INDUSTRIAL LAW JOURNAL MONTHLY PREVIEW

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Dear *Industrial Law Journal* Subscriber,

We take pleasure in presenting the August 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.

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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

Dismissal for Insubordination

The Supreme Court of Appeal has dismissed an appeal by the employee parties in *National Union of Public Service & Allied Workers on behalf of Mani & others v National Lotteries Board* from a decision of the Labour Court. The Labour Court found that their dismissal for insubordination to have been justified and fair after publicly calling for the resignation or dismissal of their CEO. The SCA found that their actions amounted to willful defiance of their employer and its CEO and a refusal to accept his authority, and did not accept that they were merely exercising their constitutional right to freedom of expression and demonstration.

Settlement Agreements

In *SA Municipal Workers Union & others v City of Johannesburg Metropolitan Municipality* (at 1944) on appeal, the Labour Appeal Court has refused to rectify the terms of a settlement agreement in which the parties set out the terms of settlement of a long-standing dispute over the employees' continued right to payment of a 'locomotion allowance' after the employees were promoted and placed on an all-inclusive remuneration package. The employees contended that the agreement did not reflect the true agreement between the parties, which was that the payments should continue. The LAC observed that a party seeking rectification must show facts entitling it to relief in the clearest and most satisfactory manner, and found that in the case before it the employees had failed on a balance of probabilities so show that it was the common intention of the parties that the allowance should continue to be paid.

In *Cook4Life CC v Commission for Conciliation, Mediation & Arbitration & others* (at 2018) the employer party asked the Labour Court to set aside a finding by the CCMA on the validity of a settlement agreement, contending that only the courts could pronounce on the validity of such agreements. Relying on the principles set out in *Bombardier Transportation (Pty) Ltd v Mthiya NO & others* (2010) 31 *ILJ* 2065 (LC), the court found that where the employee party claimed that the agreement had been induced by duress, and that he had actually been dismissed, the CCMA was empowered to pronounce on the agreement as part of its jurisdiction to determine the existence of a dismissal. In *Fakude & others v Kwikot (Pty) Ltd* (at 2024) the court reiterated the general principle that a trade union has authority to take decisions to settle disputes on behalf of its members without necessarily obtaining the members' prior consent, even if the terms of the settlement may be to the detriment of a minority of the members. A promise to re-employ an employee who was not included in an agreement made in full and final settlement of a dispute was held in *Maetisa v Pernod Ricard SA Ltd* (at 2044) to be of no force and effect, the agreement having the effect of *res judicata* and providing an absolute defence to the employees' original cause of action. In *National Education Health & Allied Workers Union on behalf of Nkoana and SA Nursing Council* (at 2154) the CCMA commissioner held that he had jurisdiction to interpret a settlement agreement and that, where a dispute had been settled at conciliation supposedly 'in full and final settlement', but where the employee had recorded his right to refer a fresh dispute in certain circumstances, the agreement was not in full and final settlement and the employee was entitled to refer a fresh dispute.

Strikes and Strike Issues

In *Chemical Energy Paper Printing Wood & Allied Workers Union & others v CTP Ltd & Another* the Labour Court examined the requirements of s 64(1) and s 66(1) of the LRA in relation to a strike called by workers employed in one division of an employer's undertaking in support of demands made by those employed in another division. Although both the employer and union parties regarded the supporting strike as secondary, the court found that it was actually a primary strike, because it was in respect of the same demand in which all employees had a direct interest. Further, the strike was protected and the

union was entitled to call out its members at other branches or divisions without having separately to refer a dispute on their behalf to conciliation.

Mxalisa & others v Dominium Uranium & another (at 2052) concerned a violent strike by employees who had lost confidence in their recognized trade union, with which their employer normally negotiated, and demanded that the employer negotiate instead with a crisis committee that they had set up. The employer refused that demand and dismissed the employees. The Labour Court found that both employer and employees were bound by the recognition agreement in terms of s 200 of the LRA, that the strike was unprotected and that in view of the violence involved the strikers' summary dismissal was justified. The employer party in *SA Transport & Allied Workers Union & Another v Three Flames Investment CC* (at 2093) employed by a sister close corporation and also that he was not a member of the Union that called the strike. The court held the employer to be estopped from denying the employment relationship and that, so long as the worker could show that he was an employee, it was not necessary for him to prove membership of the applicant union. All employees employed by that employer were entitled to embark on strike action in support of the union's demands against it.

Picketing Rules

In *Consolidated Workers Union of SA on behalf of Individual Applicants v Commission for Conciliation, Mediation & Arbitration & others* a CCMA commissioner had established picketing rules for certain striking employees in terms of s 69(5) of the LRA at the instruction of the Labour Court. The rules so framed prohibited picketing outside the employees' workplace and only allowed picketing outside the offices of their nominal employer, a TES. On an application to review the rules the court held that it had jurisdiction in terms of s 158(1)*(g)* of the LRA, and that the commissioner's failure to give reasons for them constituted a reviewable irregularity. The rules were remitted for reconsideration. The employer party in *SA Airways v SA Transport & Allied Workers Union & others* (at 2064) made a similar application in terms of s 69, but the commissioner found that she lacked jurisdiction to establish rules because there was no pending or threatened strike at the time. On review the Labour Court upheld this view, and considered the purpose of s 69, and the jurisdictional facts necessary to enable a commissioner to establish picketing rules.

Termination of Collective Agreements

The Labour Court held in *SA Federation of Civil Engineering Contractors & Another v National Union of Metalworkers of SA & others* (at 2084) that a collective agreement entered into for an indefinite period may be terminated by one party on giving reasonable notice to all other parties. What would be 'reasonable' would depend on the nature of the agreement and the facts and circumstances of the particular case. In *United Association of SA & Another v BHP Billiton Energy Coal SA Ltd & another* (at 2118) the court held that the CCMA has exclusive jurisdiction to determine the lawfulness of the termination of a collective agreement, the court itself only having jurisdiction to grant interim relief. The court granted an interim indict to prevent the employer from increasing the threshold for recognition of union rights from 15% to 30% in terms of a collective agreement pending the CCMA's determination of a dispute regarding the termination of that agreement.

Agreements in Restraint of Trade

In *Shoprite Checkers (Pty) Ltd v Jordaan & another* (at 2105) the Labour Court reviewed recent court decisions on the enforcement of restraint of trade agreements, and noted the need to balance two primary policy considerations, namely, that parties should comply with their contractual obligations, and

that all persons should be free to be productive and to engage in trade. In the case before it the court was satisfied that the employer had trade secrets and other interests worthy of protection. The employer had also offered the employee alternative employment in the town to which she was moving after leaving her employment which would allow her to continue her career without breaching the restraint. The restraint was therefore found to be enforceable, but the period of restraint was reduced from 24 months to 12 months.

Unfair Labour Practices and Dismissals

The commissioner in *Bessie and University of KwaZulu-Natal* (at 2130) found the suspension of an employee on full pay for more than five months pending finalization of a disciplinary enquiry into his alleged misconduct to be unduly long and punitive in effect, and ordered his reinstatement and payment of compensation. Similarly, in *Themba and African Meter Reading* (at 2159) the commissioner distinguished between preventive and punitive suspension, and held that suspension pending disciplinary action should only occur where there were *prima facie* grounds for believing the employee to be guilty of serious misconduct. Unpaid suspension for an indefinite period amounted to an unfair labour practice, warranting compensation. The employee party in *Jantjies and Barloworld Handling* (at 2165), who claimed to have been unfairly demoted when returned to his former post after being appointed to a higher post in an acting capacity, was found not to have been permanently appointed to the higher position, and therefore not demoted when returned to his original post.

In *Bleeker and Motau* (at 2139) an employee who had been unfairly dismissed, but who had refused a genuine offer of reinstatement, was held not to be entitled to compensation, the commissioner finding that she had only herself to blame for any financial loss. The arbitrator in *Louw and Sabcool (Pty) Ltd* (at 2170) had to consider whether an employment relationship had ever arisen in a dispute in which the worker claimed to have been dismissed, but where the employer denied ever offering employment. After considering the evidence for both parties he concluded that an employment relationship had arisen and had been unfairly terminated by the employer.

Disciplinary Code and Procedure

The Labour Court once again considered the standard of procedural fairness required by the LRA 1995 in the conduct of internal disciplinary hearings in *Kelly Group Ltd v Khanyile & others* (at 2035). Applying the less stringent requirements set out in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation & Arbitration & others* (2006) 27 *ILJ* 1644 (LC), the court found nothing untoward about chairperson probing statements made by witnesses or pursuing a line of enquiry to uncover a relevant factual issue, nor in obtaining additional evidence, provided the employee was given the chance to deal with it. In *Mthetho and P A Lochner t/a Squeeza* (at 2143) the employee of a small employer with only four employees was dismissed without any formal disciplinary enquiry but was offered the opportunity to present a written statement motivating why he should not be dismissed. He rejected the offer and referred a dispute to the CCMA. The arbitrating commissioner found that the employee had been afforded a chance to state his case and that the procedure adopted was acceptable and fair.

Stay of Award Pending Review

In an application by the employer party in *Cape Clothing Association v De Kock NO & others* (at 1957) to stay the implementation of an arbitration award pending the hearing of its application for review, the Labour Court, applying the principles applied to the stay of warrants of execution, found that the

employer would suffer no irreparable harm if the award were implemented, while the employees would clearly suffer prejudice if it were not. The employer's application was therefore refused.

Practice and Procedure

In *Chemical Energy Paper Printing Wood & Allied Workers Union & others v CTP Ltd & another* (at 1966) the Labour Court considered the principles applicable to the withdrawal of an admission made at a pretrial conference, and refused on the facts to allow the party in question to resile from the pretrial agreement. Where in court proceedings a trade union official appeared to represent a deregistered union, knowing that by doing so he acted improperly, the court in *Mageu Number One (Pty) Ltd v United People's Union of SA on behalf of Members & others* (at 2048) awarded costs against the official in his personal capacity.