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Topic: PROBLEM ISSUES IN THE
INTERSECTION OF LABOUR LAW
AND PENSION LAW

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PROBLEM ISSUES IN
THE INTERSECTION OF
LABOUR LAW AND
PENSIONS LAW

by Samantha Davidson
SHEPSTONE & WYLIE

3 AREAS OF INTERSECTION

- Transfer business & employees - S 197 of the LRA and Section 14 of the PFA
- Changing terms and conditions of employment / pension benefits
- Eligibility to join fund based on employment status

1. TRANSFER BUSINESS & EMPLOYEES

- Telkom SA Ltd & others v Blom & others - SCA
- Facts:
 - Blom & 7 others previously employed by Telkom in the Iuvatek Electronics Services division, which repaired electrical equipment
 - All members of the Telkom Pension Fund, by virtue of their employment
 - Iuvatek division sold as a going concern
 - All employees transferred to purchaser in terms of Section 197 of the LRA

Section 197 of Labour Relations Act

- “(1) A contract of employment may not be transferred from one employer (referred to as ‘the old employer’) to another employer (referred to as ‘the new employer’) without the employee’s consent, unless -*
- (a) the whole or any part of a business, trade or undertaking is transferred by the old employer as a going concern; or*
 - (b) ...*
- (2) (a) If a business, trade or undertaking is transferred in the circumstances referred to in subsection (1)(a), unless otherwise agreed, all the rights and obligations between the old employer and each employee and, anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer .*
- (b) ...*

Section 197 cont.

- (3) *An agreement contemplated in subsection (2) must be concluded with the appropriate person or body referred to in section 189(1).*
 - (4) *A transfer referred to in subsection (1) does not interrupt the employee's continuity of employment. That employment continues with the new employer as if with the old employer.*
 - (5) ...”
- Amended in August 2002 (see later), but effect of automatic transfer of employment contracts unchanged, although new provision regulating pension fund

Telkom SA Ltd & others v Blom & others - SCA

- Blom & others argued effect of Section 197 was to terminate their employment with Telkom “*as a result of the abolition of their posts and a reorganisation*”. This terminated their membership of the Fund and entitles them to benefits
- Telkom argued Section 197 kept their contracts of employment alive

Telkom case cont.

SCA held: “... *the inference is irresistible that the new employer takes over the workers and is by operation of law substituted in the place of the old employer. This is what happens on assignment. In my view the further inference is also irresistible that in the course of this process the contractual relationship between the old employer and each employee, i.e. the employment contract between them, is brought to an end...*”

Telkom case cont.

- Therefore entitled to benefits from Fund
- Telkom + new employer agreed that new employer would create a new pension fund. The Fund and employees were not parties to the agreement.
- SCA held the Fund *“could not be compelled to accept contributions by an outsider for the benefit of persons who were no longer members. It could also not, without the consent of the members affected, be compelled to transfer accrued pension rights.”*

New Section 197(4)

“Subsection (2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section 14(1)(c) of the Pension Funds Act, 1956 (Act 24 of 1956) are satisfied.”

Problem - rules of Fund required members' approval for transfer of benefits on termination employment, but Section 14 PFA doesn't

1. TRANSFER BUSINESS & EMPLOYEES - DISCUSS

- If S 197 LRA transfer terminates employment by “statutory assignment” then S 187(1)(g) LRA:

“A dismissal is automatically unfair if ... the reasons for the dismissal is ... a transfer, or a reason related to a transfer, contemplated in section 197 ...”

- S 14 PFA does not require consent members. Safeguard is Registrar satisfied that scheme is: *“reasonable and equitable and accords full recognition to the rights and reasonable benefit expectations of the members transferring”*

2. CAN EMPLOYERS CHANGE PENSION ARRANGEMENTS?

- First establish whether the pension (or medical aid or other benefit the employer wishes to change) is a term and condition of employment
- Rules of a pension fund do not constitute a contract between the fund and its members because they can be changed without reference to the members (Coetzee v Moreesburgse Koringboere Kooperatief)
- Employer owes duty of good faith to the fund, its members and beneficiaries

Rustenburg Base Metal Refiners v NUM & others - Labour Court

- Employment contract stated: employee would become & remain a member of the medical scheme nominated by the employer from time to time
- However, employment contracts often specify the pension or medical aid scheme, and even the contribution levels without provision for change
- Then these are terms & conditions of employment, which the employer may not alter unilaterally - without risking strike action or a contractual claim

HOW CAN TERMS & CONDITIONS OF EMPLOYMENT BE CHANGED?

Beware Section 187(1)(c) of Labour Relations Act

“(1) A dismissal is automatically unfair ... if the reason for the dismissal is -

(a) ...

(b) ...

(c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and the employee

”

...

NUMSA & others v Fry's Metals (Pty) Ltd - LAC

- Employer wanted to change from a 3-shift to a 2-shift system to reduce lost production time during shift changes - operational requirement
- Employees rejected the proposal
- Employer commenced retrenchment consultations
- Union brought urgent application to interdict retrenchments because would breach Section 187(1)(c) - succeeded in Labour Court

NUMSA & others v Fry's Metals (Pty) Ltd - LAC

- Labour Appeal Court overruled
- Held: purpose of retrenchments not to compel employees to accept change to terms and conditions of employment, because:
 - dismissal would be final and not reversed if employees agreed to the new shift system;
 - bargaining options exhausted before retrenchment consultations began

2. CAN EMPLOYERS CHANGE PENSION ARRANGEMENTS? - DISCUSS

- Protection for employees:
 - term and condition employment;
 - unfair labour practice re: provision of benefits
 - employer's duty of good faith re: rule amendments;
 - representative board of trustees

3. FUND MEMBERSHIP ELIGIBILITY

- Eligibility to join fund based on employment status (permanent vs temporary employees)
- Fund administration for temp employees difficult
- Old BCEA defined a person who worked less than 3 days a week as a “casual” not entitled to the statutory minima
- BCEA now extends protection to all working more than 24 hours per month

Essrich v Anglogold Pension Fund & another - PFA

- Interim ruling confirmed in final determination
- Facts:
 - complainant employed on consecutive fixed term contracts for 8 years
 - employer contributed to pension fund on his behalf for entire period employment
 - on termination employment fund refused to pay out withdrawal benefits on basis not “eligible employee”

Essrich cont.

- Definition “eligible employee” in fund rules:
“An employee who ... is on the permanent staff of the EMPLOYER”
- Murphy held:
 - whether employment is temporary or permanent depends on intention of the parties, evidenced by:
 - express wording of contract of employment; or
 - nature and circumstances of the employment
 - complainant is permanent so fund must pay out

3. FUND MEMBERSHIP ELIGIBILITY - DISCUSS

- Increasing number of claims by “casuals” for (retrospective) pension fund membership and benefits
- Particular risk in DB funds
- Beware discrimination
- Registered fund rules no defence where membership denied

THE END