LABOUR LAW NEWSFLASH – EDITION 12/2016

Labour Newsflash

Welcome to the last Labour Newsflash for 2016.

It is interesting to see how the case law has gone full circle from January to November 2016. The year started with the Penny Sparrow and Gareth Cliff cases, followed by the Kenilworth racecourse incident. Sadly, this labour newsflash starts with another incident highlighting that racism is still alive and has not been appropriately addressed in many South African workplaces.

In our first summary, the matter of ***South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*** **[2016] ZACC 38** takes us back to the past. It also illustrates, amongst other things, how unacceptable racism is in the post-democratic South Africa.

Our second case then starts to analyse different forms of employment in the future of work. Whilst not a South African case, this question has found itself in our jurisdiction. The future of work as we know it will continue to pose unique challenges to the norms of labour law. In the case of ***Aslam & others v Uber BV & others (Case No: 2202550/2015, 28 October 2015)***, that was heard in the United Kingdom Employment Tribunal, it was ruled that London Uber drivers are 'workers' subject to employment law.

The last Annual Labour Law Update Seminar for the year took place this past Friday in Cape Town. We would like to thank all those who attended around the country. We appreciate your support.

Our attention now turns to our next Employment Conference taking place on the 20th of April at Emperor's Palace. Already confirmed are National Director of the CCMA Cameron Morajane, Employment Equity Commission Chairperson Tabea Kabinde, Prof Haroon Bhorat, Johnny and our own Employment Equity Commission member and MD Thembi Chagonda. MC'ing the event will be well-known television personality, Justice Malala. We have a few more surprises up our sleeve, so diarise the date so long and keep an eye on your inbox for more information.

'Till next year

Johnny and Grant
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Case 1:

In the matter of ***SARS v CCMA & others*** (Case CCT 19/16, 8 November 2016) an employee of SARS, referred to his black superior as a "K**fir".

At the disciplinary enquiry, there was a plea bargain entered into, which saw the employee avoid being dismissed.

The Commissioner, the well-known Pravin, overturned the outcome and dismissed the employee. Procedurally, however, this was not permissible in terms of SARS' binding disciplinary procedure.

Whilst the CCMA and subsequent courts took a narrow approach in deciding to reinstate the employee, the Constitutional Court took a different approach and looked more closely at the situations, set out in section 193(2), where reinstatement is excluded.

Among these are cases where "the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable" (s 193(2) (b)).

The Court held that "To retain Mr Kruger as an employee would be similar to recklessly leaving a ticking time-bomb unattended to, knowing that it could self-detonate at any time" (para 47). The order of reinstatement was therefore set aside and replaced with an order of compensation equivalent to six months' remuneration premised mainly on procedural lapses on the part of SARS.

Lessons to be learned:

Racism is unacceptable in any form and needs to be dealt with as such. Employers need to ensure that their procedures provide for an overturning of a chairperson's ruling in the event of an unacceptable outcome.

Case 2:

In a world where the changing world of work indicates that most us will be in atypical employment, the judgement handed down by a United Kingdom Employment Tribunal in ***Aslam & others v Uber BV & others*** (Case No: 2202550/2015, 28 October 2015), has gone contrary to this future trend by ruling that London Uber drivers are 'workers' subject to employment law.

This judgement follows a settlement agreement in a landmark class action by US Uber drivers claiming employee status, in which the drivers finally acknowledged that they were independent contractors.

The Court found that Uber was "running an enterprise at the heart of which is the function of carrying people in motor cars". Requiring drivers and passengers to agree "as a matter of contract" that this was not so, in the tribunal's view, "merits … a degree of scepticism" (para 87).

The case pierces the veil of the actual relationship and where it is found to merely be a smokescreen of sorts, the law will kick in.

No doubt this will lead to a challenge by local Uber drivers. However, this is only one of numerous challenges our law will face as we navigate a changing world of work and atypical employment. Labour Law will have to adapt accordingly to ensure the protection of both employer and employee.

Lesson to be learned

The gig economy, in which organisations contract with independent workers for short-term engagement, is here with many different forms of jobs. South African labour law does not make provision for this and will consequently still need to adjust to this form of economy.