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Dear *Industrial Law Journal* Subscriber,

We take pleasure in presenting the April 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

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HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Collective Bargaining in the Defence Force

The High Court was required in *SA Security Forces Union & others v Minister of Defence & Military Veterans & others* (at 885) to consider the correct interpretation of regulations 28 and 29 of the SANDF Regulations, which provide for deduction of trade union membership dues from employees of the military. The applicant claimed that, despite the cancellation of its registration as a military trade union, it was still entitled to call on the respondent in terms of those regulations to deduct union dues from its members' salaries. The court did not accept the union's argument that a distinction had to be made between 'registered military trade unions' and 'military trade unions', and that in the absence of the word 'registered' in the regulations concerned it remained entitled to seek the deductions. The court held that only a union that was established and registered in terms of the regulations could exercise the rights created by regulation 28.

CCMA Jurisdiction

The Labour Court held in *Mohale v Net 1 Applied t/a Cash Paymaster Services Northern (Pty) Ltd* (at 930) that the CCMA has been given express power in terms or s 24(8) of the LRA 1995 to determine disputes pertaining to the interpretation or application of settlement agreements, and that a commissioner's ruling that he had no such jurisdiction, made incidentally while adjudicating an unfair dismissal dispute, was incorrect and should have been taken on review.

Termination of Fixed-term Contracts

The applicant employee in *Morgan v Central University of Technology, Free State* (at 938) claimed contractual damages for the breach of his five-year fixed-term contract of employment (which was terminable on three months' notice) when the respondent cancelled the contract without notice at the end of an initial probationary period. The Labour Court took into account accepted legal principles for the interpretation of contracts. It held the three months' notice to be required during probation, and that the employer had repudiated the contract, but found that the employee had, by his conduct, accepted the repudiation and had proved no damage beyond the three-month period.

In *National Union of Metalworkers of SA on behalf of Bratz & others andAtlantis Foundries (Pty) Ltd* (at 1055) the parties agreed in a charter that employees on fixed-term contracts would have their contracts renewed three times, and would be considered for permanent employment before the end of the second renewal of their contracts, subject to certain selection criteria. Those not selected claimed at bargaining council arbitration that they had an expectation of permanent employment. After considering the main collective agreement and the charter, the arbitrator concluded that those not selected had no expectation of automatic permanent employment, and that they had not been dismissed.

Public Service Dismissals

In *Baloyi v Minister of Communications & others* (at 890), in which a public service employee had resigned from one department of state and taken up employment in another, the Labour Court had to decide whether the second department could, in terms of s 16B(4) of the Public Service Act 103 of 1994), validly request the original employer to proceed with uncompleted disciplinary action against the employee in preference to taking on that task itself. The court found that s 16B(4) places a non-delegable duty on a departmental head to take disciplinary action against an employee for misconduct arising during prior employment if requested to do so by the previous employer, and that the original employer cannot simply step into the new employer's shoes and continue disciplinary proceedings against a person over whom it no longer exercises disciplinary powers.

Transfer of Business as a Going Concern

The Labour Court gave further consideration to the requirements of s 197 of the LRA 1995 in *Franmann Services (Pty) Ltd v Simba (Pty) Ltd & another* (at 897) to determine whether the decision of a temporary employment service (tes) to discontinue supplying staff to the first respondent, which in turn led to the appointment of another TES, had resulted in a transfer of its business as a going concern to the new TES. The court found that this question had to be determined objectively as a matter of fact, and that where there had been no transfer of all the components of the business, including its assets and goodwill, there had been no transfer as a going concern. In *Grinpal Energy Management Services (Pty) Ltd v City Power Johannesburg (Pty) Ltd & others* (at 905), in which the respondent had entered into a service agreement with the applicant for the installation and maintenance of a pre-paid electricity system to certain areas of Johannesburg, and had subsequently cancelled that agreement and appointed a new provider, the court held that a transfer of a business had taken place.

Determination of Employment Relationship

The Labour Court considered the true dividing line between employment and self-employment in *Melomed Hospital Holdings Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 920), and found that a doctor who was supplying his services to a hospital through a corporate entity was nevertheless assisting the hospital to conduct its business and not conducting his own business, and that he was an employee of the hospital. Similarly, in *Wienand v Pharma Natura (Pty) Ltd & others* (at 1012) the court found that a financial manager, who was paid his remuneration through a close corporation but who was part of the company's organization and under its supervision and control, and who was economically dependent on it, had proved an employment relationship. However, in *Total SA (Pty) Ltd v National Bargaining Council for the Chemical Industry & others* (at 1006) the court found that a person who was not economically dependent nor supervised nor controlled by the company, but who had been given an access number and an employee card by the company, was an independent contractor.

Derivative Misconduct

The employer party in *National Union of Metalworkers of SA on behalf of Ntuli & others and Argent Steel Group (Pty) Ltd t/a Gammid Trading* (at 1003) relied on derivative misconduct to justify the dismissal of employees in various different work areas where bulk material had been stolen from those areas and the perpetrators could not be found. After referring to the requirements for the proof of derivative misconduct the bargaining council arbitrator found that the employer had provided no evidence that the employees had any knowledge of the thefts or of the persons involved and had failed to prove derivative misconduct. Their dismissals were therefore substantively unfair.

Retrenchments

The Labour Court considered the requirements for a fair retrenchment in *National Union of Mineworkers & others v DB Contracting North CC* (at 971), and found that the applicant employees had been unfairly dismissed. The employer had terminated retrenchment consultations with the union prematurely, and the employees had not been dismissed for operational reasons but so that the employer might avoid paying them increased remuneration at prescribed bargaining council rates.

Disciplinary Penalty

In *Harmony Gold Mining Co Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 912) the Labour Court reviewed and set aside an award in which the CCMA commissioner had ordered the reinstatement of an underground team leader who had failed to comply with safety rules in a mine. The court found that the commissioner had not given sufficient weight to the serious consequences of such misconduct, and the potential loss of life, and that his decision was not one that a reasonable decision - maker would have made. Suspension without pay was held in *National Union of Mineworkers & others v Martin & East (Pty) Ltd* (at 978) to be permissible as a disciplinary penalty when imposed as an alternative to dismissal. However, the court held that to single out only shop stewards for dismissal for taking part in an unprotected strike, while suspending all other employees without pay, amounted to the automatically unfair dismissal of the stewards.

In *Matsi and JP Hugo Residence CC t/a Hoffe Park Accommodation Centre* (at 1018), in which an employee had been given a final written warning for disclosing his salary to his fellow employees in breach of his employer's rules, the CCMA commissioner pointed out that every employee had the right to discuss his conditions of employment with his fellow employees in terms of s 78(1)*(b)* of the BCEA 1997. The rule therefore contravened the Act and the warning amounted to an unfair labour practice. The arbitrator in *Zikhali and eThekwini Municipality (Parks Recreation & Culture Unit)* (at 1076) found dismissal to be too harsh a sanction for a municipal employee who, after experiencing what he perceived to be a demotion at the workplace, had complained to the press about it, so breaching a collective agreement which provided that no employee could comment publicly on the administration of the municipality. In *Putini and SA Commercial Catering & Allied Workers Union* (at 1023) the commissioner found that an employer who had dismissed an employee for soliciting and receiving funding from a company in which he served as a union organizer, while not disciplining a fellow employee who had received a gift from the company, had acted inconsistently. In any event, the employee had no dishonest intent. The arbitrator in *Labuschagne and Arcelor Mittal (Vanderbijlpark)* (at 1047) found an employee who had distributed a racially offensive e-mail to a colleague on the employer's e-mail system to have committed a serious offence, and that dismissal was an appropriate sanction.

Compensation or Reinstatement

In *SVB Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 996) the Labour Court reviewed and set aside a CCMA award in which the commissioner had found an employee's dismissal to have been substantively unfair, but had awarded compensation after the employee elected not to be reinstated. The court upheld the finding that the dismissal was unfair, but found that the employee did not fully understand the implications of his choice when he elected to be compensated. The court listed the matters to be disclosed to an employee to enable him to make an informed decision in such cases and remitted the matter to the commissioner to reconsider the appropriate remedy in the light of these comments.

Prescription of Debt

In *Police & Prisons Civil Right Union on behalf of Moyo v Minister of Correctional Services & another* (at 992), in which the respondent employer began to make deductions from an employee's salary to compensate for damage occasioned to the employer's motor vehicle some seven years previously, the Labour Court held that the debt had prescribed in terms of the Prescription Act 68 of 1969 and granted an urgent order requiring the employer to repay amounts already deducted and interdicting any further deductions from his remuneration.

Practice and Procedure

In *National Union of Mineworkers & another v Commission for Conciliation, Mediation & Arbitration & others* (at 945) the Labour Court found that it should not interfere with the findings of a CCMA commissioner regarding the credibility of witnesses, and did not support an application for a postponement in order to call an expert witness where this would not be in the interests of justice.

Quote of the Month:

Steenkamp J in *Melomed Hospital Holdings Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2013) 34 *ILJ* (at 920) (LC):

'At no stage did the parties enter into a written agreement, despite M having retained the services of attorneys throughout. This failure would lead, as it so often does, to an unfortunate obfuscation of the true nature of the agreement between the parties. And it shows that often, as Samuel Goldwyn supposedly remarked, "a verbal contract isn't worth the paper it's written on".'

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