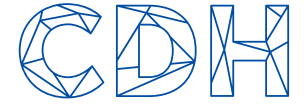


# Employment Law

ALERT | 11 November 2024



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## Agreed demotion and duress

### The judgment of the Labour Court in *Komatsu Mining Corporation Group v Metal and Engineering Bargaining Council and Others* (JR2725/21) [2024] ZALCJHB 361 deals with two core principles.

First, it serves as a reminder that a breach of confidentiality by an employee can be very serious and can attract harsh sanctions. The seniority and experience of the employee is relevant to this determination.

Secondly, it restated that an agreement between an employer and an employee on a sanction, while binding unless set aside, does not exclude the jurisdiction of the Commission for Conciliation, Mediation and Arbitration (CCMA) to arbitrate an alleged unfair labour practice dispute. However, such agreement on sanction would be a relevant factor in the assessment of fairness of the sanction (short of dismissal) and may well be decisive when the merits of the complaint (alleged unfair labour practice) are adjudicated.

#### Misconduct by the employee

Mr Zwane was a senior employee (a foreman) of Komatsu Mining Corporation Group (Komatsu) and was part of an email exchange with management concerning the scheduling of female employees for night shift.

The correspondence was confidential as it contained sensitive information about conduct committed by employees during night shift. This was clear from the content of the email.

When a female employee asked to return to night shift, Zwane forwarded the confidential correspondence to her to notify her that she was not to be scheduled for night shift.

Two charges of misconduct were levelled against Zwane for breach of confidentiality and breach of his employment contract. He was found guilty of misconduct with the recommendation that he be dismissed.

Zwane appealed the disciplinary outcome. The appeal confirmed his guilt in respect of the misconduct alleged, but recommended that he not be dismissed and rather demoted and transferred to another area in the business.

Komatsu's position was that Zwane had agreed to the demotion, while Zwane argued that he did not agree to be demoted. He then referred an alleged unfair labour practice dispute to the Metal and Engineering Bargaining Council (MEIBC).

#### The dispute before the MEIBC

At the MEIBC, the Commissioner found that Zwane did not intend to breach confidentiality and that the subordinate employee had a direct interest in the management's scheduling decision. In other words, there was no issue with Zwane's conduct of sharing the email between management with the subordinate employee.

Furthermore, the Commissioner found *inter alia* that Zwane had not agreed to be demoted; that his demotion and transfer to a different department were unfair and that Komatsu had committed an unfair labour practice.

## Agreed demotion and duress

CONTINUED



Based on this assessment and conclusion, the Commissioner ordered that Zwane be reinstated to his earlier role without backpay.

Komatsu then brought an application in the Labour Court to review the arbitration award.

### Review before the Labour Court

#### Was Zwane guilty of the alleged misconduct?

First, the Labour Court found that the Commissioner's finding that Zwane did not share confidential information fell outside the range of decisions that a reasonable decision-maker could arrive at on the evidence.

Of importance to the court's assessment on review was that the nature of the issues referred to in the email was confidential and pertained to concerns at managerial level and which *inter alia* raised concerns regarding decision-making processes at leadership level. Accordingly, the Labour Court upheld the employer's finding that the employee was guilty of misconduct.

#### Did the employee agree to be demoted?

Having found that Zwane committed the alleged misconduct, on review, the Labour Court had to consider whether he had agreed to the demotion. If so, the Labour Court had to consider whether he had done so under duress which, if proven, is a valid reason to set aside an agreement.

Despite testifying at arbitration proceedings that he had not agreed to his demotion, Zwane ultimately conceded he had agreed to it but that the employee relations manager had made him do so under duress. He testified that he felt compelled to agree to the demotion for fear of facing dismissal.

To this, the Labour Court said that based on the evidence presented at arbitration, Zwane had agreed to the demotion. What remained was for the court to consider his reliance on duress.

### Agreement under duress

First, the Labour Court reiterated the legal position set out in *Builders Warehouse (Pty) Ltd v CCMA and Others* (PA 1/14) [2015] ZALAC 13 (5 May 2015) that employers and employees are encouraged to settle matters by agreement, in which case a binding contract is effected unless set aside for a valid reason in law. Such a reason would include duress.

## Agreed demotion and duress

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Citing *Arend and Another v Astra Furnishers (Pty) Ltd* [1974] (1) SA 298 (C), the Labour Court held that duress may nullify an agreement on the basis that “*intimidation or improper pressure*” would mean that there was no true consent given by the relevant party.

Duress exists either through the infliction of physical violence on a party or by inducing fear in them through threats.

The High Court in *Arend* determined that to have an agreement set aside where duress is alleged, five elements must be established. These are that:

1. The fear must be a reasonable one.
2. It must be caused by the threat of some considerable evil to the person concerned or their family.
3. The threat must be of an imminent or inevitable evil.
4. The threat or intimidation must be unlawful or *contra bonos mores*.
5. The moral pressure must have caused damage.

In this case, the Labour Court held that there had been no “*threat of some considerable evil to the person concerned or his family*” and drew an analogy with retrenchments to say that there would be no duress if a person faced with retrenchment had to agree to an alternative and more junior position for fear of being retrenched.

### Conclusion

Ultimately, the Labour Court found that Zwane had not met the threshold of duress and held that because he agreed to the demotion, the demotion was fair.

The Labour Court reviewed, set aside and substituted the arbitration award for an award that the unfair labour practice dispute was dismissed<sup>1</sup>.

This judgment emphasises that where a party seeks to escape an agreement based on duress, the pressure must be objectively proven in the form of some real physical or threatened harm. The mere existence of some undesirable alternative for the employee would not suffice to have an agreement set aside.

**Hugo Pienaar, Leila Moosa and Denzil Mhlongo**

<sup>1</sup> The order erroneously reads that ‘the unfair dismissal dispute is dismissed’.

## Religious practice and inherent requirements of the job

The tension between religious beliefs and workplace demands was addressed in the decision of the Labour Appeal Court (LAC) in *Sun International Management Limited v Sayiti* (JA13/23) [2024] ZALCJHB 411 (21 October 2024). The issue to be decided was whether the employee's dismissal was automatically unfair, given that the reason for his dismissal was his inability to perform an inherent requirement of the job, working between sunset on Friday and sunset on Saturday, because of his religious beliefs.

### Background

The employee's contract of employment stated, *inter alia*, that "...normal hours of work will be 08h30 to 17h00 Mondays to Fridays, with an hour for lunch. However, due to the nature of the business, you will be required to work longer hours from time to time without additional compensation." Furthermore, the employee's employment contract contained a job flexibility requirement clause which stated that the employee may be required to perform work in other roles or departments, and should the employee refuse, disciplinary action may be taken. At the time that the employee was appointed and the agreement concluded, the employee agreed to the terms and did not raise any concerns.

Soon thereafter, the employee indicated that he is unable to travel or to attend to work events that took place during the Sabbath (from sunset Friday to sunset Saturday) on the basis of his religious beliefs as he identified as a Seventh Day Adventist. The employer accommodated the employee for a period of 16 months by delegating the relevant duties that fell over the Sabbath period to other employees, including a line manager. However, given capacity constraints, this accommodation was no longer tenable and an incapacity process and hearing was convened. The employer submitted that working on weekends was an inherent requirement of the job and offered the employee an alternative position that came with a 45% salary reduction. The employee refused the offer of the alternative position. The employer terminated the employment agreement based on incapacity.

### The Court

The Labour Court found that the employee's dismissal was automatically unfair in terms of section 187(1)(f) in that the dismissal constituted discrimination on the basis of religion and that the employee was unfairly discriminated against in terms of section 6 of the Employment Equity Act 55 of 1998.

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## Religious practice and inherent requirements of the job

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On appeal, in the Labour Appeal Court, the majority judgment found that the employee's dismissal was not automatically unfair, as the weekend work requirement was an inherent job necessity. Weekend work was deemed an inherent job requirement because the position involved attending and hosting events crucial for the company's operations, including national and international trade shows. This role required flexibility and availability for events that may occur on weekends, especially for trade shows and promotional activities. The LAC therefore found that this obligation was rationally connected to the job's purpose and essential for fulfilling its responsibilities.

Moreover, the employer had made reasonable efforts to accommodate the employee's religious beliefs. The employer allowed the employee to refrain from weekend work for 16 months. The employer also offered him an alternative position as a sales coordinator, which did not require weekend work, although it came with a lower salary and was therefore rejected by the employee. These efforts demonstrated the employer's commitment to balancing the employee's religious practices with the operational demands of the business.

### Key Takeaway

Employers must be careful in substantiating whether a job entails an inherent requirement, and whether the employer has made adequate efforts to accommodate the employee where relevant. The factual context and these considerations are important factors for employers to carefully assess in situations where an employee is unable to or elects, for example, on the basis of religious belief, not to meet an inherent requirement of the job she/he holds.

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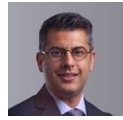
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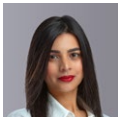
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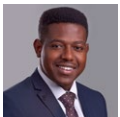
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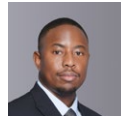
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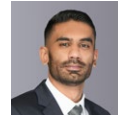
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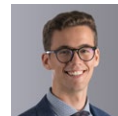
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