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LABOUR LAW NEWSFLASH - EDITION 1/2017

Welcome to our first labour newsflash of 2017.

Whilst this year has not started off as controversially as the last, it is clear that the judicial system as well as discussions on the National Minimum Wage and Collective Bargaining are well into the swing of things.

The year has already had its share of controversy, with the issue of discrimination based on the appearance of a person (or their weight) being raised on various media platforms. Our Case Summary 2 relates to this topic. In this regard, Grant will also participate in an SABC News Interview at 11am this morning. Please feel free to tune in on DSTV Channel 404 to follow the discussion.

This year has also seen an increase in retrenchments due to a number of economic factors. All indications are that unless there is proactive intervention in a number of industries, this may become a norm this year.

Some positive news is the extension of the Employment Tax Incentive Bill as well as the fact that no cap has been placed on this.

The introduction of the UIF amendments has received a mixed reaction, with COSATU in support hereof. A summary of the changes is enclosed herewith.

As always, we will attempt to keep you at the forefront of developments on the labour front.

In furtherance hereof, we have secured some of the top minds in labour law for our Employment Conference taking place on 20 April at Emperor's Palace and we look forward to seeing you there.

Enjoy the case attachments below and feel free to engage with us on any of the information provided.

Regards

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Unemployment Insurance Fund (UIF) Amendment Summary:

- increase in the UIF benefit period from 238 to 365 days;
- increase in the maternity leave benefit percentage to 66%;
- extension of cover to include workers who have lost pay due to a reduction of working hours;
- separation of maternity benefits from other UIF benefits and claims;
- inclusion of workers who are members of the Government Employees Pension Fund;
- inclusion of public servants who will now be covered in the event of dismissal;
- inclusion of women who had miscarriages during the third trimester or a stillborn birth;
- allowing the family and/or a nominated beneficiary of a deceased claimant to receive their benefits;
- prohibition of charging of fees by any party to a UIF claimant;
- allowing the Minister for Labour to issue regulations for domestic workers and employees of small businesses and enterprises to ensure that they are covered.

Case Summary 1: Prescription

The conflict between the Prescription Act and the Labour Relations Act was recently heard in the Constitutional Court in the matter of ***Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others [2016] ZACC 49 (15 December 2016)***.

The employee had been dismissed in 2009 and an arbitrator had ordered his reinstatement. The employer then took the award on review and then, in what may have been a tactic, did not drive the matter to its conclusion. (This is a tactic employed by some employers to hope that the matter dies a natural death and it disappears)

In assessing the case and arriving at its conclusion, the Court noted that the Labour Relations Act must take precedence over any conflicting legislation but even if it were to be found that the Prescription Act takes precedence, an arbitration award does not fall within the meaning of "debt" and therefore cannot prescribe.

The employee was thus awarded his job back after a seven year period.

Lessons to be learned:

Employers are to be acutely aware that the tactic mentioned herein of dragging the matter past 3 years will not allow them to avoid the consequences of an award.

Case Summary 2: Discrimination on looks

In the matter of ***Smith v The Kit Kat Group (Pty) Ltd - (2017) 26 LC 6.12.1 also reported at [2016] 12 BLLR 1239 (LC)*** the employer informed the employee that he could not resume work after he suffered an injury due to an attempted suicide.

The employee's face was left disfigured and his speech was impaired.

The employer informed him that his appearance was "not acceptable" and advised him to make a disability claim from the provident fund due to "cosmetic circumstances" and because his speech was only "70-80%" comprehensible.

The employer did not dismiss the employee, but refused his return. The Court found that the employer should immediately have accepted the employee's tender of service and then initiated incapacity proceedings or conducted the investigations required by the EEA. By not doing so, their actions constituted an automatically unfair dismissal based on disability.

Due to the nature of the employee's position, the term "cosmetically unacceptable" could not be justified and the Court also found that there were insufficient arguments raised by the employer addressing pertinent issues.

Despite the fact that the employee abandoned his reinstatement claim and had not couched the dispute as a damages claim the Court awarded the employee 24 months' remuneration as damages and a further six months' compensation as recompense - a total of R1 540 199 plus costs due to the employer's bad faith and the fact that the employee had been hurt and humiliated.

Lesson to be learned:

To prove that discrimination is fair, it must be proven that the discrimination was rational and justifiable.

Prior to the amendments the test was simply based on 2 factors: Affirmative Action or inherent job requirements. The above factors provide employers with a clear guide on this matter. Looks are irrelevant, unless you are a model.