

## Double jeopardy – Withholding a bonus is not punishment

### June 2018

The judgment of the Labour Court in a review application by *Solidarity obo K Oelofse v Armscor* was delivered by Snyman AJ on 21 February 2018. This judgment reinforced the principles regarding double jeopardy and also affirmed that a discretionary bonus need not be awarded to an employee whose conduct was not in line with the employer's organisational values.

This matter arose from a disciplinary inquiry between Armscor and Oelofse relating to Oelofse's failure to declare gifts she received from suppliers as well as her unauthorised use of company resources. Oelofse was found guilty and a final written warning was recommended and issued by Armscor on 23 February 2015.

Armscor has a Performance Management Practice in place that defines "Performance as an attainment of specific results/outputs through specific actions, while being consistent with Armscor values and objectives".

This policy is read together with a bonus policy that has the following requirements:

- employee to obtain an individual performance score of at least 90%;
- to be in the employ on the last day of the financial year to qualify for a bonus;
- to have been employed for more than six months;
- must not have been absent from work for a period longer than six months.

The policy 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."

The performance assessment for the period 2013/2014 came up and Oelofse

obtained a performance rating of 107.7%, which was miles above the minimum qualifying criteria. Oelofse also met the other criteria. 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. The arbitrator found that Armscor did not commit an unfair labour practice. It is that decision by the arbitrator that was the subject of the review application before Snyman AJ.

In the review application Oelofse contended:

- that the arbitrator misconstrued the evidence 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 (the double jeopardy);
- that the arbitrator failed to properly consider the remuneration and performance policies because Armscor had no discretion to refuse to pay the performance bonus in circumstances where the qualifying criteria were met;
- inconsistent behaviour by Armscor in relation to paying out bonuses to employees who were found to have committed misconduct and referred to three other managers who were dismissed but still received their bonuses.

The court held that there was no double jeopardy as Oelofse was not subjected to two separate disciplinary proceedings based on the same allegations. The inquiry into whether an employee is exceptional for purpose of a reward is not the same as an inquiry into misconduct. A 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 lead evidence to show the inconsistency by Armscor in dealing with employees who were found to have committed misconduct and paying bonus to those employees.

Regarding the discretion by Armscor not to pay a bonus, the court held that Armscor had discretion and that Armscor had to act fairly in exercising that discretion as fairness is the yardstick for unfair labour practice.

Snyman AJ 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 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.

Having regard to the above, 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 organisational values.

> [Read the full article online](#)