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2010 and a landmark affirmative action case

Special Interest Articles:

- Landmark AA case
- Sex Change

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The last few newsletters focused on the worldwide recession and bloody economic aftermath of one of the world's worst economic catastrophes. According to most financial gurus, 2010 should by all accounts be less devastating than 2009. In fact it appears that South Africa is showing good signs of recovery and growth.

Clients often ask what the effect of the recession has been on employment law. Well, we were kept busy. Other than the fact that we conducted more retrenchments in 2009 than possibly any other year, not much else changed. Employees vigorously continued to commit the same offences as before. Unions, despite being aware of companies' obvious financial predicament, still demanded high wage increases and better benefits. Incidents of theft have not decreased.

On an interesting note, the Labour Court ruled on the much anticipated **Solidarity obo Barnard v SAPS**. The facts of this case are briefly ...

Renata Barnard was employed as a Captain in the SAPS with the task of investigating complaints against the SAPS. She applied for the position of Superintendent in 2005. The position had been created by the police to improve its complaints handling service to the public. In 2005, Renata Barnard together with six other applicants, applied for the Superintendent position. As is the norm, the interview panel met with the applicants, interviewed them and applied a point scoring system. Barnard was awarded 86.7 percent by the interview panel and unanimously recommended for the position.

She was rated at least 7.5 percent higher than the next applicant from the designated group. The panel decided that given the fact that it was clear that she was the best candidate, she must be recommended for the position. The panel was of the opinion that the position required someone of her caliber and that not appointing her would negatively affect service

delivery.

This was however not to be...

The divisional commissioner of the SAPS recommended that she not be appointed given that appointing a white person to the position would not promote representation within the SAPS. This was decided despite the fact that Barnard is a woman and as such a member of the designated group as determined by the Employment Equity Act.

After unsuccessfully trying to resolve the matter internally, she referred a dispute to the Labour Court.

Briefly, the court found that although affirmative action is necessary, it should not be used to prevent the advancement of a person particularly in cases where the person affected is also a member of the designated group.

The SAPS were ordered to promote Barnard and bear the litigation costs.

Expect more of these cases this year...



CASES AND COMMENTS

NB NB NB NB NB

Labour Court and Labour Appeal court cases interpret the meaning and intention of our Labour Legislation. It is a good idea to keep you and your managers up to date on the latest developments in case law. For an interesting workshop in this regard contact Philippa Swan on 0861436436.

GEO ANNUAL GENERAL MEETING

THE GEO WILL HOLD ITS AGM AT 14H30 ON THE 9TH OF APRIL 2010 AT THE GEO OFFICES:

**334 EQUESTRIAN ROAD,
POORTVIEW,
ROODEPOORT**

(NEAR THE BOTANICAL GARDENS IN RUMSIG AREA).

Algoa Bus Company / SATAWU & others - (2009) 18 LC 9.5.5

Algoa bus company sued SATAWU, TARGWU and their members for losses sustained during an unprotected strike.

Algoa claimed R465 000 as a result of losses sustained due to it not being able to transport some 60 000 people. It justified the amount by claiming that the strike had lasted for two days and should therefore include all earnings and expenses that would normally have been incurred.

The Labour Court found in favour of Algoa but stated that the strike had not lasted as long as Algoa claimed. The court found that the strike was for nine hours on the one day and seven hours on the next. The court also rejected the claim of R465 000 and awarded instead damages of only R100 000. The court also decided that the respondents could repay the amount in instalments of R50 per month...

THE SEX CHANGE

Atkins v Datacentrix (Pty) Ltd (Labour Court case no. JS02/07 dated 02/12/2009).

Datacentrix offered Atkins a job as an IT technician. Soon after the interview, whilst Atkins was still working at his previous employer, Atkins informed Datacentrix that he was to undergo a sex change so that he could become a woman. Datacentrix

was not impressed with their prospective incumbents intentions and decided to withdraw its offer claiming that Atkins had been dishonest and had failed to disclose material information. Atkins sued for an automatically unfair dismissal on the ground of sexual orientation. The company denied that it had dismissed Atkins for wanting to change his sex but rather that they had dismissed Atkins for dishonesty.

The court accepted that Atkins was a transsexual. It also accepted the fact that the only remedy should a person not wish to remain in betwixt the two was to undergo surgery. Luckily he had not yet resigned from his present employer. His present employer supported his decision to undergo the operation.

The court found that dismissing an employee simply because he was to undergo a sex change operation was clearly discrimination on the basis of gender. This was forbidden by both the Labour Relations Act 66 of 1995 and the Employment Equity Act 55 of 1998.

The court awarded Atkins five months salary as compensation.

Of importance here is that the court rejected Datacentrix's argument that the applicant was obliged to disclose such information. The court will not support disclosure of information

that is in direct conflict with an individual's right to dignity and privacy.

ONE MANAGER ONE BULLET

Botha/Anglo Platinum Mines CCMA
WECT16025, 07/12/09

Mr Botha led employees out on a protected strike. He designed and printed a poster with the slogan "one manager one bullet"

A pre-dismissal arbitration was held at the CCMA to decide Botha's fate. He claimed that the poster was merely to convey the workers dissatisfaction with management and that the slogan should be seen in conjunction with the employees frustration and political struggle. Although no strike rules had been established, the commissioner noted that the schedule dealing with picketing rules made it clear that employees could not commit unlawful acts or acts which may be perceived to be violent.

The commissioner was unimpressed with the applicant's contention that the poster was likened to slogans chanted during the apartheid era...

The employee was dismissed.

IR survival tip: When faced with an IR problem make sure you get advice on what to do. Call the GEO on 0861436436.