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Without Prejudice

The judgment of the Labour Court in a review application by *Solidarity obo K Oelofse v Armscor* was delivered by Snyman AJ. This judgment reinforced the principles of double jeopardy and also affirmed that a discretionary bonus need not be awarded to an employee whose conduct is not in line with the employer's organisational values.

This matter arose from a disciplinary enquiry between Armscor and Oelofse, relating to Oelofse's failure to declare gifts she received from suppliers, and the unauthorised use of company resources.

Oelofse was employed by Armscor as Chief Contract Officer and dealt directly with Armscor suppliers. In July 2014 she was charged and subjected to a disciplinary enquiry by Armscor for misconduct relating to failure to declare gifts received from suppliers; she went on a trip paid for by one of Armscor's contractors. The charges further included the unauthorised use of company resources, as she was administering bookings for her private accommodation during work hours using Armscor's email facilities. The independent chairperson found Oelofse guilty of non-declaration of the trip and administering her private accommodation during work hours. In consideration of the appropriate sanction, the chairperson recommended that a final written warning be issued, valid for 12 months.

Armscor had a Remuneration Practice in terms of which employees who qualified could earn a bonus based on set criteria. The criteria required that the employee have an individual performance score of at least 90%, be employed by Armscor on the last day of the financial year, and must have been employed for more than six months. This remuneration practice goes on to further make a disclaimer that:

"Performance remuneration is an annual non-guaranteed, discretionary payment to employees based on the attainment of organisational, departmental, divisional/team and individual goals..."

This is read together with the Performance Management Practice, which defines performance as "an attainment of specific results/outputs through specific actions, while being consistent with Armscor values and objectives".

The performance assessment for the period 2013/2014 came up and Oelofse obtained a performance rating of 107.7%, which was in excess of the minimum qualifying criteria. Oelofse also met the other criterion. She therefore stood to receive a bonus of ZAR24 402. Armscor, however, refused to pay her the bonus.

Oelofse lodged an unfair labour practice dispute with the CCMA and an internal grievance. The Commissioner found that Armscor did not commit an unfair labour practice. It is this decision by the arbitrator that was the subject of the review application before Snyman AJ.

Pursuant to the internal grievance, Armscor submitted to the independent chairperson of the hearing written reasons for its refusal to pay the bonus which provided:

"...It is however clear that Ms Oelofse's conduct was contrary to the values of the organisation. Compliance with the organisational values contributes to performance, rather than merely meeting the performance objective stated in the individual's balance score card. At the heart of an employment relationship there is a duty of good faith. It is a common law duty of an employee to work in the best interest of its employer... Therefore, it makes no sense to reward an employee who has been found guilty of serious misconduct, and who has breached that duty, by paying the employee a performance bonus."

When the Commissioner decided the unfair labour practice dispute, he relied on these reasons for refusing to pay the bonus and found that Armscor did not act unfairly in refusing to pay Oelofse.

At the Review Court, Oelofse contended that the Arbitrator misconstrued the evidence in the following respects:

1. By failing to consider that the final written warning was a punishment on its own and that the refusal to pay her bonus was another punishment for the same misconduct (the double jeopardy);
2. Another punishment was in the form of an article in Beeld, to which the court paid no regard, on the basis that the court could not find the article was punishment sanctioned by Armscor;
3. It failed to consider and evaluate the remuneration and performance practices properly, as Armscor did not have the discretion to refuse to pay a performance bonus in circumstances where the qualifying criteria were met;
4. Armscor's behaviour was inconsistent in relation to paying out bonuses to employees who were found to have committed misconduct. Reference was made to three other managers who were dismissed and yet still received their bonuses.

In deciding the review application, Snyman AJ undertook a holistic approach to the two practices, which revealed the following (as summarised in paragraph 26). The practices contemplate that the performance remuneration and rewards are not just based on individual performance but on a broader organisational objective and values. The purpose is to reward the right kind of performance, which includes aspiring to organisational values. These organisational aspirations are determined by way of an exercise of discretion.

The court's finding was that there was no double jeopardy as Oelofse was not subjected to two separate disciplinary proceedings based on the same allegations. The enquiry into whether an employee is exceptional for purposes of a reward is not the same as an enquiry into misconduct. Performance bonus is an issue of the employee being rewarded for being exceptional. Refusal to pay a bonus was not punishment to Oelofse. Therefore, double jeopardy did not exist.

With regard to the inconsistency by Armscor, the court held that Oelofse failed to provide evidence of a like-for-like comparison being conducted. Oelofse failed to discharge the duty to establish her case of inconsistency.

Regarding the discretion by Armscor not to pay bonuses, the court held that as laid down in the LAC judgment in *Apollo Tyres*, Armscor had discretion but that it had to act fairly in exercising that discretion, as fairness is the yardstick for unfair labour practice.

"The court held that the overall wording of the policies contemplates that not only are the rewards and performance remuneration based on an individual employee performance but also on the broader organisational objectives and values. In rewarding an employee for overall individual performance, the employer has discretion to decide whether an employee has adhered to organisational objectives and values."

The review was dismissed.

Ultimately, the wording of a bonus policy will have a fundamental impact on an employer's ability to withhold a discretionary bonus generally, and specifically from

an employee whose conduct is not in line with the company's organisational values.

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