INDUSTRIAL LAW JOURNAL MONTHLY PREVIEW

VOLUME 34

MARCH 2013

Dear *Industrial Law Journal* Subscriber,

We take pleasure in presenting the March 2013 issue of the monthly *Industrial Law Journal Preview*, authored by the editors of the *ILJ*: C Cooper, A Landman, C Vosloo and L Williams - de Beer.

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

Juta General Law

Ground Floor, Sunclare Building, 21 Dreyer Street, Claremont, Cape Town, South Africa
PO Box 14373, Lansdowne 7779; Docex Number: DX 326, Cape Town
Tel: +27 21 659 2300, Fax: +27 21 659 2360

Website: www.juta.co.za; e-mail:cserv@juta.co.za

Juta and Company Ltd, REG. NO. 1919/001812/06, VAT REG. NO. 4520113319

HIGHLIGHTS FROM THE INDUSTRIAL LAW REPORTS

Restraints of Trade and Business Transfers

After taking transfer of a business as a going concern, the applicant company in *Experian SA (Pty) Ltd v Haynes & another* (at 529) signed a contract of employment with a transferred employee which contained certain restraint undertakings. When the employer later approached the High Court to enforce those undertakings, the employee contended that the employer was obliged in terms of s 197 of the LRA 1995 to take over his employment on the conditions applicable between himself and his old employer, which did not include a restraint clause, and that the restraint was therefore invalid because it contravened s 197(2). The court did not agree. It found that nothing in s 197 prevents the parties after a transfer from consensually entering into a new agreement regulating their rights and obligations, and that the restraint was valid and enforceable.

Unfair Discrimination and Affirmative Action

The Labour Appeal Court has now overruled the earlier decision of the Labour Court in *Solidarity on behalf of Barnard v SA Police Service* (2010) 31 *ILJ* 742 (LC), in which that court found the SAPS's failure to appoint a white female employee to a newly created post, although she was recommended as the preferred candidate, was based on her race and amounted to unfair discrimination. In *SA Police Service v Solidarity on behalf of Barnard (Police & Prisons Civil Rights Union as Amicus Curiae)* (at 590) the LAC considered the role of the Employment Equity Act 55 of 1998, together with the implementation of employment equity plans adopted thereunder, as constitutionally mandated tools to ensure a designated employer's compliance with the injunction to ensure and achieve equitable employment practices and representativity. The court held that the implementation of those measures is not subject to an individual's right to equality and dignity, as found by the court below. Further, the fact that an employee was recommended for promotion did not establish a right to be promoted, and the national commissioner was not compelled to fill an advertised post.

In *Nombakuse v Department of Transport & Public Works: Western Cape Provincial Government* (at 671) a public servant, whose appointment to a government post was later revoked by a new provincial administration, claimed that she had been discriminated against in terms of s 6 of the EEA on the grounds of political affiliation, gender and race. The Labour Court noted that the employee had first to show that there had been discrimination on a ground listed in the EEA, and that the onus then shifted to the employer to show that the discrimination was fair. As the court could not find on the evidence before it that there had been any such discrimination, the employer was granted absolution from the instance.

The Extent of an Employee's Duty to Disclose Information

The Labour Appeal Court in *Eskom Holdings Ltd v Fipaza & others* (at 549) dismissed an employer's appeal from an earlier Labour Court judgment, in which that court held that an applicant for employment was under no duty, either in terms of her contract or the law, to disclose in her application that she had previously been dismissed by that same employer. That information was also within the knowledge of the employer and contained in its files, and her failure to disclose it did not amount to a fraudulent misrepresentation entitling the employer to withdraw its subsequent offer of employment.

Piercing the Corporate Veil

In *National Union of Metalworkers of SA & others v Lee Electronics (Pty) Ltd & others* (at 569) the Labour Appeal Court considered the common-law approach to piercing the corporate veil, and noted that, according to recent legal authority, a court has no general discretion simply to disregard the evidence of a separate corporate identity whenever it considers it just and convenient to do so. There must in addition be some misuse or abuse of the distinction which results in an unfair advantage to the person controlling the corporate entity. The LAC refused to lift the veil in the case before it, and found that the court below had been correct in finding the controlling shareholder of the respondent company, and another close corporation, not to be jointly and severally liable for the appellants' unfair dismissal.

Jurisdiction of the Labour Court

The Labour Appeal Court in *Rand Water v Stoop & another* (at 579) allowed an appeal from a decision of the Labour Court in which that court had found that it lacked jurisdiction to consider an employer's counterclaim for damages for breach of contract against employees who claimed to have been unfairly dismissed. The LAC found that the Labour Court did have jurisdiction in terms of s 77(3) of the BCEA 1997 to consider the counterclaim, which arose from the same facts that gave rise to the employees' dismissal. The court sat both as a court of equity in terms of the LRA and as a court of law in terms of the BCEA, and there was no warrant for interpreting the BCEA in a manner that was partisan towards employees.

In *Kaylor v Minister of Public Service & Administration & another* (at 639) the Labour Court held that it had jurisdiction under s 158(1)*(h)* of the LRA, to review a decision by the respondents to direct the applicant employee to relocate her place of employment without prior consultation on the grounds of legality and of the respondents exceeding their powers.

Bargaining Council Jurisdiction

The Labour Court held in *Oosthuizen v Imperial Logistics CC & others* (at 683) that an applicant's failure personally to sign the form of a dispute referral to a bargaining council constituted a material defect and deprived the council of jurisdiction to hear the dispute.

In *National Union of Metalworkers of SA on behalf of Members and L & J Tool & Engineering Works (Pty) Ltd* (at 756) the respondent's employees had previously been paid the wage rates prescribed by the MEIBC. When it was found that the business actually fell under MIBCO new employees were thereafter paid on the lower MIBCO scale. They referred an unfair labour practice dispute to bargaining council arbitration, claiming the right to payment on the higher scale. The arbitrator found that he lacked jurisdiction to arbitrate the dispute. The new employees had no right, either in contract or in law, to the application of the earlier agreement, and their claim was essentially a matter of mutual interest. The MIBCO agreement did not permit two-tier bargaining, and mutual interest and wage disputes could not be dealt with at plant level.

Public Service Employment Contracts

In *Police & Prisons Civil Rights Union & others v Minister of Correctional Services & another* (at 690) the applicants claimed in terms of s 77(3) of the BCEA that their public service posts should be upgraded from level 11 to level 12, because other employees who undertook the same work had, over the years, been promoted to level 12. The Labour Court found, firstly, that no contractual right to an upgrade had been shown, and secondly, that in terms of the Public Service Regulations 2001 the upgrading of any post fell within the discretion of the national commissioner, who had decided not to approve it. The employees could not approach the court unilaterally for the amendment of their contractual terms.

Retrenchment and Severance Pay

An employee who accepted a voluntary severance package (vsp) from his employer, but still required the payment of certain enhancements due to him in terms of the employer's standard retrenchment policy, was held in *Prior and Nokia Siemens Networks SA (Pty) Ltd* (at 760) to be entitled to claim such enhancements. The arbitrator found the basis for the termination of his employment clearly to be operational reasons, and the VSP fell under that policy. The fact that the employer chose to use a different terminology did not change that fact and was of no consequence.

Dismissal — Poor Work Performance

The Labour Court found in *Brodie v Commission for Conciliation, Mediation & Arbitration & others* (at 608) that a senior employee who had failed to fulfill the very purpose for which she was employed had justifiably been dismissed for poor work performance. Her complaint that she had not been given a job description and proper training and guidance was rejected. As a senior employee who had been employed for her expertise and customer connections she knew what was expected of her, and the employer had complied with the provisions of schedule 8 to the LRA 1995.

Dismissal — or Termination of Employment by Operation of Law

The public service employee in *MEC: Department of Education, Gauteng v Msweli & others* (at 650 had absented himself from his employment for more than a month without authorization and was deemed to have been dismissed in terms of s 17(5) of the Public Service Act (Proc 103 of 1994). At arbitration his dismissal was found to be procedurally unfair in terms of the LRA. On review the Labour Court held the LRA not to be applicable in such cases, because his employment had been terminated by operation of law. The question of procedural unfairness therefore did not arise.

Disciplinary Penalty

Where an employee had been dismissed for an assault on a client of the employer, the CCMA commissioner in *Solidarity on behalf of Armstrong and SA Civil Aviation Authority* (at 712) considered the extent to which the employee could invoke private defence to excuse his conduct. The commissioner found that private defence was available in instances of physical injury and impairment of dignity. The test was an objective one, and not dependent on the subjective belief of the employee himself. In *Herman's and Hitachi Construction Machinery Southern Africa Co Ltd* (at 738), in which the employee had been proved guilty of misconduct involving dishonesty, the arbitrator found the sanction of dismissal to be fair, despite the employee's long service and previous clean record, because the element of trust had been destroyed.

Sporting Body — National Soccer League

A professional footballer, who had been dismissed by his club after being found guilty on five counts of misconduct, claimed in arbitration proceedings under the auspices of the NSL that his dismissal had been unfair. In *Vilakazi and Mpumalanga Black Aces Football Club* (at 770) the arbitrator found that as the club had failed to follow all the provisions of its employee handbook, which had been incorporated into the player's letter of appointment, it had waived its right to discipline the player for certain offences, and that other offences did not warrant dismissal. Although the dismissal was unfair for these reasons it was clear that the player had behaved inappropriately and that his conduct brought the club into disrepute. The arbitrator therefore declined to award him compensation.

Pre-dismissal Arbitration

In *Mudau v Metal & Engineering Industries Bargaining Council & others* (at 663) the Labour Court spelt out the functions of an arbitrator when undertaking a pre-dismissal arbitration in terms of s 188A of the

LRA, and reviewed and set aside an award in which the arbitrator had relied on matter that was not properly before her when determining that an employee had on a balance of probabilities committed the offence with which he was charged by his employer. In *SA Transport & Allied Workers Union & others v MSC Depots (Pty) Ltd & others* (at 706) the court noted that s 188A had been introduced in order to accelerate dispute resolution by bypassing internal disciplinary procedures and accelerating the disciplinary process to the arbitration stage. It was therefore not open to the employer subsequently to withdraw from that process unilaterally, and to revert to its own internal disciplinary proceedings.

Practice and Procedure

The Labour Court dismissed an application to review an award in *Brodie v Commission for Conciliation, Mediation & Arbitration & others* (at 608), finding that the litigant was required to set out all her grounds for seeking review in her founding affidavit, and that issues raised in her replying affidavit and in argument could not be considered. In *Communication Workers Union & others v SA Post Office Ltd & others* (at 626) the court supported this view, finding the only possible exception to be where a lay applicant had not received adequate legal assistance. In *Du Preez v LS Pressings CC & others* (at 634) the Labour Court refused to join a second employer to arbitration proceedings which had resulted in a default award against the original employer, finding that there were no live proceedings before it to which the party could be joined. The CCMA commissioner was functus officio. The arbitrator refused in *Vusani Engineering Services (Pty) Ltd and Arrons* (at 767) to grant an application for the rescission of a default arbitration award where the founding affidavit of the application for rescission had not been signed personally by the named deponent but by a third party on his behalf.

Evidence

In *Hermans and Hitachi Construction Machinery Southern Africa Co Ltd* (at 738), in which the employee simply denied the employer's evidence at arbitration and deliberately left it unchallenged in cross-examination, the arbitrator accepted the employer's version of events and found that it had discharged the onus of proving the employee guilty of misconduct. In *Lewis and Baltimore Aircoil Co SA (Pty) Ltd* (at 751) the arbitrator ruled that the employer could not at arbitration call as a witness the employee who had represented the applicant employee at his disciplinary hearing. He found that attorney-client privilege extended also to shop stewards and representatives at disciplinary hearings.