

Domestic Workers: Retrospective claims for Compensation for Occupational Injuries and Diseases - Candice James

Domestic workers have been advocating for their inclusion and protection by labour laws since before I was born. With a recent massive victory in the recognition and inclusion of domestic and care work in private households in the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COID Act). It seemed like the world was finally catching up to the inclusion of a sector of workers who have been (and continue to be) marginalised, undervalued and exploited.

After the monumental judgement handed down by the Constitutional Court in *Mahlangu v Minister of Labour*¹ confirming section 1(xix)(v) of the COID Act, which excluded domestic workers working in private households from the benefits of the COID Act, unconstitutional - domestic workers could finally celebrate, as one more victory came to pass. This judgement meant that domestic workers (or their dependents in the case of death) can now claim compensation for injuries and diseases contracted within the course of their work. Additionally, the Constitutional Court ruled that the order of unconstitutionality would have retrospective application. This retrospectivity would apply to claims of domestic workers where an accident occurred or disease was contracted while on duty on or after 27 April 1994. In the event of death, a domestic worker's dependents will have a retrospective claim, if the work-related death occurred on or after 27 April 1994.

However, as the law-making and law-amending process goes, certain steps are to be taken or clarity provided for domestic workers to benefit from the Constitutional Court's decision of inclusion. These steps are to be taken by the Department of Employment and Labour who is responsible for, in particular, how domestic workers (or their dependents in the case of death) would go about contributing to and claiming for compensation. This includes submitting claims for compensation for workplace injuries or death.

On 10 March 2021, a notice by the Minister of Employment and Labour to give effect to the immediate and retrospective inclusion of domestic workers under the COID Act was gazetted. The

¹ *Mahlangu and Another v Minister of Labour and Others* (CCT306/19) [2020] ZACC 24.

notice set out to provide for the process for registration and the parameters for claiming compensation from the Compensation Fund including retrospective claims. After submissions were made² regarding the 12 month period for retrospective claims to be brought to the Fund as being too short, a decision to scrap the 12 month period was made by the Minister and the prescription period for retrospective claims was extended to a 3-year period. This would mean that domestic workers have until the end of 2023 to bring forth information of occupational injuries or diseases that took place during the period 27 April 1994 to 19 November 2020 and for those claims to be submitted to the Fund.

Domestic workers were given 3 years (from 2020, now 1.5 years left) to bring forth information (along with supporting documentation) of occupational injuries or diseases that occurred during this period. Given the lack of clarity and guidance from the Department of Employment and Labour, the 3-year period would be insufficient for a number of reasons including the fact there may be employers who emigrated, passed on, or domestic workers who may not have the necessary documentation usually held by employers.

In a country such as South Africa, with mass inequality, lack of access to information and unequal employment power relations, the 3-year period as stipulated by the Department of Employment and Labour for retrospective claims to be submitted is unreasonable, as there has not been much awareness raising and information dissemination of the COID Act (and inclusion) for domestic workers and employers. The Department itself has not made sufficient effort other than a billboard at airports, which few domestic workers visit, on the COID Act, to educate employers and domestic workers about the COID Act, inclusion and how to go about registering and submitting claims. Adequate information dissemination and awareness raising is important for employers and workers, lest the prescription of 3 years pass with domestic workers not having derived any tangible benefit for their retrospective claims.

² by domestic worker trade unions such as the South African Domestic Service and Allied Workers Union (SADSAWU), United Domestic Workers of South Africa (UDWOSA) and allies such as the Socio-Economic Rights Institute of South Africa (SERI) amongst others.

Moreover, when there has been no concerted effort made by the Department to educate or create awareness of COID inclusion, how are domestic workers and employers of domestic workers to bring forth retrospective claims for occupational injuries or diseases? 'There needs to be more thought and arrangements for domestic workers and employers of domestic workers to make the COID Act a reality for domestic workers', said Kelebogile Khunou, a SERI researcher. The purpose of social security benefits such as those in the COID Act is to ensure that everyone covered by the benefit, including vulnerable segments of the workforce, such as domestic workers enjoy access to the benefits. Domestic workers would need to organise and campaign for effective processes and procedures that will guarantee the retrospective benefits of the COID Act. It cannot be left to the Department solely to raise awareness, educate and provide clarity and considerations for such retrospective claims where requirements ought to be different from those of normal claims.

There is an urgent need for the parameters for retrospective claims to be clearly defined and readily communicated to those affected. The 3-year period set down should be amended to start from the date on which the parameters are written into law, given the lack of appropriate awareness raising tools currently available or used by the Department.