Conditional Contracts of employment

The Labour Relations Act protects employees against unfair dismissal. However, our law makes allowance for a contract of employment to come to an end without it amounting to a dismissal. One example of such a situation would be where the contract of employment is entered into with the clear understanding that it would come to an end if certain conditions are not met.

Protection against unfair dismissal

The Labour Relations Act of 1995, as amended (the LRA), provides that an employer may not dismiss an employee without a fair reason and without following a fair procedure. The employer has to prove that the dismissal was for a fair reason relating to the employee's misconduct or capacity (i.e. incompetence or medical incapacity), or the employer's operational requirements. Each of these has its own set of procedural requirements. An important aspect of protection against unfair dismissal, is that it is typically the employer that takes the initiative to terminate employment. The definition of 'dismissal' reaches somewhat wider, though, to include, amongst others, the nonrenewal of a fixed term contract, not allowing an employee to resume work after maternity leave and selectively re-employing employees who had previously been dismissed. These are exceptions. As a rule dismissal flows from an act of the employer.

Was there a dismissal?

The key question when it comes to protection under the LRA, is whether or not there was a dismissal. Would it amount to a dismissal if the employee's services are terminated for failing to fulfil a condition, for example passing a '*vetting and screening test*'? This question was dealt with the case of ***Nogcantsi v Mnquma Municipality (2017)***. Nogcantsi was appointed as protection officer of the municipal manager for a fixed term of 3 years. His contract of employment contained a clause, which provided that his appointment was *"subject to a vetting and screening process"* and that *"should the revealed outcomes become negative your contract will automatically be terminated".* Approximately a month after his appointment, the employee was informed that the vetting and screening process had revealed *"negative information"* about him and that, consequently, his employment was terminated *"with immediate effect"*. Nogcantsi challenged the termination of his employment on the basis that it amounted to a dismissal, and that the dismissal had been procedurally and substantively unfair.

Resolutive condition

The arbitrating commissioner found that Nogcantsi had not been dismissed, but that his services had terminated automatically through operation of law. The matter was taken on review to the Labour Court and eventually ended up in the Labour Appeal Court (LAC). The LAC agreed with the findings of the arbitrator and the Labour Court. It concluded that Nogcantsi had freely and voluntarily agreed to a vetting process and to an automatic termination if the vetting yielded a negative result. Nogcantsi was, therefore, bound by the resolutive condition in his contract of employment. The LAC pointed out

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that misconduct amounts to a breach of the contract of employment. There had been no breach of contract by the employee in this case. It was also not the act of the employer (the municipality) which produced the negative vetting result. It was an external fact, i.e. the negative information provided by the SAPS, that caused the resolutive condition to be fulfilled. This ended the employment relationship. The LAC agreed that Nogcantsi had failed to prove that he had been dismissed. It made the comment that a conditional contract of employment is a commercial reality and that *"the LRA is not against such contracts".*

What conditions are allowed?

What types of conditions may be inserted into a contract of employment? The Labour Court gave some clues when it likened the condition in the Nogcantsi matter to clauses that provided *"that a person engaged as an airline pilot must produce proof of a pilot's licence or a chauffeur proof of an unqualified driver's licence, failing which the contract will terminate"*. Further examples of conditions that come to mind include proof of qualifications or meeting certain health requirements. The LAC pointed out that it would not matter whether it is a suspensive condition (where the contract only comes into effect once the condition is fulfilled) or a resolutive condition (where the contract is terminated when the condition is fulfilled).

Employers should, however, guard against using criteria that may be challenged on the basis that they are void for vagueness, such as the receiving "a favourable reference" – rather check the references before making an offer of employment. Employers should also refrain from setting conditions that are discriminatory or irrelevant to the requirements of the job. In our opinion the Nogcantsi case has not finally settled the principles surrounding conditional contracts of employment. It is an area that is fraught with legal technicalities. Employers are advised to seek legal advice before setting such conditions or giving effect to them.

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