

Highlighting key labour themes for 2017

With South Africa's economy under significant pressure as it battles to eke out a mere 1% growth, labour disputes and retrenchments are on the rise.



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Head of Employment at Cliffe Dekker Hofmeyr, Aadil Patel, cautioned during the practice's 2017 outlook conference in November last year, that as the economic situation potentially deteriorates, employers will seek to further streamline their businesses, while employees will attempt to hold employers to strict compliance with the Labour Relations Act.

Labour disputes

Around 690 cases a day are already being referred to the CCMA, which translates to an increase of around 23% over the past five years.

According to Patel, recent cases indicate that retrenchment processes are not easy and are in most cases “fraught with difficulty”.

Regional Practice Head and Employment Director Gillian Lumb highlighted a number of pertinent issues that are arising. In one case, it was found that subjectivity had crept into selection criteria through the use of performance rating and an employee should have been given the opportunity to be heard; while in another, it was held that an employer had given sufficient evidence as to why an employee could not simply be bumped into another position.

“In another case, a group of employees on fixed-term contracts were dismissed before the completion of a building project. The contract contained an automatic termination clause and it was held that the automatic termination clause gave the employer unfettered discretion to decide when skills were no longer required. The termination was at the will of the employer and the clause was found to be invalid,” explains Lumb.

Mergers - the public interest

The role of public interest concerns in mergers are also becoming increasingly prominent and it will be important for companies to be aware of the legal implications.

Competition law Director at CDH, Andries La Grange, says mergers reported to the Competition Commission may raise public interest concerns, including merger impact on employment.

“However, conditions may allow a merger to proceed despite public interest concerns. Conditions often impact on retrenchments, post-merger.”

Difficulties relating to mergers include co-ordinating consultations, reduced substantive justification and enforcement/remedies.

Collective agreements

Delivering a keynote address, Professor Avinash Govindjee, the Executive Dean of the Faculty of Law at the Nelson Mandela Metropolitan University, highlighted how the recent labour dispute between The Association of Mineworkers and Construction Union (Amcu) and the Chamber of Mines has brought collective agreements into the limelight.

The question here was whether Amcu was bound by the collective agreement concluded in the Chamber and whether the definition of ‘workplace’ was unconstitutional.

“Whether two or more operations of an employer constitute, separate workplaces is a matter of fact (they would have to be independent operations by virtue of their size, function or organisation). It was held that Amcu is bound by the collective agreement and section 23 is not unconstitutional: the appeal was dismissed,” says Govindjee.

Disputes over the extension of bargaining council collective agreements to non-parties is another key issue to watch in the year ahead.

"Disputes relating to jurisdiction and extension of bargaining agreements have become more prevalent and these are key issues for companies to watch for in the new year," adds Govindjee.

Spotlight on social media

The role of social media in commerce also continues to result in a number of new cases.

Employment Director Fiona Leppan highlighted important international precedents developing in this area of the law.

A number of cases relating to potentially damaging Facebook missives are coming before local courts and employers and

employees need to take precaution to avoid reputational damage.

One question raised was whether a Facebook communication obtained by way of hacking an employee's Facebook account could be admissible as evidence against the employee.

But, Employment Director Samiksha Singh says the right to privacy is not absolute.

"Without the evidence, the employer would have no platform to enforce its rights. So the unlawfully obtained evidence admissible as evidence but only in limited circumstances," she says.

Meanwhile, can an employee be dismissed for posting insolent and threatening comments on social media towards his employer and its management?

"On this issue, it was recently held that it was improbable that the employee was not thinking about what he was doing. If the employee had access to necessary resources, he was prepared to 'bomb and burn' the employer – the dismissal was found to be substantively fair," adds Singh.

In another SA case, an employee posted on Facebook calling for "civil war and killing all white people". The employee then apologised and said it was a "joke".

The question is whether an employee can be dismissed for posting racially discriminatory and threatening comments on social media?

"It was found that it was improbable that the Facebook post was a joke and also that the employee's apology was not genuine. Furthermore, allowing the employee to continue employment would signify employer condoning racism, hate speech and threats of violence. The employment relationship broken down and irreparable and so the dismissal fair in the circumstances," concludes Singh.

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