. The SCA disagreed and found that the terms 'reinstatement' and 'compensation' were not equivalent and that there was no reason to limit the retrospectivity of a reinstatement order to 12 months. *CWIU v Latex Surgical* was hence overruled.

If the judgment had ended there, the employees and their union would have walked away quite happy. However the SCA concluded that a reinstatement order in this dispute was not appropriate and that the Labour Court ought to have only ordered compensation – which of course was limited to 12 months. The employees could thus not return to their jobs and had to make do with a year's salary.

It should be pointed out, however, that a part of the delay was occasioned by the trade union and that this played a significant part in the LAC's finding.

I also point out that a commissioner or judge deciding future matters may order reinstatement from a date later than the date of the dismissal and thereby limit the back-pay due to an employee. LB

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If you have any queries that you would like a labour lawyer to answer, email or send your query to salbeditor@icon.co.za or SALB PO Box 3851 Johannesburg 2000.