Hogan Lovells

Inquiry by an arbitrator in circumstances of an alleged protected disclosure

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Employment Alert

The introduction of section 188A(11) of the Labour Relations Act

The amendments to the Labour Relations Act (LRA) and other key employment legislation in 2015 resulted in key changes to the way employers traditionally regulated employment and the manner in which employers are expected to interact with their employees.

One such amendment was the amendments to section 188A of the LRA. This section previously entitled "agreement for pre-dismissal arbitration" is now entitled "inquiry by an arbitrator". An inquiry by arbitrator (previously a pre-dismissal arbitration) allows for the appointment of an arbitrator at the CCMA, or bargaining council or accredited agency, upon request by an employer to conduct an inquiry into allegations about the conduct or capacity of an employee. Prior to the amendments, a pre-dismissal arbitration could only be conducted with the consent of the employee.

The amendments to section 188A allow for the holding of such inquiries either where the employee consents or where provision for same is made in accordance with collective agreements. Post the amendments these inquiries can now be catered for in collective agreements. The benefit of these inquiries by arbitrators is that they avoid the need to have both the internal disciplinary enquiry plus arbitration.

A significant amendment is the introduction of subsection 11. Section 188A(11) provides that where an employee in good faith alleges that the holding of an inquiry contravenes the Protected Disclosures Act, 2000, that employee or the employer may require that an inquiry be conducted in terms of section 188A into allegations by the employer into the conduct or capacity of the employee.

Parties in cases involving claims of protected disclosure typically get drawn into extensive collateral litigation that results in the delay of disciplinary enquiries. To cater for this situation the legislature introduced this subsection. The amendment is aimed at reducing the risk of collateral litigation, including High Court litigation, which has been common in these circumstances. The referral in terms of subsection 11 permits either the employee or the employer to insist upon an inquiry by an arbitrator to determine the allegations into the employee's conduct or capacity.

In a recent Labour Court judgment, the Labour Court endorsed the use of this subsection as opposed to approaching the Labour Court on an urgent basis seeking to interdict disciplinary action which the employees alleged would constitute an occupational detriment as defined in the Protected Disclosures Act.

The Labour Court held that by invoking section 188A(11) a party is able to have an independent determination of the issues during the initial inquiry by the arbitrator and the outcome is in turn subject to review by the Labour Court. This constitutes a welcome introduction into legislature.

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