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EMPLOYMENT LAW ALERT

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KENYA

An analysis of the new amendments to the Retirement Benefits Act

On 12 July 2021, the Cabinet Secretary to the Ministry of Finance made changes to the Retirements Benefits Act that affect the access that employees have to their contributions.

The Retirement Benefits Act 3 of 1997 (Retirement Benefits Act) is an act that establishes the retirement benefits authority and provides for the rules and guidelines that employers should comply with and employees should be aware of, with respect to retirement benefits schemes.

On 12 July 2021, the Cabinet Secretary to the Ministry of Finance made changes to the Retirements Benefits Act that affect the access that employees have to their contributions, specifically for early retirement and withdrawal from the certain retirement schemes. These changes have been necessitated by the following legislated regulations:

- the Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations;
- the Retirement Benefits (Umbrella Retirement Benefits Schemes) (Amendment) Regulations (**Umbrella Regulations**); and
- the Retirement Benefits (Individual Retirement Benefits Schemes) (Amendment) Regulations (**Individual Regulations**).

The Regulations of the Retirement Benefits Act initially provided that on early retirement, an employee had the option to request either:

- their contributions and 50% of their accrued benefits; or
- their contribution and 50% of the employer's contribution and the investment income that had accrued in respect of those contributions.

The position has now been changed by the new regulations to provide a member with only one option of claiming not more than 50% of their total accrued benefits and the investment income that has accrued in respect of those contributions.

The Individual Regulations go a step further and provide that where an employee makes their own contributions they may opt for payment of their total accrued benefits and the investment income that accrued in respect of those contributions.

Further, the Umbrella Regulations have been amended to introduce a prohibition on the withdrawal of membership. A member who withdraws their membership with a particular retirement scheme but still remains an employee of the employer is prohibited from withdrawing their membership from a scheme while still in active employment with that employer. However, the withdrawal is permitted for members who withdraw their membership to join another scheme established for the benefit of employees of that employer.

It is important for employees and employers to be aware of these amendments as they affect access to their retirement benefits. We urge employers to notify their employees and retirement benefit schemes to notify their members of these amendments so as to avoid future misunderstanding.

The above alert is meant for general information and does not constitute legal advice. In case of any inquiries or if you require further information or advice on how the changes could affect your business, please feel free to contact Njeri Wagacha and Rizichi Kashero-Ondego.

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SOUTH AFRICA

Alleging a 'continuing wrong' to obfuscate the timeframes in section 198D of the Labour Relations Act: The LAC has its say

The appellant employees contended that, while the dispute may have arisen in April 2017, the dispute was a "*continuing wrong (akin to an unfair labour practice)*".

On 29 November 2021, the Labour Appeal Court (LAC) delivered judgment in the case of *Amalungelo Workers Union obo Mayisela and 26 Others v Unilever South Africa and Others*. The crux of the matter revolves around an interpretation of section 198D of the Labour Relations Act 66 of 1995 (LRA), which requires a dispute arising from section 198B of the LRA to be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) within six months of the dispute arising. The "*dispute*" in this instance stemmed from the appellant employees' contention that they were permanent employees of Unilever, allegedly employed on an indefinite basis from April 2017 after their fixed-term contracts ended. Unilever had offered them further fixed-term contracts which they refused to sign. Despite this, they continued performing services as per their expired fixed-term contracts.

The arbitrator's decision

On 6 September 2018, the CCMA found that the appellant employees were deemed to be employees of Unilever since April 2017. Consequently, Unilever was deemed to have breached the provisions of section 198B(3) of the LRA. Unilever was directed to assist the appellant employees with participation in the company's medical aid, pension, education and home loan schemes, and to pay them at rates not less favourable than those paid to Unilever's permanent employees, with effect from April 2017.

Unsurprisingly, Unilever approached the Labour Court (LC) to review and set aside the arbitration award. It raised the following jurisdictional points:

- Whether the arbitrator had the jurisdiction to arbitrate the dispute in light of the dispute having been referred more than six months after the dispute arose (without an accompanying condonation application).
- Whether the arbitrator had the power or jurisdiction to make such an award given that the appellant employees only sought a declaratory award, declaring them permanent employees as envisioned in section 198B of the LRA.

In response, the appellant employees contended that, while the dispute may have arisen in April 2017, the dispute was a "*continuing wrong (akin to an unfair labour practice)*". Accordingly, the referral was not late and there was no need to apply for condonation.

SOUTH AFRICA

Alleging a 'continuing wrong' to obfuscate the timeframes in section 198D of the Labour Relations Act: The LAC has its say...*continued*

As long as it is the same "*act or omission*", a dispute can only have one initial date on which it arose.

The LC's decision and subsequent LAC appeal

Olivier AJ presided over the review application before the Labour Court. The court accepted that the dispute arose in April 2017. In relation to whether it was a "*continuing wrong*", the judge was of the view that:

> "*[T]he very nature of the disputes contemplated in sections 198A, 198B and 198C is that 'they recur on a monthly basis, for example, less favourable monthly remuneration or benefits'; and that there would be no purpose to the time limit prescribed in section 198D(3) of the LRA if all such disputes were considered as a 'continuing wrong'.*"

In support of the above, Olivier AJ referred to the cases of *SABC v CCMA and Others* [2010] 3 BLLR 251 (LAC) and *Eskom Holdings SOC Ltd v NUM obo Kyaya and Others* [2017] 8 BLLR (LC).

In deciding the second jurisdictional question, Olivier AJ concluded that there was no evidence to support the findings of the arbitrator and thus set aside the award.

On appeal to the LAC, the parties relied on the same arguments, varied slightly by the appellant employees who contended that although the dispute arose in April 2017, the "*wrong*" occurred on the date of commencement of employment of each of the individual appellant employees and continued daily until the dispute arose on 12 April 2018. Therefore, the dispute was referred timeously.

The LAC found that the "*act or omission*" referred to in section 198D(3) of the LRA is clearly that which gave rise to the dispute. As long as it is the same "*act or omission*", a dispute can only have one initial date on which it arose. According to the LAC:

> "*[t]he only period relative to the facts of this matter, when Unilever could conceptually have been in contravention of section 198B, is when the fixed-term contracts were in place and were to be renewed, and that period, we know is the period preceding April 2017. Thus the 'act or omission concerned', being an alleged failure by Unilever to comply with section 198B, could only have occurred before, or in, April 2017.*"

As long as no fixed-term contracts were in place, the act or omission concerned could not have recurred or be "*ongoing*". The LAC concurred with the findings of Olivier AJ in the LC and dismissed the appeal. It then held that it was unnecessary to comment on the veracity of the second jurisdictional point raised by Unilever as it was moot.

Conclusion

This decision provides a comprehensive explanation as to what constitutes a continued wrong in the context of the timeframes afforded to an aggrieved party in terms of section 198D. The case reiterates the importance of complying with the allocated timeframes within which to refer a dispute. Failure to do so could, as in this instance, obfuscate an otherwise promising case.

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