

## Dear SEESA Client

We would like to make use of our first newsletter of 2010 to wish all our clients a prosperous 2010 and confirm our promise and commitment to excellent service to all our clients.

In order to fulfil this promise we expanded our personnel in areas which experienced enormous pressure.

You will find details of our newly appointed staff further in this issue.

In our previous newsletter we embarked on fulfilling on our promise to arm our clients with knowledge to manage their Labour in such a way in order to avoid expensive and time consuming Labour disputes.

### In this issue we will be dealing with the following:

1. Dismissals arising from collective termination or redundancy
2. Namibia's Ban of Labour Hire did not survive the constitutional test
3. Dilemmas of the Road Freight Industry: Employee versus Independent Contractors

## 1. DISMISSALS ARISING FROM COLLECTIVE TERMINATION OR REDUNDANCY

Countries across the world, including Namibia are affected by the deepest and most serious economic crisis in at least 80 years. Numerous companies had to reduce staff in order to survive.

If you find yourself, in the company of those unfortunate ones and you need to reduce staff, be careful. The principals and procedures to follow during dismissals of this kind are complicated and we advise that you be assisted by SEESA's professional Legal Advisors.

What follow is a summarized version of important issues to take into account. You will see what we mean by "complicated", once you have read this article.

The Labour Act deals with this form of termination in Section 34. It is clear from the outset that the legislator, mainly because of the historical misapplication or abuse of retrenchments by employers, decided to prescribe specific procedures, when employers anticipate dismissing employees due to operational or economic reasons. No specific procedures with regard to other forms of dismissals has statutorily been laid down. From this it is clear that the legislator intended to regulate retrenchments more strictly than any other form of dismissal.

Section 34 of the Labour Act reads as follow:

*34(1) If the reason for an intended dismissal is the reduction of the workforce arising from the re-organisation or transfer of the business or discontinuance or reduction of the business for economic or technological reasons, an employer must:*

From the wording of Section 34(1) we are able to deduct, to a certain extend, a "definition" for or scope wherein collective termination or redundancy will apply.

These are dismissals for one or more of the following reasons:

The reduction of the workforce due to:

- re-organisation;
- transfer of the business;
- discontinuance of the business;
- reduction of the business.
- for economic reasons; or
- for technological reasons;

Section 33(1) of the Labour Act, 2007 prohibits the dismissal of an employee:

- without a valid reason; and
- without following: the procedures set out in the Act, if the dismissal arises from a reason set out in section 34(1).

The Act therefore sets substantive and procedural requirements for a fair dismissal.

### 1.1 SUBSTANTIVE FAIRNESS

As with any other form of dismissal, the substantive fairness of retrenchments is based on two pillars.

- Substantive fairness - being for a valid reason and
- Substantive fairness - being the last resort under the specific circumstances.

The question whether or not an employee's dismissal for operational reasons is substantively fair is a factual one. The employer will have to prove a number of things. In the first instance, the employer must prove that the proffered reason is one based on the operational requirements of the business. The employer will thus have to prove that the reason for dismissal falls within the statutory definition of section 34.

In the second instance, the employer must prove that the operational reason actually existed and that it was the real reason for the dismissal. In other words, the employer must prove that the proffered operational reason is not a mere cover-up for another reason for the dismissal of the employees.

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### 1.1.1 VALID REASON

"Valid reason" refers to the provisional aspects and scope of section 34(1).

It is only possible to dismiss employees based on Collective Termination or Redundancy if it is for reasons specifically mentioned in section 34(1).

### 1.1.2 LAST RESORT

"Last resort" refers to the common law fair dismissal practices, where an employer should always exercise all measures and alternatives at his disposal to avoid dismissals and that it was eventually the absolute last resort.

## 1.2 PROCEDURAL FAIRNESS

The Act set specific procedural requirements when an employer anticipates dismissing employees on a collective basis or due to redundancy.

The five major procedural requirements which an employer must comply with are as follow:

- 1.2.1 inform the Labour Commissioner of the fact that dismissals are to take place,
- 1.2.2 inform any trade union which the employer has recognised as the exclusive bargaining agent in respect of employees of the fact that dismissals are to take place;
- 1.2.3 disclose all relevant information necessary for the trade union to engage effectively in the negotiations about the intended dismissals;
- 1.2.4 negotiate in good faith with the trade union/workplace representative/workers;
- 1.2.5 select the employees according to a selection criteria that is either agreed upon or one that is fair and objective.

If there is no trade union recognised as the exclusive bargaining agent in respect of the employees, the notice contemplated above must be given to the workplace representatives.

If there is no such workplace representatives

in the workplace, the notice must be given to each individual employee who may be affected by the intended dismissals.

#### Information required to be in the notice?

- the fact that the employer intends to dismiss employees;
- the reason for the reduction in the workplace;
- the number and categories of employees to be affected;
- the intended date of the dismissals.

#### Information required to be in the disclosure of information?

- the fact that the employer anticipates dismissals;
- the reason/s for the intended dismissals;
- the alternative measures which were considered before proposing the measures to avoid dismissals and the reasons why these were not viable;
- the number of employees likely to be affected by the intended dismissals, and their job categories;
- the proposed selection criteria;
- the date of intended dismissals;
- measures to minimise the dismissals;
- conditions on which the dismissals are to take place;
- any other relevant information;
- a date, time and place where and when negotiations are to take place.

When disclosing information, the employer is not required to disclose information if:

- it is legally privileged;
- any law or court order prohibits the employer from disclosing it; or it is confidential and, if disclosed, might cause substantial harm to the employer.

## 1.3 NEGOTIATIONS

The Act requires the employer to negotiate in good faith.

What should the parties negotiate and reach consensus about?

- alternatives to dismissals;
- selection criteria;
- ways how to minimise dismissals;
- the conditions on which the dismissals are to take place;
- how to avert the adverse effects of the dismissals;
- severance pay

## 1.4 SUMMARY OF PROCEDURES

A Chronological order of procedures to be followed when the employer intends to dismiss employees arising from reduction in the workplace, are as follows:

- 1.4.1 Before any procedure in order to dismiss employees is commenced, the employer must first consider and implement viable/workable alternative measures to avoid dismissals. There are a number of alternatives to retrenchment, which the parties may consider such as:

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- The granting of either paid or unpaid leave
- Implementation of short-time or layoff
- The reduction or elimination of overtime
- The reduction or elimination of work on Sundays
- The transfer of employees to other positions in the same undertaking
- The spreading of the retrenchment over a period of time, in order to allow time for a natural reduction in personnel numbers to occur
- The training or retraining of employees to enable them to take up alternative positions in the same undertaking
- The reduction of wages (by agreement).
- The provision of voluntary retrenchment packages

If this is not successful:

- 1.4.2 Give notice to the Labour Commissioner and Trade Union.
- 1.4.3 Disclose information.
- 1.4.4 Negotiate.
- 1.4.5 Select the employees according to an agreed selection criteria or one that is fair and objective.

If consensus has been reached, the employer may terminate services and pay the affected employees' severance pay and other payments due to them.

If after the negotiations and selection has been concluded, and the parties do not reach agreement, a party may, after one

week following the dispute, refer the matter to the Labour Commissioner.

After appointment, the conciliator must as soon as reasonably possible convene a meeting of the parties and attempt to resolve the dispute. The conciliator may convene as many meetings as may be necessary, but within a maximum period of 4 weeks since the referral of the dispute.

The employer may not dismiss any employee during this period unless the dispute has been settled or otherwise disposed of. ●

## 2. NAMIBIA'S BAN OF LABOUR HIRE DID NOT SURVIVE THE CONSTITUTIONAL TEST

Namibia is one of the countries with the highest levels of income inequality and is not known for taking radical steps to confront exploitation. It has adopted a liberal economic policy framework and provides numerous incentives for capital while encouraging unions and employers to address their different interests through collective bargaining. A notable exception occurred when the Namibian parliament adopted the new Labour Act, 2007, which was signed into law in December 2007 and then implemented with effect from 1 November 2008. One of its most interesting parts was article 128 which led to heated debates and even court action. This article states that labour hire (i.e. the operations of labour brokers) will be prohibited in the Republic of Namibia: "No person may, for reward, employ any person with a view to making that person available to a third party to perform work for the third party".

### The ban on Labour Hire

Some labour hire companies have claimed that the abolition of labour hire would lead to thousands of job losses. This argument is based on the assumption that client companies will reduce their operations and staff-levels if they cannot use labour hire workers any longer.

African Personnel Services decided to take Government to Court on this matter and argued that the ban was unconstitutional in that a blanket prohibition of labour hire, under the threat that anyone engaging in labour hire would be committing a crime and could be sentenced to pay a fine of up to N\$80 000 or be sent to jail for up to five years, is not a reasonable restriction of the rights that are protected in the Constitution's Article 21 (1)(j).

The Labour Act's provision that banned labour hire is too wide, is over-broad, and should be struck down as unconstitutional. They argued to the court that in its current form, the ban on labour hire would for example make it a crime for a cleaning services company to provide staff to a shopping mall to keep the mall clean. It would also for instance make it a crime for an auditing firm to provide staff to a client with problems in its accounting department to perform accounting functions for the firm, they said. Under some circumstances a company employing security guards would now also be committing a crime when it places its guards at another company to work there, they added.

The High Court case took place on 24-25 November 2009 and pitted labour hire companies (in particular Africa Personnel Services - APS) and the employers' federation against government and trade unions. The judges had to decide if the right of labour hire companies to unfettered profits is superior to workers' rights to protection against highly exploitative labour practices.

Judgement was delivered on 1 December 2009, and the 3 judges were unanimous in their verdict. They found that "labour hire is not lawful in Namibia because it has no legal basis in Namibian Law". This view was justified on the basis that contracts of employment are based on Roman Law, i.e. "the letting or hiring of personal services in return for monetary return". The judges further argued that Roman law recognised

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slavery of person who are not Roman citizens and therefore such person (slaves) could be hired or rented to another person for whom the slaves performs a personal service. Thus the hiring or renting out of employees to another person, for reward, falls outside the law of contract of employment and "smacks of the hiring of a slave by his slave-master to another person". The court thus found that there was no law in Namibia under which a company could enter a contract of employment with persons and then hire them for reward to third parties. Furthermore, the court found that labour hire "violates a fundamental principle on which the ILO is based, namely that "labour is not a commodity".

#### Appeal

APS appealed immediately against this decision and the appeal was heard in the Supreme Court on 3 March 2010. The Supreme Court gave its decision and declared the ban on labour hire unconstitutional confirming the arguments of African Personnel Services as the reasons for their decisions. **LABOUR HIRE SURVIVED.** The section in the Labour Act will now have to be amended. ☺

### 3. DILEMMA OF THE ROAD FREIGHT INDUSTRY: EMPLOYEE VERSUS INDEPENDENT CONTRACTOR

The unique circumstances under which the Road Freight Industry operates makes it nearly impossible for employers in the industry to comply with the provisions of the Labour Act.

It is estimated that 90 % of operators in the industry operates on a 24/7 basis.

The Labour Act which regulates hours of work, work on Sundays, Public Holidays and overtime prohibits work on these days as well as overtime unless it's operations involve the transport of live stock, perishable goods or passengers under the definition of "urgent work" (Section 8(1)(k)).

The practical dilemma which employers find themselves in, is to limit actual driving time

to "office hours", reduce their workweeks to six days and avoid overtime. What happens while the driver awaits loading and offloading? Is the time spent while waiting at border posts "work time"? If it is expected of the driver to guard the load and truck during sleep hours, is this "work time", just to name a few.

Employers need to structure the working conditions of heavy duty vehicle drivers in a way not to contravene the law, and that it does not defeat the financial viability of the business.

Solutions to difficulties has resulted in various innovative schemes, none of which is either safe in an occupational safety sense or legal. The employer's hands are tied behind his back in terms of exercising control over drivers once they leave the point of departure.

One solution to this dilemma is probably the independent contracting system. Employers should however, know that operating on such a system is easier said than done.

The first and most important difference between an employer/employee and an Independent Contractor/Contractor relationship is that the Labour Act does not apply to the latter.

This means that the relationship, when in the event of a dispute related to payment of remuneration and work conditions, is regulated by the law of contract and not by the Labour Act. The contractor cannot be forced to comply with legislation regulating the employment conditions. Social Security and Workmans Compensation also does not apply.

If a dispute arises between the parties and the so called independent contractor refers the dispute to the Labour Commissioner in terms of the Labour Act, the Arbitrator will have to determine the true nature of the relationship.

In doing this he will consider the following and apply the tests created by our Courts:

- The first thing the Arbitrator will do, is to interpret the contract entered into between the parties, if one exists.

The contract may on first sight indicate the relationship, but it is the actual day to day operations which indicate the real relationship.

If the independent contractor disputes the nature of the relationship, the Arbitrator will apply the other tests in order to come to a conclusion. This test is usually referred to as the "dominant impression test". From the following test and all surrounding circumstances the arbitrator will determine the legal, true nature and consequences of the relationship.

#### The multiple or dominant impression test

The deficiencies of the 'control' and 'organisation' tests have led the courts to approach the question whether a particular relationship is one of employment in the same way as they approach many other problems: the relationship is viewed as a whole and a conclusion is drawn from the entire picture. Although the court did not spell out exactly what may be included in the general picture, guidance was to be derived from the English case of Ready Mixed Concrete, in which Mackenna J set out three possible components

*A contract of service exists if ... three conditions are fulfilled:*

- (i) The servant agrees that, in consideration of a wage or other remuneration, he*

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*will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other his master. (iii) The other provisions of the contract are consistent with it being a contract of service.*

The 'other provisions of the contract', refer to all relevant aspects of the relationship, including the form of the contract, the method of payment, the supply of capital assets and the employer's right of suspension and dismissal.

While it is impossible to compile an exhaustive list of 'relevant factors', the more significant are the employer's right to select who will do the work, the power to terminate the relationship, the employee's obligation to work for a given time and for certain hours, whether remuneration is paid for time worked or for a particular result, whether the employer provides the employee with tools, equipment and office space, and whether the employer has the right to deploy the employee as it sees fit.

*In our next issue we will give specific guidelines on how to introduce and manage your independent contractors. ☺*

| EMPLOYMENT   | CONTRACTORSHIP  |
|--|---|
| Object is the rendering of personal services between employer and employee   | Object is the production of a certain specified service or the production of a certain specified result                     |
| Employee renders service at the behest of employer   | Independent contractor is not obliged to perform work personally unless otherwise agreed                                    |
| Employer may decide whether it wishes to have employee render service  | Independent contractor is bound to perform specified work or produce specified result within a specified or reasonable time |
| Employee is obliged to obey lawful, reasonable instructions regarding work to be done and manner in which it is to be done | Independent contractor is not obliged to obey instructions regarding manner in which task is to be performed                |
| Terminated by the death of the employee  | Not terminated by the death of the contractor   |
| Terminates on completion of the agreed period  | Terminates on completion of the specified work or production of the specified result  |



*The National Manager, Koos Barkhuizen, recently visited some of our clients.*

*On the left hand side he appears with the very first client, mr. Johan Loubser from Mariental*

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