LETTER FROM THE EDITOR

Greetings valued clients!

We are proud to bring you another edition of our monthly newsletter, put together by our knowledgeable and talented staff.

For those of our clients in the restaurant trade, please note that neither the Labour Department nor the Bargaining Council have as yet published any updates concerning minimum wages for this sector. As such, the current minimum wage structure remains in effect until new tables are promulgated.

Feel free to contact us with any questions or queries.

Kind regards
The Editor

LEGAL STRIKES

- WHO PAYS FOR DAMAGES? -

In a recent Constitutional Court decision, SATAWU and Another v Carvas and Others 2012 ZACC 13 (CC), protest action relating to a strike came under the microscope. Specifically – who should be held accountable for the damages arising from protest action that was organised by a trade union?

The strike was in relation to a sector wide wage dispute in the security sector in March and April 2006. SATAWU was one of many trade unions in negotiation with the employers’ organisations in the sector. Some 14 other trade unions concluded a collective agreement with the employers’ organisations in the sector on the 1st of April 2006. SATAWU wasn’t a party to this collective agreement. The Labour Appeal Court confirmed this in SEO and Others v SATAWU and Others 2006 ZALAC 6 (LAC),
finding that SATAWU was not bound by the collective agreement concluded by the 14 other trade unions because SATAWU never concurred with the handwritten amendments that were made on the bargaining council’s constitution.

This particular strike was accompanied by a great deal of violence, a great deal of which was committed by non-union members. Noteworthy was the attacks on commuters using Metrorail. SATAWU's national office bearers made a call to the employers’ organisations to return to the bargaining table and conclude a collective agreement with SATAWU concerning wage increases and maternity leave.

In support of this strike, SATAWU organised a protest action in the Cape Town City Bowl. The organisers took certain steps to adhere to the requirements set out in the Regulation of Gatherings Act 205 of 1993. In section 11(2) of the aforementioned Act the organiser of such a protest action is afforded protection from being liable by taking reasonable steps to guard against the causing of damages and or harm to persons. SATAWU argued that the protection afforded by section 11(2) severely impeded their constitutional right to assembly contained in section 17 of the Constitution.

Mogoeng CJ did suggest that section 11(2) of the Act did limit the right to assemble. He said that in order to comply with these prerequisites the costs related to protest action would skyrocket, making it difficult for smaller organisations to organise a gathering and he further stated that the right of the organiser would be impeded: “It is quite plausible that the organizer of a gathering who anticipates the involvement of, say, ten thousand people may be forced to cancel it because a few hundred of the participants would cause mayhem. In these circumstances, the right of thousands of people to protest peacefully and unarmed is affected.” (58-59)

The learned Judge went into a detailed examination on the justification of the limitation of the right to assemble by applying the criteria set out in section 36 of the Constitution. He arrived at the conclusion that the limitation on the right to assemble is justifiable in an open and democratic society based on human dignity, equality and freedom: “There is a tight fit between the limitations and its purpose. The purpose is to achieve the perfect balance between the right to assemble on the one hand and the safety of people and property on the other. That balance has been struck.” (81-82)
This meant that SATAWU would be held vicariously liable for the damages claimed by the Respondents (various business owners and owners of personal property which had been damaged in the protest action).

The organisers of a protest action can now be held accountable for the damages arising from a legal strike, their only recourse in turn would be to claim redress from the joint wrongdoers who were to blame for the damages.

HUMAN RESOURCES

INCAPACITY AND ILL HEALTH
–THE EMPLOYER’S OBLIGATION –

Our clients often query what they stand to do when an employee claims to be too sick to perform his/her duties. This relates to incapacity due to illness. Incapacity refers to the failure or inability of an employee to work according to the required standard of the job. It encompasses poor work performance but is distinct from misconduct. No fault can be attributed to the employee for incapacity. In a case of poor performance or absence due to ill health, the employer is obliged to assist the employee to remain in employment in as far as this is reasonably possible.

This requires an investigation by the employer to determine the cause, the extent and expected duration of an employee’s incapacity. An employee who is temporarily unable to work does not pose much difficulty unless the employee is likely to be absent for a long period of time. This prolonged absence in itself is not grounds for dismissal and employers should be wary of dismissing any employee as a result of incapacity. Instead the employer is required to investigate all possible alternatives short of dismissal.

The employee's medical certificate (and medical report – if available) is critical to this investigation. The employer will depend on professional medical prognosis to determine the extent and the probable duration of the employee's incapacity. This often poses some difficulties as a great number of medical professionals are hesitant to provide employers with such prognosis, operating under the mistaken belief that the information is sought for disciplinary purposes. This is not to say that an investigation into an employee who fails to provide medical certificates or is otherwise suspected of abusing their sick leave might
not lead to a disciplinary investigation. But such is not the focus of this article.

The investigation is aimed at determining lesser alternatives to dismissal. For example, can the employee still perform some of his/her duties? Can the employee’s duties reasonably be adapted to suit her new capacity? Is there alternative work available to which the employee is still suited? Does the incapacity qualify the employee for disability benefits? If at all reasonably possible, the employer is obliged to keep the employee in employment. Dismissal is only to be considered as a last resort.

Most importantly, as with all due process, it is necessary that the employee be given a chance to state his or her case during the investigation.

In Hendricks v Mercantile & General Reinsurance Co of SA Ltd (1994) 25 ILJ 304 (LAC), the Labour Appeal Court held that "the substantive fairness of dismissal depends on the question whether the employer can fairly be expected to continue the employment relationship bearing in mind the interests of the employee, the employer and the equities of the case.

"Relevant factors would include inter alia the nature of the incapacity; the cause of the incapacity; the likelihood of recovery, improvement or recurrence; the period of absence and its effect on the employer's operations; the effect of the employee's disability on the other employees and the employee's work record and length of service".

The test, it was added, "remains whether because of the employee's absences and incapacity [...] the employer could in fairness have been expected to wait any longer before considering dismissal.” Therefore, in determining whether or not dismissal was substantively fair, one must weigh the interest of the employee in retaining their employment against the interest of the employer in assuring its business remains profitable.

Having said this, the issue of incapacity dismissals remain fraught and complicated. Employers are advised to seek the advice of Invictus or their normal service provider before embarking upon such action or investigation.
INDUSTRIAL RELATIONS

THE CLOSED SHOP DEBATE
- MAY HOLD REAL CONSEQUENCES -

One of the more controversial aspects of the LRA is its stance on closed shop agreements – which is worth a mention. The closed shop agreement can be seen as a limitation or infringement on the right to freedom of association. (Albertyn ILJ 986)

A closed shop agreement is an agreement concluded between a trade union and an employer which forces the employees to become members of the representative trade union. (Olivier Freedom of Association and union security arrangements, 29) The closed shop agreement can therefore be seen as an encroachment on the right to freedom of association as it forces employees to join a union if they want to obtain / maintain their employment. The LRA describes the closed shop in section 26 and makes provision for safeguards and restraints due to its infringing nature. For example, section 26(3) requires a ballot to be held by which two thirds of the employees must have voted in favour of the agreement (read with 26(3) (c) and (d)).

Luckily, the legislator made an exception for an employee not to be dismissed, should he/she refuse to join such trade union on grounds of conscientious objection(s), at the time the agreement was formed.

There is a less infringing option available, known as the agency shop agreement. These employees are not required to become members of the trade union with which the agency shop agreement has been concluded. They are, however, still liable to have deducted from their salaries a so-called agency fee, similar to that deducted from union members and also paid over to a separate account administered by the representative union.

The necessity of the agency shop agreement becomes clear when one considers the logistic difficulties of excluding non-union members from the benefits negotiated by the unions for their own members. It would be unfair, where the actions of the union benefitted all employees (and not just their own members), to deny the union the right to collect fees from all the affected employees.

In Greathead v SACCAWU 2001 22 ILJ 595 (SCA), Grosskopf JA found that the agency shop agreement between the South African Commercial Catering & Allied Workers Union (or SACCAWU) and Metcash Trading Ltd was not a binding agreement because it had not complied with the requirements set out in
section 25(3) of the LRA. It was further held that such an agreement must be in writing and specifically make provision for and comply with the LRA requirements.

In Solidarity & Others v Minister of Public Service and Administration & another 2004 25 ILJ 1764 (LC) the same was decided by Ncgamu JA in the Labour Court: “In other words, the failure to comply with section 25(3) does not only make the agreement not binding but also invalid. If the agreement is invalid ab initio, there can be no rectification.” (13)

This shows that one cannot simply default to the agency shop agreement if there is no formal closed shop agreement in place. Further, the day may come when employers will be forced to consider the agency shop agreement: A constitutional argument against the closed shop may still succeed, says Olivier in Impact of the Constitution (113).

Employers who regularly deal with unions should consider how the implementation of an agency shop agreement could potentially affect their business.

LEGAL

SEXUAL HARASSMENT

– VICARIOUS LIABILITY AND THE PAH –

In February of this year this newsletter screened an article concerning sexual harassment in the workplace. Controversy ignited again this year when the Protection from Harassment Act 17 of 2011 (or the “PAH”) came to the attention of many employers for the first time. Concern was raised at the potential vicarious liability of employers for the actions of their employees.

Vicarious liability means that the employer is held financially responsible for the actions committed by one of its employees and the damages resulting from those actions. These cases mostly relate to vehicular damages and similar simple damages. However, it has also been known to apply in cases of harassment in the workplace, including sexual harassment. These damages could include loss of income, medical damages and pain and suffering. It is not uncommon for such damages to be
calculated in the hundreds of thousands of rands-range.

The PAH at section 1(1) defines “harassment” as “directly or indirectly engaging in conduct that the [employee] knows or ought to know; (a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably” stalking that person either physically or electronically or indirectly in private or in the workplace (my summation); or “(b) amounts to sexual harassment of the complainant or related person.”

The PAH goes further, setting out in section 2 the procedure such a complainant may follow to obtain what is termed a protection order against the offending employee. If a complainant makes a prima facie case, an interim protection order as per section 3(2) may be issued without notice to the offending employee. This could potentially affect an employer, who would be suddenly forced to separate the parties and may require that the offending employee be removed from the workplace whilst the protection order is in operation. In fact, as per the court’s powers granted by section 10(2) of the PAH, the court may prohibit the offending employee from attending the workplace. This could severely disrupt the employer’s day-to-day operations and deprive it of the guidance of senior management staff or other crucial employee services.

Although these are certainly serious considerations, they are nothing new. The common law has long provided the recourse of vicarious liability and protection orders were part and parcel of the Domestic Violence Act 116 of 1998. Further, Botha and Millard make mention in The past, present and future of vicarious liability in South Africa that as early as 2004 this issue was already being dealt with. (231) In the landmark case of Grobler v Naspers Bpk en ’n Ander 2004(4) SA 220 (C) a company was held vicariously liable for the sexual harassment perpetrated by one of its supervisors on a secretary. This outcome Botha and Millard described as “a development of the common law with reference to vicarious liability.” (232)

There is, of course, a test for whether an employee’s actions may be attributed to his employer through vicarious liability.
These tests are too lengthy to be set out in any great detail in this article. Suffice to say that the focus rests on whether the actions of the employee were connected to the scope of his employment or instructions in a sufficiently close manner so as to say he had not deviated from that scope at the time of the offending actions. However, Botha and Millard warn that “an employer will not escape liability merely because the conduct [of its employee] was ‘fraudulent, unauthorised and undertaken for the employee’s own interest’.” (233)

In short, while nothing much has changed vis-à-vis the employer and vicarious liability through sexual harassment, this remains a crucial issue for employers to take notice of. Employers are under an obligation to ensure the safety of their employees and failure to act in prevention of sexual harassment may have dire consequences. Employers are advised to contact Invictus or their normal service provider immediately should allegations of sexual harassment be raised.