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Legal update

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Employer Liability

In Legal Update 14 of 2009 we explained the compulsory nature of membership of retirement funds. It should be a condition of employment for all employees to be members of the retirement fund in which their employer participates. This applies to members who joined the fund after the employer joined the fund. Those members who were already in employment when the employer joined the fund would have 12 months in which to decide whether they would like to be members of the fund or not.

Legal Update 5 of 2010 further addressed this matter and also touched on the liability that employers face when failing to pay over contributions and premiums. The onus is on the employer to notify the fund of any new employees who now qualify for membership and to also pay contributions to the fund in respect of those new members. Failure to do so would be unlawful as it would be contrary to the terms of employment as well as an act of bad faith and wrongfulness on the part of the employer. As such an employee could sue the employer for the benefit which he would have received if he were on the fund. Employers could also be held liable by the dependants and other beneficiaries of the employee for retirement fund and insurance benefits which they would have been entitled to benefit from if the employee joined the fund or the insurance benefit scheme when he should have.

AUCAMP AND OTHERS v THE UNIVERSITY OF STELLENBOSCH

This case deals with the points raised above and further indicates the implications of allowing a member to not be on the fund or negligently failing to include employees as members on the fund.

Mr Aucamp began employment with the University of Stellenbosch in 1966. In 1970 he became a member of an optional group life insurance scheme. In 1971, the university introduced a compulsory group life insurance scheme which new employees had to join and existing employees were invited to join. Mr Aucamp did not join the new scheme. He chose to remain in the existing scheme. In 1975 the University terminated the optional scheme on the belief that only retired pension members were still in that scheme. In 1978, Mr Aucamp was again invited to join the new scheme, which he declined. Mr Aucamp died in 1995. His spouse realised that he was not a member of the group life insurance scheme.

Mrs Aucamp brought an action against the university claiming the amount that would have been paid to her and the surviving children under the group life insurance scheme. Her cause of action was the employer's negligent failure to ensure that the member was registered under the group life insurance scheme.

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The court stated that the university owed Mr Aucamp a duty to ensure that he was given an opportunity to join the new group life insurance scheme. This duty arose from the fiduciary nature of the employer-employee relationship. Mr Aucamp had exercised his right to join the optional group life insurance scheme and was under no obligation to join any scheme that might supersede it. The court stated that the notice that was sent to employees in 1975 created the impression that members of the old scheme would automatically become members of the new scheme. As such the court believed that Mr Aucamp was not given a proper opportunity to join the new scheme at that point. The court was also of the opinion that this amounted to a misrepresentation made to Mr Aucamp that he was considered to be a member of the new scheme. The letter addressed to Mr Aucamp in 1978 was a clumsy attempt to correct the earlier misrepresentation and failed to remedy the breach of duty already committed.

Mrs Aucamp's claim was one of a disappointed beneficiary who, as a result of the employer's negligence, suffered pure economic loss. This type of claim has been recognised in South African law. Disappointed beneficiaries have a claim in delict against a person who has wrongfully and negligently caused them loss or damage. Mrs Aucamp's claim succeeded and the university became liable to Mrs Aucamp for the losses that flowed from the wrongfulness.

The important factor that stems from this case is the fact that beneficiaries can have a claim against a negligent employer for a benefit that they would have become entitled to. It is of utmost importance that employers always inform the fund of new employees as soon as they are employed so as to avoid opening themselves up to claims such as the one in this case.

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