



INDUSTRIAL LAW JOURNAL MONTHLY PREVIEW

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Dear *Industrial Law Journal* Subscriber

We take pleasure in presenting the September 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

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HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Limitations on the Right to Strike

In 2010 the Labour Court found that, where the constitution of an industry's bargaining council prohibited plant-level bargaining, employees in that industry who persisted in taking strike action over a demand for increased wages made at company level were engaged in an unprotected strike, and that their dismissal was not automatically unfair. On appeal to the Labour Appeal Court in *SA Clothing & Textile Workers Union & others v Yartex (Pty) Ltd t/a Bertrand Group* (at 2199) the employees argued that their strike was in fact protected as the council's constitution did not specifically prohibit strike action as required in terms of s 65(1)(a) of the LRA. The LAC held the council's constitution to be a collective agreement within the meaning of s 65, and that its aim was to avoid fragmenting the bargaining process and ensure uniformity in the industry.

Section 65 had to be interpreted to give effect to that purpose, and the court below had correctly held that the strike was not protected. The Labour Court also considered the requirements for a protected strike in *Concor Projects (Pty) Ltd t/a Concor Opencast Mining v Commission for Conciliation, Mediation & Arbitration & others* (at 2217) where an employer refused to bargain with a non-party trade union over matters provided for in an agreement promulgated as a wage determination in terms of the BCEA. The court held that the determination did not prevent the union from embarking on protected strike action, but that the refusal to bargain should have been referred to advisory arbitration in terms of s 64 of the LRA.

Determination of Employment Relationship

In *Kambule v Commission for Conciliation, Mediation & Arbitration & others* (at 2234) the Labour Court considered the established criteria for determining the existence of an employment relationship and noted that the test is a qualitative one and not determined simply by comparing the number of indicators for and against in any particular case. In respect of the case before it the court found a radio broadcaster with his own programme to be an independent contractor and not an employee of the radio station.

In *Langa v SA Local Government Bargaining Council (Mpumalanga) & others* (at 2248) the court found that an applicant's signing of a letter of appointment had established an employment relationship between her and the respondent municipality, even though she failed to provide proof that she had the experience necessary to meet the requirements for the post. The employer was not entitled simply to withdraw her appointment on account of that failure. However, in *Retlaobaka v Lekwa Local Municipality & another* (at 2320) the court held that a municipal employee who had signed an employment contract appointing him as chief financial officer had not been validly appointed to that position because the contract did not comply with the requirements of the Local Government: Municipal Systems Act 32 of 2000. The applicant MEC in *Member of the Executive Council, Free State Provincial Government: Tourism, Economic & Environmental Affairs v Moeko & others* (at 2256) was found to be the employer of the CEO of the Free State Gambling & Racing Board in terms of the Free State Gambling and Racing Board Act 6 of 1996, and not the board itself.

Employment Equity Act 55 of 1998

Where the SAPS' interpretation and implementation of its employment equity plan had resulted in the complete exclusion of Indian women from advancement within the higher ranks of the SAPS in certain areas, the Labour Court found in *Naidoo v Minister of Safety & Security & others* (at 2279) that the plan was not consistent with the purpose of the Employment Equity Act or of the Constitution, and that it





discriminated unfairly against an Indian female employee on the grounds of her race and gender. The SAPS was ordered to grant the requested promotion.

Proof of Dismissal

In *Botha v Commission for Conciliation, Mediation & Arbitration & others* (at 2212) the Labour Court endorsed the finding by a CCMA commissioner that an employee who had merely refused to relocate to another area to perform her duties had not been dismissed, and that the contract between the parties remained intact. The employee's claim for unfair dismissal was accordingly dismissed. Similarly, in *Sithole and Solway Precision Engineering CC* (at 2417) the arbitrator dismissed a claim for unfair dismissal where an employee had been absent without leave for an extended period, but where the employer denied having dismissed him. There was nothing in law to prevent the employee from reporting for duty, nor the employer from then taking appropriate disciplinary action.

Abscondment and Desertion

In *Mpact Ltd v National Bargaining Council for the Wood & Paper Sector & others* (at 2266) and again in *Tubatse Chrome (Pty) Ltd v Metal & Engineering Industries Bargaining Council & others* (at 2333) the Labour Court found that it was not unfair for an employer to dismiss an employee for presumed desertion when the employee had been absent without explanation beyond the maximum period stipulated in the employer's disciplinary code, provided the employee was given the opportunity to explain his or her absence if he or she did return. In the *Tubatse* decision, in which the employee had absented herself in order to consult a sangoma, the court distinguished the situation from that in *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others* (2012) 33 ILJ 2812 (LAC), finding that there was no evidence of any urgency in her undertaking the consultation, and that the employee should have sought authorization from her employer before leaving her work. In *Building Construction & Allied Workers Union on behalf of Zondi and Kusile Civil Works Joint Venture* (at 2395) the applicant employee similarly absented himself beyond the limits prescribed in the employer's disciplinary code in order to seek treatment from a traditional healer. In that case the arbitrator found that there were mitigating circumstances and followed the *Kievits Kroon* decision, finding that the sanction of dismissal was too harsh.

Terms and Conditions of Employment

The Labour Court refused in *Du Randt v Ultramat SA (Pty) Ltd & another* (at 2228) to grant the applicant a final interdict to prevent the respondent employer implementing what the employee alleged to be a unilateral change to his terms and conditions of employment, finding that he had a clear alternative remedy available to him by referring an alleged demotion as an unfair labour practice dispute to the CCMA in terms of s 186(2)(a) of the LRA.

Disciplinary Code and Procedure

In *Moonsamy and Quality Products* (at 2386) the employer had been aware for five months of serious complaints which had been made against an employee, but only took disciplinary action against him when it decided to add that charge to other allegations of misconduct that had arisen later. The arbitrator held that disciplinary action must be implemented expeditiously as a matter of first resort. It could not be held back and then added to other charges. The earlier charge should not have been brought. The arbitrator in *Solidarity on behalf of Van den Berg and Evraz Highveld Steel & Vanadium* (at 2422) considered when it would be appropriate to hold a second disciplinary enquiry into an employee's alleged misconduct, and concluded that it would only be appropriate where the first hearing was not a proper hearing, or where the second hearing related to a different offence. In the case before him the arbitrator





found that the employee had been subjected to double jeopardy, and his dismissal was unfair. Two employees in *National Union of Mineworkers on behalf of Malaza and Assmang Chrome Machadodorp Works (Pty) Ltd* (at 2407) had been dismissed for the same misconduct, but while the first was still on a final warning for similar misconduct the second had a clean disciplinary record. The arbitrator found that the employer had acted inconsistently and should have taken their differing circumstances into account when imposing the sanction of dismissal.

The Review of Arbitration Awards on the Ground of Bias

The employee party in *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman NO & others* (at 2347) were dismissed for misconduct, but before the CCMA the commissioner concluded that the dispute related not to misconduct but to poor performance, and that the dismissal was unfair. On review the Labour Court found that the commissioner had misdirected herself by determining a dispute not placed before her. Further, the court *mero motu* considered the conduct of the commissioner during the hearing and, after considering the extent of the licence granted to commissioners in terms of s 138(1) of the LRA to conduct arbitration proceedings as they deem fit, found that she had descended into the arena and had shown bias in favour of the employee. The court emphasized its supervisory role over the work of arbitration bodies and, after considering the facts, set aside the award. Similarly, in *Southgold Exploration v Commission for Conciliation, Mediation & Arbitration & others* (at 2327) the commissioner was found to have formed a biased opinion against the employer party and to have failed to apply his mind to the evidence before him. In a matter before the Labour Court of Namibia, *Namura Mineral Resources (Pty) Ltd v Mwandingi & others* (at 2429), the court restated the general principles relating to bias and recusal and found that an arbitrator's refusal to recuse himself after a formal application to do so amounted to an irregularity warranting the setting aside of his award.

Enforcement of Settlement Agreement

The employee party in *Ulster v Standard Bank of SA Ltd & another* (at 2343) claimed that when, during the course of arbitration before the CCMA, she signed an agreement settling her unfair dismissal claim she did so under duress, and applied to the Labour Court to set it aside. The court noted that it had jurisdiction to review an agreement which had been made an arbitration award in terms of both s 145 and s 158(1)(f) of the LRA, but found that on the facts before it the employee was fully aware of what she was agreeing to and had not been coerced into entering into the settlement agreement.

Practice and Procedure

On review in *Member of the Executive Council, Free State Provincial Government: Tourism, Economic & Environmental Affairs v Moeko & others* (at 2256) the Labour Court found that a CCMA commissioner had committed a gross irregularity by substituting one legal entity for another as the employer of the respondent employee without any formal application on notice to the other party as required by rule 26(6) of the CCMA Rules.

Quote of the Month:

Shaik AJ in *Naidoo v Minister of Safety & Security & others* (2013) 34 ILJ 2279 (LC):

'Despite the laudable purposes of affirmative action, employees are not called upon to rest their hopes on a wing and a prayer and be deferential to the equity plans of their employers. They are invited to participate in the development of equity plans and forge an acceptable compromise that is appropriate to the situation that prevails at any given time.' personal capacity.

