INDUSTRIAL LAW JOURNAL MONTHLY PREVIEW

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Dear *Industrial Law Journal* Subscriber,

We take pleasure in presenting the July 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 functions
- 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

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Review Test

In *Myers v National Commissioner of the SA Police Service & others* (at 1729) the Supreme Court of Appeal held that the fairness of a decision to dismiss an employee had to be tested against the review standard laid down by the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC). It followed that, to survive scrutiny, the decision to dismiss had to be 'reasonable' and reasonableness had to be tested in the light of the facts and circumstances of the case. Although the majority in the Labour Appeal Court (*National Commissioner of the SA Police Service v Myers & others* (2012) 33 *ILJ* 1417 (LAC)) had correctly recognized that the test for dismissal was that set out in *Sidumo*, the SCA found that the LAC appeared to have accepted that the decision was unreasonable, but not sufficiently unreasonable to warrant interference. This appeared to be an application of the pre-constitutional era 'gross unreasonableness' test. By adopting such a standard, the majority in the LAC inadvertently imported a higher standard than that contemplated in *Sidumo*. Were this to be the test, it would mean that a dismissed employee seeking to set aside a dismissal would have to show not only that the decision maker's decision was unreasonable, but that it was 'so unreasonable' that it fell to be reviewed and set aside. That was not the test.

Reinstatement

Having considered the meaning of 'reinstatement' in s 193 of the LRA 1995 and the authorities, the Supreme Court of Appeal found, in *Nel v Oudshoorn Municipality & another* (at 1737), that it is clear that by taking a decision to reinstate a dismissed employee the employer does not purport to conclude a fresh contract of employment. The employer merely restores the position to what it was before the dismissal. In the matter before it the court found that a municipal council's resolution to reinstate its dismissed municipal manager did not constitute the appointment of the municipal manager as contemplated in the Local Government: Municipal Systems Act 32 of 2000, his appointment had occurred in 2007 and the resolution did no more than restore that relationship.

In *Independent Municipal & Allied Trade Union on behalf of Erasmus & another v City of Johannesburg & another* (at 1741) the Labour Court found that where an employee is seeking specific performance in the form of reinstatement in terms of a court order, the partial tender of services by the employee is not sufficient – the employee must tender his or her services in full. The court found that the employer had not disobeyed the court order or acted in bad faith by rejecting the employees' partial tender of services, and was consequently not in contempt of court.

Unfair Discrimination

In terms of a collective agreement between SA Airways and the Airline Pilots Association pilots over 60 years were paid less than younger pilots. The Labour Court found, in *Jansen van Vuuren v SA Airways (Pty) Ltd & another* (at 1749), that discrimination could not be justified by a collective agreement or any other agreement. It found that parties cannot contract out of the fundamental rights and protections, and that any contractual term which violates constitutional rights is contrary to public policy and unenforceable. The court found that SAA had unfairly discriminated against the applicant pilot on the basis of his age and ordered it to pay him the amount he would have earned had the agreement not been in place.

Strike — Essential Services Workers

In *Attorney General v Botswana Landboards & Local Authorities Workers' Union & other* (at 1875) the Botswana Court of Appeal extensively surveyed statutory and judicial authority, international instruments and foreign authority on the right to a hearing before dismissal of public service employees and essential

services employees. It found that, in the case of essential services workers who had participated in an unlawful strike in Botswana, there was no absolute right to a hearing before dismissal. Dismissal without a hearing was permissible provided a proper ultimatum had been issued to the striking workers.

Strike — Unprotected Strike

Where the Labour Appeal Court had ruled that a strike by TAWUSA's members employed by the respondent company in respect of certain demands was prohibited and the union's members had nonetheless embarked on a strike on those prohibited demands, the Labour Court found their subsequent dismissal not to be automatically unfair or unfair (*Transport & Allied Workers Union of SA & others v Unitrans Fuel & Chemical (Pty) Ltd* at 1785).

Dismissal – Latecoming

In *Williams and Diesel-Electric Cape (Pty) Ltd* (at 1870) a bargaining council arbitrator found that the employee's dismissal for continuously coming to work late was unfair. The employer had failed to consider the nexus between the employee's misconduct and his underlying medical condition which required him to use unreliable public transport to get to work. The employer was aware of the employee's medical condition and should have accommodated him in some way. The arbitrator ordered that the employee be reinstated with limited backpay.

Retrenchment

In *Welch v Kulu Motors Kenilworth (Pty) Ltd & others* (at 1804) the Labour Court found that the true reason for the applicant employee's retrenchment was not the transfer of the respondent company as a going concern, but the operational requirements of the company. It found further that the reason for the closure of the business and the transfer of certain assets and employees to another company was that the business was trading in insolvent circumstances. The court noted that there is no principle that requires shareholders or directors of an increasingly insolvent company to fritter away their own resources to keep the entity afloat. And it was not for the court to interfere with a reasonable decision by a shareholder to consolidate his losses, even if this had the effect of the closure of the business.

Warnings

In unfair dismissal proceedings the employee contended that the previous warnings relied on by the employer had all expired by the time of his dismissal. The bargaining council arbitrator, having concluded that the employee had been guilty of insubordination, found that the employer was permitted to make use of expired warning to prove that it had complied with progressive discipline. The arbitrator confirmed that there was no absolute rule about the status of lapsed warnings as long as the employer dealt with the warnings consistently in the workplace. A final warning warned an employee that he was on the verge of dismissal and that any future transgression would leave the employer with little choice but to dismiss him. The imposition of any punishment less than dismissal would be at odds with the very purpose of punishment. The arbitrator, therefore, upheld the dismissal (*National Union of Metalworkers of SA on behalf of Zwane and Maksal Tubes (Pty) Ltd* at 1860).

Jurisdiction

In *Mphage & others v SA Municipal Workers Union* (at 1764) the applicant shop stewards approached the Labour Court to have their suspensions by their union set aside. The court ruled that it did not have jurisdiction as the dispute between the parties did not concern employment or labour relations. In *Public Servants Association on behalf of Liebenberg v Department of Defence & others* (at 1769) the court

found that the LAC judgment in *Public Servants Association of SA on behalf of De Bruyn v Minister of Safety & Security & another* (2012) 33 *ILJ* 1822 (LAC) made it clear that, in a case such as the one before it, where the employee and her union were dissatisfied with the employer's refusal to grant temporary incapacity leave and the procedure for granting or refusing such leave was governed by a collective agreement, her remedy lay in the referral of a dispute over the application of the agreement to the bargaining council in terms of s 24 of the LRA 1995.

In *Panayan and Matrix Investments t/a Vodacom 4U (Pty) Ltd* (at 1830) a CCMA commissioner found that an earlier jurisdictional ruling by another commissioner in an application for rescission was not a ruling on jurisdiction but rather a set of directives to the parties in the normal administrative course of business. The commissioner was therefore entitled to rule on and grant the rescission application. A police officer had resigned on the instruction of the SAPS as part of the cover for covert intelligence operations into corruption in the service. When he was refused promotion and approached the SSSBC in unfair labour practice proceedings, the SAPS denied that an employment relationship existed. The arbitrator had little hesitation in ruling in favour of the employee. Having noted that the employee had been subjected to an unnecessary indignity in having to argue that he was employed by SAPS, the arbitrator ruled that the council had jurisdiction to hear the matter (*Naidoo and SA Police Service & another* at 1855).

Local Government — Acting Manager

The Labour Court, in *SA Municipal Workers Union on behalf of Monyama & others v Greater Tzaneen Municipality & others* (at 1781), noted that s 56(1)*(c)* of the Local Government: Municipal Systems Act 32 of 2000 stipulates that a municipal council can appoint an acting manager for a period not exceeding three months and that an acting period can be extended only with the approval of the MEC for Local Government for a further period of three months. Moreover, in terms of s 56(3) a municipality must advertise a manager's post nationally. It noted further that s 56A(1) prohibits the appointment of a person to act in a manager's position if that person hold an office in a political party. The court found that the municipality had failed to comply with the provisions of s 56 and s 56A when it had appointed the third respondent, a member of the national executive council of the African National Congress Youth League, to act for a period of over a year and had recently resolved to extend his acting appointment for a further period. The acting appointment of the third respondent was consequently null and void, and the court interdicted him from continuing in the acting position.

Legal Representation before the CCMA

In *Khunoa and African Security Solutions Gauteng (Pty) Ltd* (at 1824) a CCMA commissioner had to determine the current status of rule 25(1)*(c)* of the CCMA Rules, bearing in mind that, whilst the High Court had declared the rule to be invalid, the declaration of invalidity had been suspended for 36 months. The High Court had found the rule to be inconsistent with the Promotion of Administrative Justice Act 3 of 2000 and, as a commissioner conducting an arbitration was performing an administrative function, he was required to exercise a discretion whether or not to grant legal representation. The commissioner, therefore, found it appropriate to apply the test set out in s 3(3)*(a)* of PAJA instead of rule 25(1). His enquiry was thus whether the matter was sufficiently 'serious and complex' to warrant legal representation.

Quote of the month

Van Niekerk J in *Welch v Kulu Motors Kenilworth (Pty) Ltd & others* (2013) 34 *ILJ* 1804 (LC) para 33:
'There is no principle which requires shareholders or directors of an increasingly insolvent company to fritter away their own resources to keep the entity afloat. It is not for this court to interfere with a reasonable decision by a shareholder to consolidate his losses, even if that has the effect of the closure of a business.'