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Once a South African employee, always a South African employee

By Johan Botes

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With the globalisation of business increasing, the question is raised around the rights of an employer and employee working across different jurisdictions and countries. Does a South African citizen employed by a South African business in a foreign jurisdiction have a claim for unfair dismissal under the South African Labour Relations Act, 66 of 1995 (LRA)? The Labour Appeal Court (LAC) delivered its judgment on this important issue on 11 November 2015.

Understanding employee rights and obligations in different jurisdictions is critical in managing global human resources. Disgruntled employees, like any claimants, will shop around for the best forum to lodge any claims against their employer. Employers who appreciate the legal landscape of their foreign operations can take steps to protect the business from spurious claims brought merely because of perceptions of an employee-friendly legal landscape.

The employee in Monare v South African Tourism and others (as yet unreported Labour Court judgment in case JA45/14) was dismissed following an internal disciplinary hearing relating to allegations of dishonesty and fraud. He referred a dispute to the South African statutory employment tribunal, the Commission for Conciliation, Mediation and Arbitration (CCMA). The tribunal held that his dismissal was unfair and ordered his reinstatement. The employer brought an application to the Labour Court to review and set aside the arbitration award issued by the tribunal.

On review, the court raised the issue of the jurisdiction of the tribunal to hear the dispute. The judge's eyebrow was raised on this point, as the employee was recruited, contracted, worked, attended his hearing and was dismissed in London (not South Africa). The Labour Court, applying the same reasoning as that of the LAC in Astral Operations Ltd v Parry (2008) 29 ILJ 2668 (LAC), held that the necessary jurisdictional facts were absent. The tribunal did therefore not have the requisite competence to hear the unfair dismissal dispute. The Labour Court thus reviewed and set aside the tribunal's award on the basis that the CCMA lacked jurisdiction to entertain the employee's claim.

On appeal, the LAC overturned the judgment. The higher court held that the main issue to be considered was not where the employee was employed but rather whether the employer's foreign office was an undertaking, which is separate and

divorced from its undertaking in the Republic of South Africa. It held that SA Tourism is an entity established through legislation and was the same juristic person in the United Kingdom as it was in South Africa. It upheld the appeal - with the effect that the arbitration award reinstating the employee still stands.

Deploying South Africans? Take heed

Employers seeking to deploy South African employees into foreign jurisdictions should take heed of the judgment. Where the South African business operates in an extra-territorial jurisdiction, there is a risk that the employee seconded to that location may wish to bring a claim under South African employment legislation before the CCMA. Whilst that tribunal has quite unfairly been labelled as employee friendly, our legislation does provide greater protection to employee rights than that found in many other jurisdictions.

A separate, independent legal entity that is divorced from the South African entity is required to break the jurisdictional link. A properly drafted contract can go a long way to achieve greater legal certainty and limit legal risk. Foreign employers seeking to second staff to South Africa should understand the legal landscape before contracting with the employees. Our legislation compares favourably with that in many other jurisdictions but contains some aspects peculiar to our country that could cause heartburn if encountered for the first time at the steps of the court.

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