Employment Law

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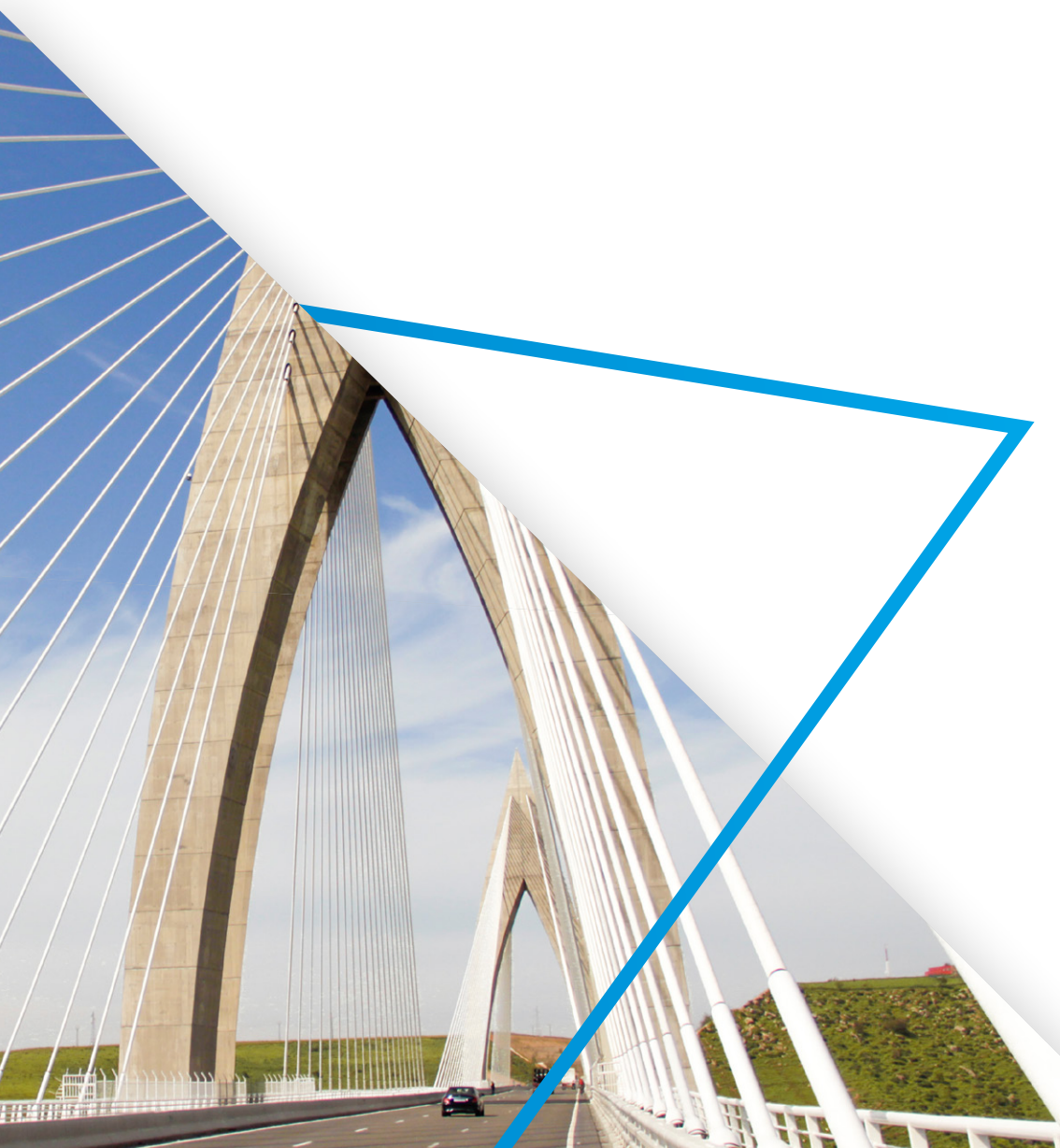

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EMPLOYMENT LAW ALERT

Navigating occupational health and safety in the digital economy

The digitalisation of labour has become increasingly prevalent, necessitating a review of occupational health and safety (OHS) protocols and standards. Employers and employees face unprecedented challenges as well as opportunities in the digital workplace.

On 25 March 2025, the Department of Employment and Labour released a guide titled "*What Every Employer and Employee Should Know for the Digital Economy*", (Guide) which addresses the risks associated with digital labour, highlights key precautionary measures and emphasises the importance of risk management by outlining a step-by-step approach to identify and minimise workplace risks.

What is the digital economy?

The digital economy refers to the digitalisation of commercial operations and economic activities conducted on an online platform, which has become prevalent in many economic sectors, and has established a variety of options to incorporate data and the internet in production processes and business models.

The Guide makes specific reference to telework, call centres and platform work as examples of work conducted via electronic devices and online platforms at the employer's premises, or in a "*hybrid*" format (a combination of remote work and working at the employer's premises).

Risks in the digital economy

With the rise of digital and hybrid work, along with advancements in technology, new workplace risks have emerged. These include ergonomics (which would centre upon the risks of sitting for long hours; awkward postures), physical (working in confirmed spaces), psychological (mental health aspects; biological risks), and other such safety risks. While remote work blurs the lines of employer liability, companies remain responsible for ensuring the occupational health and safety of employees, even when they work from home.

Under section 8 of the Occupational Health and Safety Act 85 of 1993, as amended (OHS Act), employers have a duty towards their employees to provide and maintain a safe working environment, free from health and safety risks. In terms of section 9 of the OHS Act, this obligation extends to third parties and independent contractor employees, meaning that if an accident occurs during or as a result of someone's work, a company that is not their direct employer could still bear responsibility if they are affected by that company's business operations.

To mitigate risks, both employers and employees should implement clear health and safety measures tailored to suit digital workspaces. Proactive policies are necessary to ensure compliance and protect parties in this evolving work environment.

Navigating occupational health and safety in the digital economy

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Key takeaways: An employer's role in risk management

Risk assessment

Employers must identify risks and hazards in the "*workplace*" and determine the degree of risk associated with them. Employers should implement appropriate control measures after considering the working environment (ventilation, temperature, noise levels), as well as the nature of the work being conducted and the specific needs of employees in these various scenarios. This process extends beyond employees in direct employment and includes people who may be affected the by the employer's workplace activities.

Risk control

Employers should prioritise eliminating risks as far as reasonably practicable and, where a complete elimination is not possible, engineering controls should be considered (such as improving ventilation systems, repairing defective lighting and ensuring an appropriate workplace setup). Additionally, administrative controls, including internal policies, workplace procedures and health behaviour counselling for employees, should be considered to further mitigate risks.

Once control measures are in place, employers should establish an appropriate action plan that includes regular inspections and reviews to ensure the ongoing effectiveness of risk management strategies. This may be challenging where access to the "*workplace*" for inspections is limited and not guaranteed. Employers need to be agile in considering effective alternatives such as the use of checklists to gauge appropriate measures that could manage identified risks.

Record keeping and review

While employers must be aware of workplace risks, there are opportunities to enhance safety through tools such as accident reporting software, health and safety awareness programmes and related systems, and virtual employee training programmes. Implementing these measures can help prevent incidents and improve overall workplace safety.

Employers are required to maintain detailed records, including risk assessments and occupational exposure monitoring, and to retain medical surveillance records for up to 40 years. Additionally, records of implemented control measures and their maintenance are to be kept for at least three years. These records may be stored electronically or in hard copy, provided they remain readily accessible.

Given the long latency period of many occupational diseases, maintaining and regularly reviewing and updating these records would be essential.

Risk assessments should be reviewed at least every two years, or sooner if new information arises or a workplace incident occurs.

Navigating occupational health and safety in the digital economy

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Checklist for employers and employees

The Guide provides a comprehensive checklist for both employers and employees to ensure practicality when making an assessment of digital economy workplaces. The checklist covers all aspects of workplace health and safety, including appropriate seating, suitable desks and hardware, proper ventilation, the prevention of harmful pollutants, etc. It also covers the need to ensure reasonable workloads and make provision for employee recognition and support.

Conclusion

As the digital economy continues to evolve and permeate the workplace, it is essential for employers and employees to prioritise occupational health and safety generally. This is achieved by taking heed of the measures outlined in the Guide. In this way, employers can manage and control risks more effectively and create awareness of potential risks. That way employees can also take proactive steps to safeguard their well-being by ensuring support and improvement of their work environment, especially as they, too, carry such obligations.

Fiona Leppan, Kgodisho Phashe, and Sinead McElligott

Underlying cause in a section 197 transfer? Labour Appeal Court clarifies

The recent Labour Appeal Court (LAC) decision in *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v Belinda Perlee* (JA01/24) provides further clarification on the interpretation of section 197 of the Labour Relations Act 66 of 1996 (LRA).

This matter concerned a dispute over whether employees of Avis Fleet, who were dismissed following a restructuring exercise, were automatically unfairly dismissed (for reasons related to a transfer of business) or due to the operational requirements of Avis Fleet. Central to the appeal was the question of the legal cause for the restructuring.

Barloworld is a 100% shareholder of Barloworld SA (which in turn, owns 100% of Avis Fleet). Barloworld SA also owns a 51% shareholding in Crownmill Trading (Pty) Ltd (Crownmill), trading as DealersOnline. Dealersbid was another shareholder of Crownmill. Crownmill is thus part of Barloworld's conglomerate. Barloworld Logistics, Barloworld Equipment and Barloworld Automotive form the three distinct operating segments of Barloworld. Avis Fleet and Crownmill forms part of the Barloworld Automotive Segment.

The respondents were employed by Avis Fleet's Car Mall unit, responsible for collecting and disposing of vehicles at the end of lease agreements. Avis Fleet would also use the DealersOnline online auction portal for the same purpose.

As part of the restructuring, Barloworld decided to close Car Mall and move the vehicle collection and disposal services to DealersOnline. Given the consequent redundancies, retrenchment of the respondents became necessary. The respondents challenged their dismissals, arguing that the closure of the Car Mall division and contracting of Car Mall's functions to DealersOnline constituted a transfer of business under section 197 of the LRA. The Labour Court ruled in favour of the respondents, finding that section 197 had been triggered by the closure of Car Mall and the shift of the services provided by it, as a discrete, identifiable entity, to DealersOnline.

Underlying cause in a section 197 transfer? Labour Appeal Court clarifies

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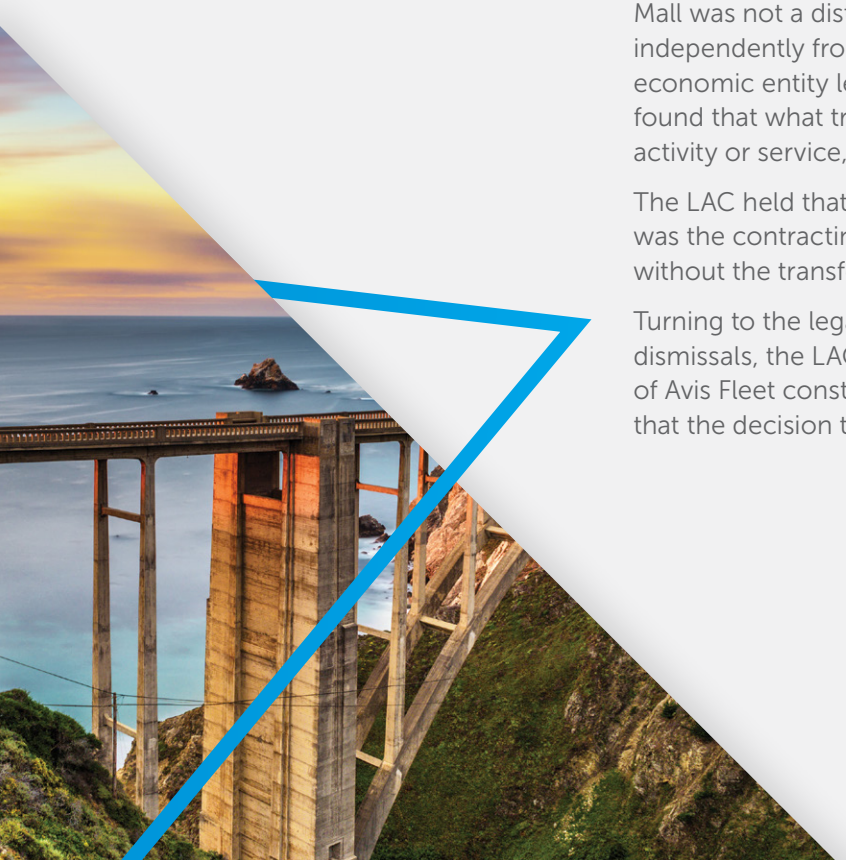

The LAC's findings

On appeal, the LAC was tasked with determining whether a transfer under section 197 indeed arose. The LAC restated the importance of the legal cause in determining whether section 197 is triggered. The LAC upheld the appeal against the Labour Court's judgment, and held that the mere outsourcing of services alone will not, without more, automatically trigger the application of section 197. In this regard the LAC found that Labour Court erred in its finding that the fact that no transfer of assets occurred was inconsequential as "*those assets were never the assets of Car Mall to begin with*". The LAC held that Car Mall was a mere unit comprised of the employees of Avis Fleet and Car Mall was not a distinct business entity which could operate independently from Avis Fleet. Avis Fleet continued as an economic entity leasing and selling fleet cars. The court found that what transferred to DealersOnline was solely an activity or service, nothing more.

The LAC held that, in the circumstances, all that transpired was the contracting out of services to DealersOnline without the transfer of any tangible or intangible assets.

Turning to the legal *causa* or dominant cause of the dismissals, the LAC found that the operational requirements of Avis Fleet constituted the true *causa*, thus concluding that the decision to outsource and retrench employees of Car Mall was triggered by operational requirements, rather than a transfer of business. No tangible or intangible assets, such as premises, operating systems or equipment, were transferred from Avis Fleet to DealersOnline. DealersOnline was an independent service provider with its own infrastructure and did not acquire any part of Avis Fleet's business as a going concern.

Conclusion

This decision reinforces the principle that outsourcing does not automatically amount to a transfer of business under section 197. Employers must carefully assess the specific circumstances of each transaction to determine whether the legal requirements for a transfer have been met. The decisive factor is the legal *causa* of the transaction, whether there has been a transfer of tangible or intangible assets, employees, or operational control. If a restructuring process merely results in outsourcing services without transferring the core elements of a business, section 197 will not apply. However, where the essential component/s of a business are transferred as a going concern, the new employer will assume all obligations towards the employees. Ensuring this distinction is properly evaluated is crucial for compliance with the LRA and for mitigating potential legal risks.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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