

EMPLOYMENT

Salary made up of commission: What rules apply?

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Although South African labour law has a lot to say about minimum terms and conditions of employment, and pieces of legislation such as the Basic Conditions of Employment Act, 75 of 1997 provide a statutory background to the employment relationship if the contract between the parties is silent, and the National Minimum Wage Act, 9 of 2018 sets minimum hourly and wages for all employees, when it comes to remuneration structures which exceed the require minimum amounts, and especially when an employee's remuneration is calculated with reference to a metric other than the time spent by them performing their services, the contract of employment between the parties becomes of vital importance.

This is for the reason that the statutory background does not regulate this area, and the parties are left to themselves to ensure that there is sufficient clarity as to how, and when, such amounts are to be calculated and paid, and if there are any applicable conditions to the payment of commission.

A recent case has shown just how important the contract of employment can be in this regard. In the case of *Redelinghuys v Adapt IT (2023)*, the Labour Court considered a situation in which Redelinghuys had been a commission earner and subsequently left the employ of Adapt IT. When Adapt IT claimed that she forfeited the right to any commission which had not yet been paid as at the date of termination of her employment, a dispute arose which was adjudicated by the Labour Court.

Unfortunately for Adapt IT, the contract of employment did not contain any specific provisions which provided for such a forfeiture, and at most it sought to argue that it had a policy or practice which would mean that Redelinghuys would forfeit any commission that had not been paid to her by the time that her employment terminated.

The Labour Court however, in the absence of any clear contractual provisions, and the absence of any evidence from Adapt IT that it had ever implement a policy of forfeiture, remained sceptical that Redelinghuys should lose the entitlement to commission that, in all other respects, had been earned by her.

Especially when Redelinghuys was able to challenge Adapt IT's stance that it had a policy of forfeiture, and claimed without further challenge from Adapt IT that in fact a number of persons who had left its employ had been paid outstanding commission, her entitlement became clear.

The Labour Court accordingly found that "the employer failed to prove there was a contractual term that she forfeited any claim to commission" and that anything to the contrary would not make business sense for the parties to agree to. Adapt It was ordered to pay Redelinghuys the outstanding commission earned, as well as her legal costs.

This case is a good example of why it should always be borne in mind that, a contract of employment at its heart is a contract between the parties, and where the law is silent, the contract should speak. Employer's should ensure that their contractual arrangements with employees are properly considered and reduced to writing.



Bradley Workman-Davies

Director

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