

Leave judgment rustles employers

 By [Johan Botes](#)

17 Sep 2018

Is an employer bound by its own changes to its leave policy? What happens when the employer disputes whether the changes were ever implemented, and there is no witness to gainsay claims of what happened a decade or so ago? The Labour Court in South Africa had to consider this and other interesting issues in deciding whether an employee had a legal entitlement to accrued annual leave upon termination of employment. The judgment confirms the importance of employers taking special care in clarifying employee entitlements in their employment policies. It also highlights the importance of maintaining a record of the implementation and communication of salient changes.



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The employee in *Bester v Selfmed Medical Scheme* (judgment delivered 31 July 2018) claimed she was entitled to over 200 days annual leave at the termination of her fixed-term contract. Her salary advice, or payslip, recorded this as the number of annual leave days due to her. The employer declined to pay the leave days claimed. It disputed whether the original terms and conditions of employment were in fact amended by a subsequent policy.

The employee testified about the changes to the standard terms and conditions of employment brought about by the board adopting a new leave policy in 2005. The employer's witness was not in the company's employ at that time and was unable to refute salient facts supporting the implementation of the policy. The policy entitled employees to accumulate 50% of their annual leave allotment.

The court confirmed the general position in respect of resolving the disputes of fact. Quoting from the leading case on the issue, the court stated as follows:

The technique to resolve disputes of fact is well known:

The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on

- a. the credibility of the various factual witnesses;*
- b. their reliability; and*
- c. the probabilities.*

As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as

- i. the witness's candour and demeanour in the witness-box,*
- ii. his bias, latent and blatant,*
- iii. internal contradictions in his evidence,*
- iv. external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions,*
- v. the probability or improbability of particular aspects of his version,*
- vi. the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.*

As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof.

As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues.

In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail. - (Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others (SCA))

The court upheld the employee's claim for payment of her accumulated annual leave payable upon termination of employment.

Importance of records

What value should the employers rake from this annual leave judgment? Critical to any business's long-term ability to manage employment disputes is sound record-keeping. Where changes are made to terms and conditions of employment, new policies introduced or work practices amended, proper records should be maintained and preserved. Keeping detailed records will assist the organisation in dealing with disputes long after the current role-players have left the business. Important information that should be recorded includes: exactly what was changed; when amendments took effect; what prior process was followed and how changes were communicated to staff.

In this technological age, it is relatively simple to track and record how policies are communicated via email, to whom such emails were delivered and who actually read the emails. Some businesses append important communications to payslips when these are distributed to staff, allowing further confirmation of the communication of important issues or workplace changes. Whatever method is preferred, sound record keeping allows parties the ability to reconstruct events when the organisational memory has faded. A system that gathers the institutional memory leaves that fall as seasons change may prevent money from leaving the organisational coffers in years to come.

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