

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

**J2614/08
Reportable**

In the matter between:

COMTECH NETWORKING SOLUTIONS CC

APPLICANT

and

**DIRECTOR GENERAL OF DEPARTMENT
OF LABOUR N.O**

FIRST RESPONDENT

VENECIA L SCHOEMAN

SECOND RESPONDENT

JUDGMENT

Pillay D, J

Introduction

1. This is an appeal in terms of section 72 (1) of the Basic Conditions of Employment Act 75 of 1997 (BCEA). On 24 October 2008 the first respondent, the Director General of the Department of Labour, issued a compliance order ordering the applicant employer to pay R47 049,41 to the second respondent employee for alleged unpaid salary and commission.
2. On 27 October 2008 the employer objected to the compliance order. On 9 December 2008 the Department of Labour modified its compliance order and its reasons for it in terms of section 71 (3) (a) and (b) of the BCEA.

3. Both respondents oppose the appeal jointly.

The Nature of the Appeal

4. The employer invited the court to determine whether an appeal in terms of section 72 of the BCEA is on the record or a rehearing. Mr Malan for the employer submitted that the Department of Labour's record was inadequate. If the court intended to determine the matter finally the employer wanted a rehearing. In support of its submissions, Mr Malan referred to acclaimed academic authorities and several cases all of which predate the Labour Relations Act 66 of 1995 (LRA).
5. The BCEA does not prescribe the powers of the Labour Court specifically for an appeal. In the circumstances, the court takes its cue from the purpose of the LRA itself, namely to resolve labour disputes effectively. The circumstances of each case determines whether the appeal is most effectively resolved if it is determined on the record or reheard by the court or the Department of Labour. Given that this appeal is against an administrative decision, it is permissible for the court to refer the dispute back to the administrative organ responsible for the decision. (JR De Ville *Judicial Review of Administrative Action in South Africa* at 387)

Grounds of Appeal

6. The employer submits that Department of Labour is biased in favour of the employee in that it acts jointly with the employee in opposing the appeal and in the manner in which its officials considered the employer's objection. It denied the employer a fair opportunity to respond to the employee's claim. It disregarded the employer's evidence that all three claims of the employee were unfounded.

7. The employer submitted that the Department of Labour erred firstly in finding that it owed the employee salary and commission for June 2008. On 22 June 2008 the employee took an advance of R5 000 on her salary for June. She earned no commission for June 2008. After deducting her salary of R3 000 and taxes from the R5 000, the employee owed the employer R2 434. The employee had consented to the loan being offset automatically against her salary at the end of June or when she left her employment.
8. The employee's response to this claim was to deny that she signed any acknowledgment of debt. The signature on the acknowledgment of debt looked like hers but was not hers.
9. The Department of Labour's response to this claim was that the employee did not ask for an advance on her salary.
10. The court notes that the employee does not deny receiving an advance. She did not tender its return, assuming in her favour that the employer advanced her an unsolicited loan, as unlikely as that might be. The employee is not entitled to her salary for June 2008 until she refunds the loan to the employer. She failed to tender the refund. Consequently, she owes the employer the difference between her salary and the loan.
11. The employer supported its defence with documentation. In the absence of any response to the documentation from the employee, the Department of Labour should have accepted the employer's version. The Department of Labour erred in rejecting the employer's defence to the claim for her June salary.
12. The employer submitted secondly that the Department of Labour erred in finding that the employer owed the employee salary and commission for

September and October 2007. The background to this claim is that in her complaint on 7 July 2008, the employee under oath claimed wages for June 1 to June 26 2008 plus commission amounting to R13 585,89. This is the amount the Department of Labour advised the employer on 27 August 2008 was owing to the employee.

13. However, on 24 October 2008, the Department of Labour issued a compliance order calling on the employer to pay R47 207,59. This amount included purported claims for April and May salary 2008 (R6 000) plus “commission for the sales she made before the notice period” amounting to R38 576,62.
14. On 9 December 2008, pursuant to the employer’s objection, the Department of Labour modified the compliance order in terms of section 71 (3) (a) of the BCEA and its reasons to claim salary of R6 000 for September and October 2007, not April and May 2008.
15. The employee alleged that when she terminated her employment in June 2007 the employer did not pay her salary for September and October 2007.
16. The Department of Labour submitted that the salary for 2007 was included in the amount of R47 207,59 claimed in the compliance order.
17. The Court finds that the documentary evidence supports the employer. The Department of Labour’s record contains no evidence of either the employee lodging a complaint for the 2007 salary or of an inspector calling on the employer for an undertaking in respect of that claim. The Department of Labour had not put the claim for 2007 salaries to the employer prior to 8 December 2008 when it modified its compliance order.

As a result it had not given the employer an opportunity to respond to it before issuing the order.

18. Furthermore, the Department of Labour did not have the power to make any findings on the claims for 2007 salary because section 70 (d) of the BCEA bars a labour inspector from issuing a compliance award if the amount is payable for longer than 12 months before the date when the complaint was made to an inspector or, if no complaint was made, the date when the inspector first endeavoured to secure a written undertaking from the employer in terms of section 68.
19. When the Department of Labour called for payment for the first time about 4 December 2008, the claim was more than 12 months old. Therefore, Department of Labour erred in issuing an order for payment of the 2007 claims.
20. The employer submitted thirdly that the Department of Labour erred in finding that it owed the employee commission:
 - (a) without first giving the employer particulars of this claim and calling on it to respond before issuing the compliance order,
 - (b) without acceding to the employer's request for particulars,
 - (c) when the employee had expressly waived her rights in terms of section 30 of the BCEA in the Commission Agreement, and
 - (d) on the basis that the forfeiture clause could be treated as if it did not exist.
21. The Department of Labour and the employee, on its advice, claimed that the forfeiture of commission clause in the Commission Agreement conflicted with section 4 and 5 of the BCEA read with clause 6(3) of the Sectoral Determination No 9: Wholesale and Retail Sector, a copy of which was not placed before the court.

22. The forfeiture clause stated:

“Management reserves the right to decide the amount of commission applicable in case of orders received between the period of resignation and departure from the company. In the event of termination dismissal, any outstanding commission will be forfeited.”

23. The court finds that without full evidence and argument, the Department of Labour could not determine the validity of this clause. It omitted to give the employer an opportunity to make representations before it issued its compliance order. Furthermore, there is no evidence that the employee represented that the forfeiture clause was invalid. The Department of Labour therefore erred in ordering the employer to pay commission.

24. Without adequate evidence and argument on the record, the court is not in a position to determine finally whether any commission is payable to the employee. Consequently, the employee is given leave to refer this aspect of the claim to the Department of Labour within 10 days of receipt of this judgment, if she so chooses. In that event, the Department of Labour must assign inspectors other than those previously involved in this case to administer and determine it.

Costs

25. The inspector(s) who pursued the employee's case were over-exuberant and biased in favour of the employee. Inspectors perform an administrative function. Their administrative actions have to meet the requirements of fairness. One of the requirements of fairness or just administrative action is that the decision maker should be unbiased and impartial. In this case the inspector(s) believed in good faith that they were

acting within their mandate to protect employee rights. The Department of Labour should therefore not be burdened with an order for costs.

Order

1. The appeal is upheld on all grounds.
2. The court gives leave to the employee to refer only her dispute concerning unpaid commissions to the Department of Labour to be administered and determined by inspectors other than those previously involved in the dispute.
3. The employee's claims for salary for June 2008 and September and October 2007 are dismissed.
4. The employee is ordered to pay the costs of the appeal.

Pillay D, J

Date of Judgment: 28 August 2009

Appearances

For the Applicant: Adv ZM Malan instructed by AC Schmidt Inc

For the Respondent: Labour Official SB Manpeule