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LABOUR LAW NEWSFLASH - EDITION 3/2017

Welcome to the third edition of the labour newsflash for 2017.

In practice we often are aware that practitioners try to compartmentalise the various aspects of HR/IR and away from the operational business model.

At Global Business Solutions we understand the necessity of foresight and the ability to foresee overlaps and to ensure that any HR/IR issues are dealt with in a manner which makes operational business sense, thus ensuring smooth business processes, which will then ensure a stable workforce.

It is this overlap in legislation and real world occurrences which develop our law further and drive the interactions with our teams.

Case in point, the below two cases. Please enjoy the read and feel free to give us any feedback or queries you may have.

It is because of these intricacies that we have put together some of the greatest minds in our field to debate the employment landscape at our Employment Conference.

The clock is ticking and seats are filling up fast. We hope that you have reserved your seats and that we will see you at Emperor's Palace on the 20th of April 2017.

Till next time

Johnny and Grant
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Case Summary 1:

Reinstatement orders and contempt of court claims

Michael and Another v Phakisa Technical Service (Pty) Ltd and Another (JS282/14, JS280/14) [2017] ZALCJHB 73 (7 March 2017)

The two employees had both worked for a Temporary Employment Service and were placed with a certain client.

Separate Courts found their dismissals to be procedurally and substantively unfair.
The Court ordered the employer (the TES) to reinstate them "on the same terms and conditions governing the employment prior to dismissal" The employees had presented themselves for reinstatement, however, the one was sent home on the basis that there was no alternative post available for him after the client had restructured, and that he would be contacted soon once clarity was obtained on his position.

The other employee was offered other duties whilst a suitable position was still to be found, but he had declined it. He was nevertheless paid his remuneration.

The employees then approached the Court – seeking an order that the employer was in contempt of Court.

The Court confirmed the principles relating to contempt:

(a) there must be an order in existence;
(b) the order must have been duly served on, or brought to the notice of, the respondent party;
(c) there must have been non-compliance with the order; and
(d) the non-compliance must have been wilful or mala fide

In determining whether the employer met these requirements, the Court found that despite not being in a position to place the employees immediately, they had with clear intention to comply with the court orders, offered them alternative placing at different sites, and had immediately after they had presented themselves for reinstatement, paid them their remuneration whilst looking for alternative placing.

The employer had correctly stopped paying them their salary as they had unreasonably refused to take up alternative positions. The Court found that the conduct of the employer in the circumstances can hardly be construed as mala fide.

The Court further found that the "impossibility" in complying with the order was not the employer's fault. On the contrary, genuine attempts were made to place the employees at different sites, which placement would not have affected their other terms and conditions.

Given the nature of the TES' business, the only reasonable option available was to place them at another site, as long as this would not have impacted on their other conditions of service, particularly pertaining to remuneration and other benefits. The Court thus held that the employer had not been in contempt.

Case Summary 2:

Sexual harassment – it is the employer's problem

Employers sometimes feel that it is not their responsibility to manage their employees' urges. The case hereunder reminds us of the need for employers to be proactive in managing and preventing occurrences of sexual harassment.

A long serving employee of Liberty resigned citing the intolerable nature of her employment brought on by sexual harassment by her manager. Liberty had a sexual harassment policy dealing with sexual harassment, but as we all know, a policy is only as good as its implementation.

As a result of the behaviour of her manager, the Applicant brought a matter against the employer. The Labour Appeal Court in ***Liberty Group Ltd v Masango*** (Case no JA 105/2015, 7 March 2017) dealt with the extent of employer liability for sexual harassment in terms of section 60 of the Employment Equity Act (EEA).

For some factual background, the Applicant informed a colleague about her harassment, who carried this over to a human resources consultant. The colleague had asked her to study the policy to see if this was in fact harassment and the HR consultant attempted unsuccessfully to contact her and the matter then ended. Sadly though the alleged perpetrator was advised of the complaint and made it known to her that he was aware.

There was a process of resignation, withdrawal and resignation again. The Applicant then referred the matter for discrimination. She felt that the employer had not done enough to protect her and would not take adequate steps in the future.

For a claim against the employer to succeed there are three important requirements:

- The alleged harassment was "immediately" brought to the attention of the employer (section 60(1));
- the employer had failed to "consult all relevant parties" and "take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act" (section 60(2)); and
- the employer failed to show that it had done "all that was reasonably practicable to ensure that the employee would not act in contravention of this Act" by committing sexual harassment (section 60(4)).

The Court confirmed that the word "immediately" in section 60(1) should not be interpreted literally but given a meaning that is "sensible" in the circumstances and added to that, that it should be understood more broadly as referring to failure by the employer to ensure that employees "did not act in contravention of the EEA".

The court awarded damages to the employee in the amount of R250 000, with costs.

Lesson to be learned:

It is not only important to have a Sexual Harassment Policy in the workplace, but it is also necessary to ensure that managers are trained on how to handle these situations appropriately. Failure to do so places employees at risk of being sexually harassed and the employer of having damages claims successfully brought against them.