INDUSTRIAL LAW JOURNAL MONTHLY PREVIEW

VOLUME 34

JUNE 2013

Dear *Industrial Law Journal* Subscriber,

We take pleasure in presenting the June 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.

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

PUT YOUR TRAINING BUDGET TO WORK AND REAP THE BENEFITS OF THIS SEMINAR FOR YOUR ENTIRE ORGANISATION

Keeping abreast of important developments in the ever-changing area of labour law is a prime concern for labour law and HR practitioners. Juta's Annual Labour Law Seminar, now in its 12th year, is a comprehensive one day update, bringing you practical information about current developments in all the critical areas of labour law. Our panel of renowned experts will highlight potential pitfalls and provide you with the information needed to ensure that your IR and HR practices are up to date and compliant.

Our expert team of speakers will discuss the most recent important case law and statutory developments affecting the employment relationship. This year the panel will be joined in the afternoon by a guest speaker on a topic of current interest to delegates.

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

Delegates will also receive an electronic newsletter service during the course of the year incorporating key case law and commentary, written by the panel, keeping you up to date all year round with the law affecting your business.

SEMINAR TOPICS

EMPLOYMENT LAW - John Grogan

- Contractual and statutory developments affecting the private and public sector
- Dismissal law (excluding automatically unfair)

RETRENCHMENTS & WORKPLACE CHANGE - Puke Maserumule

- Reasons for retrenchment: What counts as a 'fair' reason?
- Workplace change: Altering terms and conditions of employment
- May an employer still retrench when employees resist change?

TRANSFER OF BUSINESS - Barney Jordaan

- Business Transfers: when does s 197 apply?
- Outsourcing and s 197?

EMPLOYMENT EQUITY - Barney Jordaan

- Discrimination: When is it 'fair'?
- Automatically unfair dismissals: Dismissal on the basis of culture, religion and retirement age
- Employment equity and affirmative action: latest case law and statutory developments

COLLECTIVE LABOUR LAW - Puke Maserumule

- Recent legal challenges to extension of bargaining council agreements to non-parties
- Unprotected strikes and interdicts: has the Labour Court become toothless to end unprotected strikes?
- Strikes and dismissal of strikers

PANEL DISCUSSION WITH GUEST SPEAKERS

- This year our panel will be joined in the afternoon by labour law experts from the various regions

When & Where?

17 September 2013 - CSIR Convention Centre, Pretoria

18 September 2013 - The Forum, Sandton

19 September 2013 - Protea Hotel Central, Bloemfontein

01 October 2013 - CTICC Cape Town

02 October 2013 - Radisson Blue, Port Elizabeth

03 October 2013 - ICC, Durban

Who should attend?

- HR and LR Practitioners
- Legal Practitioners
- CCMA officials
- Bargaining council and private arbitrators
- Line Managers responsible for HR/LR function
- Academics

Provisional Programme 2013

08h00	Registration, tea & coffee
08h30	Welcome and introduction
08h35	Employment Law - John Grogan
09h45	Dismissal - John Grogan
10h45	Tea
11h00	Retrenchments and Workplace Change – Puke Maserumule
11h30	Transfer of Business - Barney Jordaan
12h30	Q & A
13h00	Lunch
14h00	Discrimination - Barney Jordaan
14h45	Collective Labour Law - Puke Maserumule
15h30	Tea
15h45	Guest speaker & panel discussion on current issues
16h30	Close

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 OF THE INDUSTRIAL LAW REPORTS

Unfair Discrimination and Automatically Unfair Dismissal

The Supreme Court of Appeal has now in *Department of Correctional Services & another v Police & Prisons Civil Rights Union & others* (at 1375) upheld the earlier finding by the Labour Appeal Court (reported in (2011) 32 *ILJ* 2629 (LAC)) that male prison officers, who were dismissed after refusing to comply with an order to remove their dreadlocks, were the victims of unfair discrimination, not only on the grounds of gender but also on the grounds of religion and culture, and that their dismissal was automatically unfair. On appeal the department argued that the discrimination was justifiable as the religious or cultural belief promoted criminality in the form of dagga usage. The SCA rejected that argument and found that whether the discrimination was justifiable had to be decided under the provisions of s 187(2)*(a)* of the LRA, namely, whether it was based on an inherent requirement of the officers' job. It had not been shown that the wearing of dreadlocks affected the officers' ability to perform their duties, nor that it jeopardized the safety of the public or other employees, or caused the employer undue hardship, and the appeal therefore had to fail.

Liability of Trade Union to its Members

In *Food & Allied Workers Union v Ngcobo & another* (at 1383) the Supreme Court of Appeal has, by a majority of four to one, now upheld an earlier High Court judgment, in which that court held the trade union party liable in damages to certain of its members for failing to refer their unfair dismissal dispute to the Labour Court, and for failing to apply for condonation. (See (2012) 33 *ILJ* 1337 (KZD).) The SCA found that there was clearly a contract of mandate between the union and its members, which the union had breached. The members then had an election either to claim performance of the union's obligations or to claim damages.

Extension of Bargaining Council Agreements

The High Court in *Valuline CC & others v Minister of Labour & others* (at 1404) and the Labour Court in *National Employers Association of SA & others v Minister of Labour & others* (at 1556) both granted orders reviewing and setting aside decisions by the Minister of Labour to extend the provisions of bargaining council agreements to non-parties. In both cases the courts examined the requirements of s 32 of the LRA 1995 governing the extension of agreements, and held that the minister was not entitled to rely solely on the certificate issued by the Registrar of Labour Relations in terms of s 49(4) of the LRA in order to conclude that the council was representative and that its agreements should be extended to non-parties. She had to apply her mind to the issue and be objectively satisfied that the peremptory requirements of s 32(3)*(b)* and *(c)* would be met before agreeing to the requested extension. In *National Employers Association of SA,* the Labour Court agreed to suspend its order of invalidity for a period of four months to afford the minister time to consider whether to use the discretionary powers granted to her in terms of s 32(5) to extend the agreement. However, in *Valuline CC* the High Court refused to suspend its order, finding that it would not be just and equitable to do so and that an invalid administrative act remained invalid.

Demarcation Disputes

In *National Bargaining Council for the Road Freight Industry v Marcus NO & others* (at 1458) the Labour Appeal Court has upheld earlier decisions by both the Labour Court and the CCMA, ruling that a business involved in hiring out tipper trucks together with their drivers to clients at a fixed rental, for use at their

own discretion, was not engaged in 'the transportation of goods for hire or reward' within the registered scope of the bargaining council for the road freight industry. The LAC considered the approach to be adopted by a commissioner when considering whether an enterprise falls within an industry definition and found it not to require either an expansive or a restrictive definition of the industry itself, but merely the application of the established facts to the definition in the agreement.

Novation of Collective Agreement

The Labour Court held in *SA Post Office Ltd v Nowosenetz NO & others* (at 1604) that, when the SAPO entered into a new collective agreement with a recognized trade union which set the threshold for recognition at a higher level to that in the previous agreement, and which stipulated that it superseded the previous threshold, that novated the previous agreement and abolished all obligations arising from the earlier agreement, including obligations that applied to parties other than the contracting parties.
A second union which claimed the right to recognition at the previous level was therefore subject to the new threshold.

Transfer of Business as a Going Concern

In a majority judgment the Labour Appeal Court in *PE Rack 4100 CC v Sanders & others* (at 1477) has overruled an earlier decision of the Labour Court (reported at (2010) 31 *ILJ* 2722 (LC)) and has held that the termination of a franchise agreement permitting the franchisee to sell certain products, and the appointment of another franchisee to sell the same products, does not constitute the sale of a business as a going concern within the meaning of s 197 of the LRA. The court found that the franchisor continued to hold the core assets of the business both before and after the conclusion of the franchise agreements, which was effectively a joint business venture between franchisor and franchisee. In a dissenting judgment Landman AJA held that the economic entity that was the business did change hands when it reverted to the franchisor and then to the new franchisee, and that this construction accorded with the aims of s 197 to protect job security and to facilitate the transfer of businesses.

Fixed-term Contract — Expectation of Renewal

The Labour Appeal Court in *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape & others* (at 1427) dismissed an appeal from a decision of the Labour Court in which that court found that a public service employee had not acquired a reasonable expectation that her fixed-term contract of employment would be renewed, and so had not been dismissed. The LAC adopted a similar two-stage enquiry, firstly to determine whether the employee had a subjective expectation of renewal, and secondly, if so, whether her expectation was objectively reasonable.
The court further found that it was incumbent on the employee to set out the material facts on which she relied for her expectation of renewal, and that she had not done so.

Public Service — Discharge by Operation of Law

In *Solidarity & another v Public Health & Welfare Sectoral Bargaining Council & others* (at 1503) the Labour Appeal Court had to consider whether a public servant who, while on precautionary suspension, took up other employment was deemed to have been discharged by operation of law in terms of s 17(5)*(a)*(ii) of the Public Service Act. The majority court held that that was the case. Even though on suspension the employee remained in employment and subject to the employer's authority. His assumption of other employment amounted to his being absent from duty and brought the deeming provisions of s 17(5)*(a)* into play. In a dissenting judgment Murphy AJA held that s 17(5)*(a)* did not apply because the employee was not absent without permission — he had been suspended. However,

accepting other employment might constitute a repudiation of his contract, which would entitle the employer to accept the repudiation and terminate the contract.

Residual Unfair Labour Practices

In *Minister of Labour v Mathibeli & others* (at 1548) the Labour Court held that the incumbent in a public service post that had been upgraded, who was retained in the post but was not afforded a higher salary, had not been promoted. The incumbent did not thereby acquire a right to be promoted, and the dispute was a matter of mutual interest, and did not amount to an unfair labour practice. In *SA Post Office v Bhana NO & others* (at 1595) the court considered when a dispute regarding an alleged unfair labour practice arises, and found that it arises when it first comes to the attention of the employee. In the case before it this was when the employer first refused to accede to the employee's request for a bonus. Constantly repeating the demand in the face of repeated refusals could not keep the dispute alive indefinitely.

SA Police Service

The Labour Court considered the terms of the SAPS Discipline Regulations in *SA Police Service & another v Van der Merwe NO & others* (at 1579) and found that reg 20*(z)*, which provides that an employee is guilty of misconduct if he or she commits a common-law or statutory offence, imposes an ethical duty on police officers to live their private lives according to the same standards as those imposed on them as police officers. The regulation is not only applicable once they have been convicted of an offence. The court refused to grant an urgent interdict in *SA Police Union v Minister of Safety & Security & another* (at 1586) to prevent the SAPS from recruiting new employees to guard various police premises, finding that the unions had failed to prove any agreement in the matter, and that the SAPS was just using its ordinary procedures to recruit new employees. In *Stone v SA Police Service* (at 1619) the court found that the SAPS had failed to prove that it had acted fairly in terms of its employment equity plan when it passed over a white male employee who had applied for promotion. However, it did not follow that the employee would have been appointed but for that unfairness, because another candidate, a white female, was in fact the best candidate with the highest marks. The employee had therefore failed to show a causal link between that unfairness and his non-promotion.

Conditions of Employment — Unilateral Change

The Labour Appeal Court found in *Motor Industry Staff Association & another v Silverton Spraypainters & Panelbeaters (Pty) Ltd & others* (at 1440) that an instruction to employees to assist in marketing the employer's services during an economic downturn did not amount to a unilateral change to their terms and conditions of employment but was merely ancillary to their normal duties, and a reasonable variation of work practice in the interests of all.

Retrenchment

The Labour Court in *Association of Mineworkers & Construction Union & others v Shanduka Coal (Pty) Ltd* (at 1519) considered and restated the purpose of the consultations required in terms of s 189 of the LRA prior to embarking on a retrenchment exercise. The case before the court involved more than 50 employees, and so required facilitation in terms of s 189A. The court found that the union party had been consistently dilatory and evasive throughout that process, and that the retrenchment procedure was not procedurally unfair.

Determination of Employment Relationship

In *Shell SA Energy (Pty) Ltd v National Bargaining Council for the Chemical Industry & others* (at 1490) the Labour Appeal Court has ruled that a dispute over the existence of an employer/employee relationship raised at the commencement of conciliation proceedings is a matter that has to be decided before conciliation begins, and that it does not form part of the conciliation process. The court also took the view that the conciliator should have heard oral evidence on the question, and had committed a material irregularity by failing to do so. In *Independent Institute of Education (Pty) Ltd v Mbileni & others* (at 1538), in which a business was sold and the financial director was thereafter paid a retainer for a period while finding suitable alternative employment, the Labour Court found that after assisting with the initial handing over, the director did no further work for the business and that he was no longer an employee.

Disciplinary Code and Procedure

In *Ocean Basket Airport v Bargaining Council for Restaurant Catering & Allied Trades & others* (at 1569), in which an employee had been dismissed for misconduct without a proper hearing, the employer later offered him an appeal hearing to cure any procedural unfairness. He refused and lodged an unfair dismissal dispute with the bargaining council, which awarded compensation. In review proceedings, the Labour Court was not convinced that the employer's offer was genuine and reasonable, and thought it likely that the employee would then have been dismissed for a second time, resulting in a further dismissal dispute. The award was therefore reasonable and not subject to review.

Polygraph Testing

On review the Labour Court in *DHL Supply Chain (Pty) Ltd v De Beer NO & others* (at 1530) agreed with the bargaining council arbitrator that the result of a polygraph test on its own is not sufficient to determine an employee's guilt, and that it must be supported by other evidence.

Practice and Procedure

In *Ngema & others v Screenex Wire Weaving Manufacturers (Pty) Ltd & another* (at 1470) a business had been sold as a going concern after the dismissal of the employees, who had obtained an order for reinstatement against the old employer. The Labour Appeal Court held that employees seeking to enforce that order must do so against the new employer, and that the new employer should have been joined in the enforcement proceedings. It further held that s 197 of the LRA does not automatically effect a joinder or substitution of the employer party, and that the employees were not entitled to substitute the new employer as judgment debtor in the reinstatement order without joining it in the proceedings. The Labour Court had reference to the Rules of the Labour Court in *Public Servants Association on behalf of Botha & another v MEC for Health: North West Provincial Government & others* (at 1574), and ruled that where in motion proceedings a dispute of fact arose on the papers the matter should have been referred for the hearing of oral evidence. In *SA Transport & Allied Workers Union & others v Nationwide Airlines (Pty) Ltd & another* (at 1612) the court refused to substitute the liquidators of a company in liquidation as the defendants in unfair dismissal proceedings pending a substantive application by the applicants in terms of s 359(2)*(b)* of the Companies Act 61 of 1973.