Short notes on:

BEING IN POSSESSION OF A VALID WORK PERMIT: IS IT AN OPERATIONAL REQUIREMENT??

Introduction

With the current ineffective boarder control and the increase of globalisation, South Africa has its share of undocumented foreigners living here. South Africa is facing an influx of foreign nationals seeking employment here. Many of them find employment without official work permits. Now the biggest question is, "How are they protected by the South African Labour Laws?"

Section 38 of the Immigration Act 13 OF 2002 (Immigration Act) prohibits Employers from employing illegal foreigners. Furthermore, Section 49(3) of the Immigration Act provides that "anyone who knowingly employs an illegal foreigner or a foreigner in violation of the Immigration Act shall be guilty of an offence and liable to a fine or a period of imprisonment not exceeding one year for a first offence".

Overview

For the purposes of the Labour Relations Act 66 of 1995 (LRA) a work permit is not a requirement for an Employee's status and Employees are afforded full protection by South African Labour Laws.

Employment contracts are valid irrespective of whether the Employee is not in possession of a valid work permit or not, but employment in contravention of the statutory requirement of a valid work permit is still an offence in terms of the Immigration Act.

An "employment relationship" is established notwithstanding the fact that the actual contract is illegal in terms of the Immigration Act and as a result, a dismissed Employee has full recourse to the CCMA and Labour Courts although they might be deemed an "Illegal Alien".

The fact that an Employee does not have a valid work permit to work for an institution or any other entity, doesn't affect his/her status and would still be deemed an Employee as defined in Section 213 of the LRA and entitled to refer a case to a dispute concerning his/her unfair dismissal to the CCMA and/or Bargaining Councils. The CCMA and/or Bargaining Councils consequently has jurisdiction to arbitrate the unfair dismissal dispute referred by a Foreign National who worked for "another person or entity" without a work permit issued to him under the Immigration Act.

While it seems to be obvious that an Employer cannot be required to continue the employment of an Illegal Foreigner or a Foreigner whose specific work permit does not permit the Employer to employ him/her, that does not mean that the protections afforded to Employees by the Act cannot apply to such Foreigners prior to decisions being made in this regard

Line between Operational requirements and Incapacity

It seems appropriate that the line between operational requirements and incapacity should be drawn where the Employer determines or acknowledges the need to restructure its business and not where the Employer cannot employ an Employee because of a statutory provision prohibiting such employment.

In the event of incapacity, the focus is on the qualities of the Employee. In the event of operational requirements, the focus is on the Employer and its decisions relating to its business.

Essentially, the reason for the dismissal will be related to Employee's incapability rather than the Employer's need to restructure its business. Failure to meet the minimum legal requirements to render the service by the Employee meant that it had become impossible as an operation of law.

First National Bank — A Division of First Rand Bank Ltd v Commission for Conciliation, Mediation & Arbitration & others [1]

In this case, an Employee at the bank was appointed to the position of Sales Consultant during 2011. To perform the required tasks associated with the position, the Employee needed to be an accredited Financial and Intermediary Services ("FAIS") representative as defined under the Financial Advisory and Intermediary Services Act 37 of 2002 ("FAIS Act"). The Employer convened an incapacity process and dismissed the Employee on the grounds of incapacity.

It is however still evident that an Employer must follow a fair procedure as determined by the LRA. The Labour Court confirmed that the LRA recognises forms of incapacity broader than poor performance or ill-health and injury. After considering both the Samancor[2] and Armscor[3]

[1] (2017) 38 ILJ 2545 (LC)
[2] Samancor Tubatse Ferrochrome v MEIBC & Others [2010] 8 BLLR 824 (LAC)
[3] Armaments Corporation of South Africa (SOC) Ltd v CCMA & Others (2016) 37 ILJ (LC)

judgments, the Labour Court confirmed that where an Act of Parliament prohibits certain types of employment, the continued employment is not possible on the grounds of incapacity, and not based on operational requirements.

The operation of the Immigration Act is no different. The Immigration Act precludes the employment of a foreigner who does not have a valid work permit. If an Employee's work permit expires, the Employer is unable to satisfy the legal obligations demanded of it by the Immigration Act. In these circumstances, it may be appropriate for the Employer to terminate the employment relationship by relying on the ground of legal incapacity.

Conclusion and advice

An Employer has recourse and disciplinary action on the basis of misconduct should be taken against Employees who have intentionally misled the Employer to act on the misrepresentation that the Employer was in possession of a valid work permit.

Disciplinary action on the grounds of incapacity would be the correct procedures to follow in the event that an Employee is not in possession of a valid work permit and has taken the necessary steps to have his/her work permit renewed. All statutory procedures in relation hereto must be observed by the acting Employer.

However, Employers are reminded that properly constituted hearings will have to be convened for the above reasons and applicable procedures followed. Contact SchoemanLaw on all employment-related matters today for expert assistance.