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FROM THE BENCH

Rawlins v Dr DC Kemp t/a Centralmed [2010] ZASCA 102

This case arises from the dismissal of Dr Rawlins from the employment of Dr Kemp. Soon after the dismissal occurred Dr Kemp accepted that it was unfair. What remained in dispute was only what remedy Dr Rawlins should have. Dr Kemp offered to reinstate Dr Rawlins on numerous occasions but on each occasion the offer was refused. Dr Rawlins said in evidence that she refused the offers because the relationship of trust had broken down. The dispute in the litigation that followed was confined to whether she should be awarded compensation and, if so, what amount that should be.

The court held that there is no doubt Dr Rawlins genuinely felt that there had been a breach of trust. But these are two professional people who might be expected to resolve any acrimony that might earlier have existed. No objective grounds were advanced why any perceived breach of trust between them was not



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capable of being restored. Dr Rawlins chose not even to explore that possibility but rejected it out of hand. That is not how labour relations should be conducted and the rejection of the repeated offers of reinstatement was unreasonable and she has only herself to blame for her financial loss. The appeal was dismissed.

Stander v Education Labour Relations Council and Others [2010] ZALC 164

The applicant who had been an educator with the Department of Education for over thirty years was dismissed for an assault of a learner. The applicant slapped a seventeen year old grade 11 learner. His explanation for this conduct was that the learner had provoked him. His defence was that in slapping the learner he acted involuntarily in circumstances of “semi automatism.” He further stated that he could not recall the incident.

The applicant was dismissed after a disciplinary process. The dispute was referred to the Education Labour Relations Council (ELRC) for resolution. The ELRC found that the dismissal was fair. The court found that proper analysis of the commissioner’s award is that he decided the dispute not so much on whether the dismissal was in the circumstances of that case fair or otherwise. The approach adopted by, the commissioner failed to appreciate that the enquiry he needed to conduct was not limited only to investigating whether the employee had the



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intention to commit the offence or not. He needed to consider all the facts and circumstances before him and determine whether the dismissal was fair or otherwise. The evidence of the psychiatrist doctor in particular in relation to the mental condition in which the applicant was when he committed the offence, is an important aspect in the assessment of the fairness or otherwise of the dismissal.

The facts which the court believed had the commissioner applied his mind properly would have found tilted the scales of the fairness in favour of the applicant are the following:

- The applicant did not deny that the commission of the offence.
- The applicant accepted that what he did was wrong and subjected himself to a further medical assessment and treatment.
- The offence was as a result of provocative behaviour on the part of the learner which has not been disputed.
- At the work place the view that the relationship had not broken down and that this was a matter which could be resolved through facilitation. It would appear from the version of the school that disciplinary action was only taken because of pressure from outside the school.



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It was for the above reasons that the court said it reviewed, set aside and remitted the matter back to the bargaining council for determination by a commissioner other than the second respondent.

Oasis Group Holdings (Pty) Ltd v Bardien [2010] ZALC 161

The respondent was a chartered accountant employed by the applicant. In terms of his contract of employment, either party may terminate it on **three calendar months'** notice. The contract also provides for **30 days' sick leave** during each **cycle of 36 months** of employment. The respondent resigned on 30 July 2010 and asked that his notice period be waived as his health has deteriorated substantially. On the same day, he submitted a medical certificate diagnosing "depression and anxiety." Since then, and throughout the notice period of three months, he has not returned to work, submitting a series of medical certificates declaring him unfit to do so.

Before his resignation, the respondent was confronted with allegations that he had advised one of the applicant's clients to bond her house and to invest the capital in volatile investments. When the market crashed, she lost hundreds of thousands of rands. It is important to note that the applicant is a financial services provider in terms of the Financial Advisory and Intermediate Services Act, Act 37



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of 2002 ("the FAIS Act") and the respondent is a financial adviser. The respondent admitted his wrongdoing in an affidavit on 16 July 2010.

Applicant contends that it is obliged by law to take steps and to hold a disciplinary enquiry into the respondent's conduct; and, if necessary, to make disclosures to the FSB. It is for these reasons that it seeks the respondent's return to work once he is well enough to do so.

The court held that in terms of the Basic Conditions of Employment Act it appears, therefore, that an employer may not give notice of termination to an employee who is on sick leave; but that notice may run during a period of sick leave. What if it is not the employer, but the employee who gives notice of termination, and then wishes to take sick leave (provided, of course, that it is legitimate)? One of the foremost commentators - and indeed, one of the drafters - of the BCEA, Paul Benjamin, "Basic Conditions of Employment Act 75 of 1997: Commentary" in Thompson & Benjamin South African Labour Law BB1-26 interprets this provision as follows:

"Therefore, an employer may not give notice to an employee who is on sick leave; however, the employee taking sick leave does not interrupt the notice period."



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The court said that it seemed, that the respondent was entitled to take sick leave during his notice period. Once he had exhausted his entitlement to paid sick leave, there is no obligation on the applicant to continue paying him his salary. But the court did not agree that his contract of employment is suspended and has the effect that it should be extended beyond the termination date of 31 October 2010.

The applicant has not, in the court's view, made out a case for the urgent relief sought. The application was dismissed.

LABOUR NEWS AND DEVELOPMENT

- FEDUSA filed a section 77 notice in terms of the LRA to NEDLAC warning of possible protest action should government not take firmer and faster steps to tackle the country's massive water pollution problems according to News24 reports.
- DA called for teaching to be declared an essential service according to News 24 reports.
- MEC's and mayors on 14 October 2010 signed service delivery agreements with Co-operative Governance Minister. The agreements were expected to



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ensure an accountable and efficient local government system. Report found on News24 website.

- Solidarity obtained a warrant to seize assets worth about R 40 000 from the Department of Correctional Services according to News24 reports.
- CCMA intervention in the SACCAWU and Pick & Pay dispute, brought an end to the countrywide strike, see CCMA website.
- New CCMA offices open in George in Western Cape, see CCMA website

TOPIC FOR THE MONTH

Chapter 5 of BCEA: Termination of Employment

This chapter does not apply to employees working less than 24 hours a month.

Section 37 prescribes the following notice periods:

- ✚ 1 week – if employee worked less than 6 months
- ✚ 2 weeks - if employee worked more than 6 months but less than 1 year
- ✚ 4 weeks- if employee worked more than a year, or is a farm worker or domestic worker having worked more than 6 months.



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Section 1 of the act defines domestic worker as:

An employee who performs domestic work in the home of his employer and includes:

- ✚ A gardener
- ✚ A household driver
- ✚ A person who takes care of children, the aged, the sick the frail and the disabled.

A collective agreement may not vary the above notice period to a shorter period, except the 4 weeks which might be changed to 2 weeks. A longer period of notice by agreement is permitted. No agreement may however require or permit an employee to give longer notice than the notice required for an employer.

An employee may not give notice of a period shorter that required above, unless the employer waives any part of the notice in terms of **section 38**. The employer may agree with the employee that the employee need not work the notice period or part thereof as long as the employer still pay the employee for the full notice period.(**section 38**).

If a contract of employment provides for a certain period notice and the employee gives shorter notice the employer may also institute a civil claim against the employee for damages. This happened in the case of **Labournet Payment Solutions v Vosloo** where the employee gave 24 hours notice.



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The employer instituted a claim for damages in the Labour Court in terms of **section 77** of the BCEA. The court found that the employee breached the contract of employment by giving short notice, but dismissed the claim since it was of the view that the employer could not prove damages it suffered as a result of the short notice.

Notice of termination of employment must be given in writing, except when it is given by an illiterate employee. In the case of **Mafika v SABC (2010) ZALC 1** where a legal advisor tendered resignation via sms and later wanted to retract it, the court held that it was not convinced that where there is a resignation in the form of a clear and unequivocal intention by the employee not to continue with the contract of employment, it is invalid only because it was not reduced to writing. The court held further that an sms is a communication in writing in terms of **section 12 of the Electronic Communications and Transactions Act, Act 25 of 2002**.

Notice of termination of employment by not be given during any period of leave or run concurrently with any period of leave, except sick leave. See the case of **Oasis Group Holdings (Pty) Ltd v Bardien [2010] ZALC 161** above.

