

Employment Alert



St Elmo Wilken
 director
 email: sw@tabacks.com
 tel: +27 (0)11 358-7700
 fax: +27 (0)11 358-7800
 cell: +27 (0) 82 900 7678

13 Eton Road
 Parktown
 Johannesburg
 South Africa

P O Box 3334
 Houghton, 2041
 Johannesburg
 South Africa

www.tabacks.com

LABOUR BROKERS : LANDMARK DECISION

On 10 March 2010 , the Labour Court, Johannesburg handed down its decision in the matter of between Simon Nape and INTCS Corporate Solutions (Pty) Limited, Case JR 617/07 (unreported as yet). This decision examines the constitutional impact of the commonly found provision in labour broking arrangements which permits the client to compel a labour broker to remove an employee from the client's premises regardless whether there is a reason justifying such removal.

The Labour Court held that :

"... insofar as the contract between the Respondent (labour broker) and its client allowed the client to arbitrarily require the removal of an employee from its premises, such provision was unlawful and against public policy as it took no account of the right of the employee not to be unfairly dismissed."

This decision has profound consequences, for both labour brokers as well as the clients of labour brokers as the Court held that the labour broker may resist any demand by a client that the person placed with the client be removed.

FACTS

Mr Nape was deployed by INTCS Corporate solutions (Pty) Limited (the labour broker) with Nissan (Proprietary) Limited ("the client") as a Sales Consultant. Mr Nape received an offensive email and distributed it to another person at the client using the client's IT infrastructure. The client took offence to this and demanded that Mr Nape be removed by the labour broker. The labour broker suspended Mr Nape, and after a disciplinary hearing determined that a final written warning, instead of a dismissal, was the appropriate sanction. Mr Nape agreed to the written warning but the client was not satisfied with the sanction imposed and refused to allow Mr Nape access to its premises. The labour broker acceded to the client's demand and commenced a retrenchment process resulting in the termination of Mr Nape's employment on account of his retrenchment Mr Nape subsequently challenged his retrenchment in the Labour Court.

THE ISSUE

The labour broker contended that the client acted lawfully by requiring the removal of Mr Nape. The contract between the client and the labour broker permitted the client to demand Mr Nape's removal and the labour broker could do nothing in response to such demand. Accordingly, the only alternative open to the labour broker was to terminate Mr Nape on account of its operational requirements. The Court proceeded to examine the lawfulness of the terms of the contract between the labour broker and the client and held that whilst the labour broking arrangement may be lawful, it did not necessarily mean that the term requiring the labour broker to remove Mr Nape is lawful. The Court then

Employment Alert

considered whether contractual obligations could offend public policy, particularly constitutional values enshrined in the Bill of Rights, and concluded such terms ought to be struck down.

Whilst Section 189 of the LRA permitted labour brokering, it did not limit the right of an employee not to be unfairly dismissed, which primarily existed to guarantee security of employment.

The Court held that :

“If Labour Brokers and clients are given the license to contract for standards that are less than the fundamentals guaranteed, the right to security of employment of employees involved in this tri-partite relationship will be severely undermined. In applying the right not to be unfairly dismissed, a Court is not bound by contractual limitations created by parties through an agreement when the agreement conflicts with the fundamental rights of workers.”

DECISION

The Court had to decide whether or not the obligation imposed upon labour broker to remove the person deployed with the client without a valid reason, (a reason justifying dismissal) would constitute an impermissible term. The Court held :

“Accordingly, any clause in a contract between a Labour Broker and a client which allows a client to undermine the right not to be unfairly dismissed would in my view be against public policy. It is axiomatic that an employer should not be allowed to invoke such a clause to justify dismissal for operational requirements.”

The Court then turned to consider whether the labour broker is prevented from instituting action against the client. The Court held that since the LRA is silent on the rights of the labour broker against the client, the labour broker is not powerless to resist the client’s attempts to wield his bargaining power in a way which undermined the fundamental rights of employees. The Court held that :

“The Labour Broker is entitled to approach a Court of law to compel the client not to insist upon the removal of an employee where no fair grounds exist, that employee be removed”

The Court found that the client’s insistence that Mr Nape be removed by the labour broker was unlawful and a breach of Mr Nape’s right to fair labour practices. Mr Nape had not committed an offence which justified dismissal, and the client therefore had no right to insist that he be removed.

- Commercial
- Commercial litigation
- Company law
- Competition law
- Corporate rescue & recovery
- Corporate structuring
- Employment
- Insolvency
- Labour
- Listings
- Mergers and acquisitions
- Regulatory advice
- Tax

COMMENT

This decision is of great importance, not only to labour brokers but also to the clients using the services of labour brokers. Clients can no longer rely upon the contractual term requiring labour brokers to remove persons deployed for no reason at all as such provision has been found to be against public policy. Therefore, labour brokers may legitimately refuse to remove, without valid reason any person deployed with clients. However, if labour brokers do comply with such unlawful term, the persons removed may join the client and their labour broker in an action to claim reinstatement with the client, rather than the labour broker.

ST ELMO WILKEN
 March 2010

- Commercial
- Commercial litigation
- Company law
- Competition law
- Corporate rescue & recovery
- Corporate structuring
- Employment
- Insolvency
- Labour
- Listings
- Mergers and acquisitions
- Regulatory advice
- Tax

This communication is for general information only and is not intended as legal or other professional advice. Specific professional advice should be sought and relied upon. We cannot be held responsible for any inaccuracy, errors or omissions.