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Special Interest Article:

- **Retrenchments in 2009.**

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Retrenchments in 2009

According to a Business Day article *(SA's recession rescue plan 'paralysed' by ineptitude – Mthabo Le Roux - 13/07/09)*, around 200 000 people have been retrenched in South Africa this year so far.
There is no doubt that the international economic fallout has affected every sector of the South African economy.

The GEO is of the opinion that the figure of 200 000 employees is far lower than the actual number of people that have been retrenched. GEO officials are attending to more retrenchments this year than in the past decade.

From a Labour Law point of view, there is no doubt that litigation around current retrenchments will occupy the Labour Court for years to come.

Unlike the law dealing with unfair dismissal, retrenchment law is complex and fraught with difficulty. The reason for this is that the retrenchment of an employee is regarded as a 'no fault dismissal'. Stated differently, it is not the employee's fault that he was dismissed for economic or other operational reasons. With this in mind, the Labour Court scrutinizes the process and reasons behind retrenchments. Added to this, given the current high level of job losses, The Labour Courts follow a stricter approach to the process followed and reasons given by the employer.

It is therefore extremely important that employers ensure that they are guided from the very moment that the employer 'contemplates' rationalizing or restructuring an operation.

In NUMSA obo Members v Timken SA (Pty) Ltd (2009) 18 LC 5.3.1, the Labour Court found that the employer had unfairly retrenched six employees. The employer had not used fair selection criteria. They had used a combination of LIFO, disciplinary record, attendance and tardiness to decide on who should be retrenched. They had also failed to consider alternatives such as the "bumping" of the employees into other positions. They had also failed to offer the retrenched employees the opportunity to apply for new positions when these became available. The employees were each awarded 12 months salary and the employer was liable for their own and the union's legal costs.

Ed- Should you be contemplating retrenchments, please ensure you contact the GEO from the very outset
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Andre Rabe

Remember to contact the GEO should you need any Labour Law advice. The GEO represents employers in all sectors, nationwide. 0861436436

CASES AND COMMENTS

NB NB NB NB NB

SEXUAL HARASSMENT IN THE WORKPLACE IS A MAJOR ISSUE! More and more case are being referred to the CCMA and labour Court where company's are being sued for instances of sexual harassment that have occurred in the workplace. The Labour Court is taking a hard line against company's that have not communicated their policy against sexual harassment and that have not put mechanisms in place to deal with such.

Company's are advised to train their staff to ensure that incidents of sexual harassment don't occur.

Contact Philippa Swan on 0861436436 for more information.

WITHDRAWING A RESIGNATION

SACWU obo Sithole and Afrox Gas Equipment Factory (Pty) Ltd

(2006) 16 MEIBC 7.1.4

The applicant employee resigned after 17 years of service. He had apparently decided to take up a position elsewhere with better prospects.

He submitted his resignation on the 11th of March 2005 in writing, thanking the company for the time that he had spent there. On the 30th of March, he sent another letter stating that he was withdrawing his resignation. The reason for his decision was that he had not realised that he was still indebted to the company for a study bursary that they had assisted him with. The terms of the bursary required that he repay the balance of the bursary on his departure.

The company indicated that they could not accept the withdrawal of the resignation as they had already begun processing the documentation associated with his resignation and that arrangements to fill his position had already been made.

The employee referred a dispute claiming that he had been unfairly dismissed. The union argued on behalf of the employee that the employer was obligated to accept the employee's retraction given that the employer had not formally responded in writing that they had accepted his resignation. They stated that the employer had no right to process the resignation particularly because the employee had expressly indicated that he had decided to withdraw the resignation.

The arbitrator had to decide whether the employer was obligated to accept the withdrawal given the facts above and whether an unfair dismissal had occurred.

The arbitrator decided that he did not agree that the employer was obligated to accept the withdrawal. He stated that when an employee voluntarily resigns on notice, without alleging constructive dismissal, he has made a conscious decision to terminate his employment.

Under cross-examination , the employee confirmed that he had not been pressurized into resigning. Given this, there could not be any talk of a constructive dismissal.

The fact is that the employee only subsequently changed his mind when he discovered the financial implications of his resignation.

The arbitrator held further that an employee can tender his resignation and leave the employ of the company even though the employer does not accept the resignation. There is essentially nothing that the employer can do to force an employee to remain in its employ. Once faced with a resignation letter, the employer has no option but to accept the resignation.

When an employee resigns and subsequently withdraws the resignation, he must accept that there is no guarantee that the employer will accept the withdrawal and reverse the termination process. In addition, there is no obligation on the employer to do so.

DEPRESSION

Strydom v Witzenberg Municipality

(2008) 17 LC 1.11.47

Can an employee be dismissed for depression? Simply put, yes. Depression is recognized as a disease and as such, if a person becomes incapacitated as a result, the employment contract may ultimately be terminated. A proper procedure must however be followed. The extent of the illness and duration needs to be determined. The employer is obliged to seek alternatives and possibly consider amending employment conditions to assist the employee. Dismissal is a last resort and only after complying with the procedures in Schedule 8 of the LRA.