INDUSTRIAL LAW JOURNAL MONTHLY PREVIEW

ISSUE 35

MAY 2012

Dear *Industrial Law Journal* Subscriber,

We take pleasure in presenting the May 2012 issue of the monthly *Industrial Law Journal Preview*, authored by the editors of the *ILJ*: C Cooper, A Landman, C Vosloo and J Wilson. Below is a message from our marketing department.

Please note: This newsletter serves as a preview of the printed and the electronic *Industrial Law Journal*. At the time of this dissemination, the full-length cases and determinations are still being prepared for publication in the *Industrial Law Journal*. The material mentioned in this newsletter only becomes available to subscribers when the *Industrial Law Journal* is published.

WE WELCOME YOUR FEEDBACK

Please forward any comments and suggestions regarding the *Industrial Law Journal* preview to the publisher, Anita Kleinsmidt, akleinsmidt@juta.co.za

Please accept our apologies for any inconvenience caused if you have received this mail in error.

Kind regards

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HIGHLIGHTS FROM THE INDUSTRIAL LAW REPORTS

The Good Name of a Trade Union

The High Court was called upon in *SA National Defence Union v Minister of Defence & others* (at 1061), in which the plaintiff union claimed that it had been defamed by the Department of Defence, to decide whether a non-trading corporation such as a trade union has the right to sue for defamation if the defamatory matter of which it complains relates to the conduct of its affairs but is not calculated to cause it financial prejudice. The court noted the right of workers to associate and dissociate, and found that a trade union has indeed a reputation which is entitled to protection if it is to attract and retain its membership. The department's statements were found to be defamatory and moderate compensation was awarded.

Dismissal for Incapacity

The Labour Appeal Court in *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & others* (at 1081) allowed an appeal from a decision of the Labour Court ((2008) 29 *ILJ* 2947 (LC)) in which that court had found an employee's dismissal for incapacity, due to stress at work, to be inevitable and fair. The LAC considered the extent of an employer's duty to attempt to accommodate the employee's incapacity, or to adapt his duties to provide him with alternative work, and found that the employer had failed to fulfill its obligations as set out in the Code of Good Practice: Dismissal, so rendering the dismissal substantively and procedurally unfair. The court further found that the arbitrator in the original dismissal arbitration should have taken into account new evidence which showed that the employee had recovered from his illness and could perform his duties, but the arbitrator had not done so. The court below should accordingly have set aside that award on review.

Powers and Jurisdiction of the Labour Court

Noting the wide jurisdiction granted to it in terms of s 158(1)(*a*)(iii) of the LRA 1995, the Labour Court in *Abrahams v Drake & Scull Facilities Management (SA)(Pty) Ltd & another* (at 1093) granted an order of specific performance requiring an employer which had unilaterally reduced an employee's salary to restore the original terms and conditions of the contract of employment. In *Mogola & another v Head of Department: Department of Education* (at 1203) the Labour Court exercised its discretion in terms of s 158(1)(*h*) to set aside an educational employer's refusal to reinstate teachers deemed to have been dismissed in terms of the Employment of Educators Act 76 of 1998 after being absent from work. The Labour Court found in *Police & Prisons Civil Rights Union on behalf of Mahlangu & others v Premier, Gauteng & another* (at 1247) that it had no jurisdiction to consider a dispute relating to the rentals for houses leased by the state to public service employees, because the state was not acting in its capacity as an employer but as a lessor.

Powers and Jurisdiction of the CCMA

The CCMA was held to have acted *ultra vires* in *AHI Employers' Organisation on behalf of Members v Commission for Conciliation, Mediation & Arbitration; AHI Employers' Organisation on behalf of Members & others v Commission for Conciliation, Mediation & Arbitration & others* (at 1106) when it issued a circular instructing commissioners how they should evaluate whether a party's representative had a right to appear before them. The Labour Court held that the circular contravened the provisions of rule 25 of the CCMA Rules, which provided only for guidelines, not for prescriptive regulations. *In Renier Reyneke Vervoer CC t/a Premium Trucking v Commission for Conciliation, Mediation & Arbitration & others* (at 1262) the Labour Court found that where the only issue before a commissioner was whether an employer had been dismissed or had resigned on a particular day, the commissioner lacked jurisdiction to determine any other matter during the same proceedings. Similarly, in *SA Express Airways (Pty) Ltd v Sjolund NO & others* (at 1268) the Labour Court found that, in a constructive dismissal dispute, where the employee maintained that he had been forced to resign because of race discrimination, the

commissioner had no jurisdiction to arbitrate that dispute. The commissioner in *Builders Trade Depot v Commission for Conciliation, Mediation & Arbitration & others* (at 1154) was held by the Labour Court to have no power to rescind an award at the instance of the employee party where the employee had been present at the hearing and it was the employer who had been absent.

Conciliation / Arbitration Proceedings

In *Zitha and Forever Resort Badplaas* (at 1302) the CCMA commissioner ruled, after reference to the CCMA Rules, that con/arb proceedings are not a single process in which the commissioner is required to commence arbitration immediately after the conclusion of the conciliation stage, and that he/she retains a discretion whether or not to proceed directly to arbitration, having regard to the circumstances.

Fixed-term Contracts — A Reasonable Expectation of Renewal

The Labour Court in *Gubevu Security Group (Pty) Ltd v Ruggiero & others* (at 1171) considered the recent judgment of the Labour Appeal Court in *University of Pretoria v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 ILJ 183 (LAC) and, following that decision, found that the wording of s 186(1)(*b*) of the LRA requires that, to constitute a dismissal, an employee must have had a reasonable expectation that the contract would be renewed on the same or similar terms, and that it was not so renewed. It thus cannot lead to an expectation of permanent employment. In *Van Blerk and Tshwane University of Technology* (at 1284) the employee's fixed-term contract had already been renewed ten times, and he had lodged a grievance concerning his employer's failure to convert his employment to a permanent position. He also claimed that the employer's failure to short-list him for a permanent appointment to the position in which he was already acting amounted to an unfair labour practice concerning promotion. When his final contract was not renewed he CCMA commissioner arbitrating that matter found the employer guilty of a flagrant abuse of the law on fixed-term contracts, and found its failure to consider the employee for promotion to be oppressive and unfair. The commissioner ordered his reinstatement on a permanent basis, and that his application for appointment to his acting position be shortlisted and considered.

Fixed-term Contracts — Early Termination

In *Mmethi and Bloemfontein Celtics Football Club* (at 1307) a football player with a fixed-term five-year contract maintained that his contract could only be terminated for a material breach, and not for operational requirements during the currency of the contract. The arbitrator had reference to the Labour Appeal Court decision in *Buthelezi v Municipal Demarcation Board* (2004) 25 *ILJ* 2317 (LAC) in which that position was postulated, and doubted the correctness of that judgment. He found that it could, in any event, not apply in the field of professional soccer, which was subject to the FIFA regulations, which in turn recognized termination for 'just cause'.

Constructive Dismissal

In *Hickman v Tsatsimpe NO & others* (at 1179), in which the employee claimed that his employer's engagement in illegal activities had rendered his employment intolerable, and so amounted to constructive dismissal, the Labour Court found that the employer's illegal conduct had not been directed at the employee in order to coerce him into resigning, and that the employee had in fact resigned in order to avoid possible disciplinary proceedings. He had therefore not been constructively dismissed.

Deemed Discharge by Operationof Law

The Labour Court held in *Mogola & another v Head of Department: Department of Education* (at 1203) that the educational employer had failed to exercise its discretion appropriately when it refused an application for reinstatement by employees who were deemed to have been discharged in terms of s 14(1) of the EEA, finding that the employees had shown a good and valid reason for their absence from

work. In *National Education Health & Allied Workers Union & another v McGladdery NO & others* (at 1236) the Labour Court similarly found, in respect of a termination of employment by operation of law in terms of the Public Service Act 1994, that the termination is a two-stage process. At the first stage the employer effects the termination in terms of the legislation and there is no dismissal. At the second stage, when an employee makes representations for reinstatement on good cause shown, the employer exercises a discretion, and the employer's decision is then subject to review by the courts.

Other Public Service Issues

The Labour Court granted an interdict in *Hlabangwane v MEC for Public Works, Roads & Transport, Mpumalanga Provincial Government & others* (at 1195) to prevent the head of a government department from instituting disciplinary proceedings against an employee who had already been transferred to another department, finding that he had no power to do so. Such proceedings had to be instituted by the new department. In *Mokhethi v General Public Service Sectoral Bargaining Council & others* (at 1215) the Labour Court found that an alleged offer of employment made without compliance with the peremptory requirements prescribed by the PSA was not an effective offer, and that no employment relationship had arisen from its apparent acceptance.

Similarly, in *Turner and Yatsar Centre* (at 1280), which concerned a long-term prisoner released on parole into the care of a welfare organization, the CCMA commissioner held that no employment relationship had arisen between the prisoner and the care centre simply because the centre was willing to pay the prisoner a commission on work that he had carried out as a condition for his acceptance at the centre.

SA Police Service

Booysen v Minister of Safety & Security & others; Provincial Commissioner Petros NO v Joubert NO & another (at 1132) concerned a number of applications to the Labour Court to review the actions of officials of the SAPS relating to the medical fitness of a police officer to attend a disciplinary enquiry into his alleged misconduct, and to his subsequent deemed dismissal in terms of reg 18(5)(*a*)(ii) of the SAPS Discipline Regulations 2006. The presiding officer of the enquiry had refused the officer an adjournment despite extensive medical evidence which showed him to be unfit to attend. The court found that the presiding officer had acted irrationally in not accepting the medical evidence. The subsequent finding by an appeals authority overturning that ruling was therefore reasonable and not open to review.

In *Mosima v SA Police Service & others* (at 1225) the Labour Court refused to review and set aside an arbitration award upholding a police officer's dismissal for allegedly accepting a bribe. The arbitrator had accepted the version of the SAPS, although neither complainant had testified, and had also accepted hearsay evidence in arriving at a conclusion. The court spelt out the distinction between the test for a review, which was that of the reasonable decision maker, and that for an appeal, which concerned the correctness of the decision. It found that in the present case the officer was trying to disguise an appeal as a review, and that the arbitrator's decision had been reasonable and was based on the totality of the evidence.

Disciplinary Penalty — Dismissal

In *Builders Trade Depot v Commission for Conciliation, Mediation & Arbitration & others* (at 1154) the Labour Court considered the factors to be taken into account when deciding upon an appropriate sanction for an employee found to be under the influence of alcohol at work when he had already received a final warning for that offence. The court distinguished between an employer's duty towards the employee in the case of alcoholism, which was recognized as a form of incapacity, and its obligations where the employee simply reported for duty under the influence of alcohol, which amounted to misconduct. In the latter case, where a warning had already been issued, dismissal was justified and served as a deterrent to others. In *HOCAFAWU on behalf of Machavi and Cheetah Plains Private Game Reserve* (at 1273) the arbitrating commissioner recognized that in a game reserve an employee who disregarded an instruction to keep watch on a dangerous snake was guilty of misconduct, but found that it did not warrant dismissal.

Prescription of Awards

Aon SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (at 1124) concerned an arbitration award made in 2004 which only came before the Labour Court for consideration in 2011. The court found that the employer's application for review, made in 2006, had interrupted prescription in terms of the Prescription Act 68 of 1969, because it amounted to an express acknowledgment of the debt by the employer. However, the employer's subsequent delays in prosecuting the review application were held to have prejudiced the employee. The review application was dismissed and the award made an order of court.

Settlement Agreements

In *Greeff v Consol Glass (Pty) Ltd* (at 1167) the Labour Court held that only a settlement agreement relating to a dispute that has been validly referred to the court for adjudication can be made an order of court in terms of s 158(1)(*c*) of the LRA. In *Public Servants Association of SA on behalf of Members v Gwanta NO & another* (at 1255) the Labour Court found that a settlement agreement resolving a wage dispute, which had been made an order of court, could not, in the event of later conflict, be resolved through litigation but only through collective bargaining.

Quote of the Month:

Commissioner Skhosana in *Van Blerk and Tshwane University of Technology* (2012) 33 *ILJ* 1284 (CCMA):

'I have deliberately decided to refer to the above constitutional provision [s 195(1) of the Constitution 1996] so as to highlight the crucial importance of preserving the services of skilled, competent, highly capable, diligent and professional employees in our institutions and all other organizations. This is vital for the future prosperity and economic development of this country. People in responsible positions should desist from destroying people's futures simply because they want positions to be occupied by their less competent and deserving friends and family members. That is repugnant to the values enshrined in our Constitution. Ability, objectivity, fairness and striving for excellence are fundamental and paramount for the future of this country, and future generations.