



# INDUSTRIAL LAW JOURNAL MONTHLY PREVIEW

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**Dear *Industrial Law Journal* Subscriber**

We take pleasure in presenting the December 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.

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Please forward any comments and suggestions regarding the *Industrial Law Journal* preview to the publisher, Anita Kleinsmidt, [akleinsmidt@juta.co.za](mailto:akleinsmidt@juta.co.za)

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We welcome your feedback

**Kind regards**

**Juta General Law**





## HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

### Liability of Trade Union to its Members

In *Food & Allied Workers Union v Ngcobo NO & another* (at 3061) the Constitutional Court has unanimously upheld earlier decisions of the Supreme Court of Appeal, and the High Court, both of which held FAWU to be liable to its members in damages after it failed in its undertaking to pursue their claim for unfair dismissal timeously, and failed to seek condonation for the late referral of their dispute to the Labour Court. The CC rejected the union's argument that it enjoyed special protection under the Constitution and the Labour Relations Act 1995 against such claims, and that the parties had tacitly agreed that it could lodge its members claim at any time, even after expiry of the 90-day time-limit for the lodging of claims. The court found the union's contentions to be entirely without merit and dismissed its application for leave to appeal.

### Temporary Employment Services

The Supreme Court of Appeal has now in *National Union of Metalworkers of SA & others v Abancedisi Labour Services* (at 3075) overturned the earlier decision of the Labour Appeal Court in *National Union of Metalworkers of SA & others v Abancedisi Labour Services CC* (2012) 33 ILJ 2824 (LAC), and has found that the respondent labour broker did indeed dismiss those of its employees who had been placed with a client after the client excluded them from its premises. Although the employees remained nominally on the broker's books it did not pay them and made no effort to secure them alternative work. The SCA found that nothing resembling an employment relationship remained between the parties and that the employees had been unfairly dismissed.

### Reinstatement

On appeal the Labour Appeal Court in *De Beer v Minister of Safety & Security & another* (at 3083) upheld the finding by the court below that it had no jurisdiction to grant an employee interim reinstatement on a 'semi-urgent' basis, unless the dispute had first been referred for conciliation. The court held that reinstatement is a final remedy and that the LRA 1995 does not provide for 'semi-urgent interim relief'. It further found that the employee had attempted to 'leapfrog' the procedural requirements of the Act. In *First National Bank—A Division of First Bank Ltd v Language & others* (at 3103) the LAC allowed an appeal from a decision of the Labour Court, which had refused to set aside a CCMA award reinstating an employee who had been dismissed for reversing bank charges on his own personal account without authority. Although the employee's dismissal was not fair his conduct following his dismissal was relevant in determining whether he should be reinstated. His behaviour had been vexatious and ill-tempered during court proceedings and the LAC found that reinstatement was not appropriate. Compensation was awarded instead.

### Protected Disclosures Act 26 of 2000

The applicant in *Lowies v University of Johannesburg* (at 3232) claimed that he had been automatically unfairly dismissed for making a protected disclosure in terms of the PDA 2000. After traversing the history of the claim the Labour Court dismissed it with costs on a party and party scale, finding that the activity disclosed was not corrupt or fraudulent and that the claim had not been made in good faith. An employee who had been retrenched during a restructuring process claimed in *Magagane v MTN SA (Pty) Ltd & another* (at 3252) that she had been selected for retrenchment because she had disclosed an impropriety by a senior employee. The court found the disclosure to be protected, but that the employee would have been correctly dismissed for operational reasons even if she had not made the disclosure, and that there was no evidence linking the disclosure with the dismissal. The retrenchment was, however, procedurally unfair. In *Van Alphen v Rheinmetall Denel Munition (Pty) Ltd* (at 3314) the





employee sought a final interdict to prevent her employer from taking disciplinary action against her for making what she regarded as a protected disclosure. The court found that if the disclosure was protected, then disciplinary action would clearly be an occupational detriment. However, it further found that her complaint, which concerned the poor performance of fellow employees and a failure to deal with customer complaints, did not amount to the disclosure of criminal or other irregular conduct as contemplated by the PDA, and that she had an alternative remedy at the CCMA. The application was therefore dismissed.

## Constructive Dismissal and the Jurisdiction of the CCMA

In two decisions involving the alleged constructive dismissal of an employee the Labour Court has, on review, had to consider whether the CCMA's jurisdiction to hear the dispute was founded on the existence or otherwise of a dismissal. In *Conti Print CC v Commission for Conciliation, Mediation & Arbitration & others* (at 3169), the court had reference to earlier case law on the issue, certain of which appeared to indicate that this was the case, and in particular to the decision in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others* (2008) 29 ILJ 2218 (LAC), in which the LAC stated that whether there had been a dismissal was an issue that went to the jurisdiction of the CCMA. The court declined to follow *SA Rugby Players*, noting that the CCMA derives its jurisdiction from the LRA 1995 and that nothing in that Act provides that it has jurisdiction only when a dismissal is established. Whether an employee could prove his or her claim was independent of the question of jurisdiction. This in turn led the court to find that, on review, the test was not an objective one but the reasonable decision maker test formulated in *Sidumo*. Adopting this test the court found that the commissioner's finding, namely that the employee had been constructively dismissed, was not one that a reasonable decision maker could not reach, and so dismissed the review.

In *Distinctive Choice 721 CC t/a Husan Panel Beaters v Dispute Resolution Centre (Motor Industry Bargaining Council) & others* (at 3184) the court held that it was bound by the decision in *SA Rugby Players* and that the test on review was whether the arbitrator had jurisdiction to entertain the dispute on the facts. The court further found that where a finding on a jurisdictional fact was challenged the court could receive fresh evidence on the matter. After an extensive review of the history and development of the law on constructive dismissal the court found on the evidence that the employee had not been dismissed.

In *Majatladi v Metropolitan Health Risk Management & others* (at 3282) an employee who justifiably refused to comply with an instruction which amounted to a unilateral variation of her contract of employment, was called on two occasions to face disciplinary action for insubordination and for failing to obey a reasonable instruction. The court found that she had been constructively dismissed when she resigned before the second hearing.

## Automatically Unfair Dismissal — Compensation

The applicant workers in *SA Transport & Allied Workers Union on behalf of Rune & others v Bosasa Security (Pty) Ltd* (at 3305), who were taking part in a nationwide protected strike, were dismissed for being absent for three shifts without their employer's permission. The Labour Court found their participation in the strike to be the most likely cause of their dismissal, and that it was automatically unfair in terms of s 187(1)(a) of the LRA. Although they found new jobs within six months the court awarded them 15 months' compensation to express its disapproval of the employer's action.

## Transfers in the Public Service

In *Minister for Public Service & Administration & another v Kaylor* (at 3111) the Labour Court had set aside a directive ordering the relocation of a public servant to Pretoria without consultation, and had ordered the employer to consult with the employee for appointment to a suitable alternate position in Cape Town. On appeal the Labour Appeal Court agreed that the directive had to be reviewed, but that the court below had overreached itself by making its order so specific. The order was replaced by one simply requiring consultation with regard to a suitable position.





## Employment Relationship

The commissioner had to consider in *Hutton and Tenova Minerals (Pty) Ltd* (at 3334) whether a worker who had been transferred to the respondent as part of the transfer of a business as a going concern, and had then signed a series of fixed-term contracts agreeing to devote 15 days a month to the respondent in return for a fee, was in fact an employee and, if so, whether he had a reasonable expectation of the contracts being renewed. After analysing the true nature of the contracts the commissioner concluded that he was an employee in spite of certain provisions designed to avoid income tax, but that there was no suggestion of a renewal after the expiry of the final contract.

In *National Bargaining Council for the Clothing Manufacturing Industry (KZN Regional Chamber) and Hot Chilli Worker Primary Co-operative Ltd* (at 3377) the respondent factory claimed that it operated as a worker cooperative and, as such, was not required to register with the applicant bargaining council and to comply with its minimum wage rates and other agreements. The arbitrator considered the history of the formation of the cooperative after the closure of the original business by its owner and concluded that it had been formed principally to avoid the need to register with the council, and so make the factory more competitive. The requirements of the Co-operatives Act 14 of 2005 had not been met and, apart from the three directors, the workers did not enjoy the benefits of a cooperative, and could not be said to be joint owners of the business assets. They were rather employees and the business was obliged to register with the council.

## Dismissals — Fair and Unfair

The dismissal of a probationary employee for poor work performance before the expiry of his probationary period was found to be fair in *Grobbelaar and KH Diesel Electric CC* (at 3328), the CCMA commissioner finding that she should accept reasons that were 'less compelling' in respect of such employees. In *United Chemical Industries Mining Electrical State Health & Aligned Workers Union on behalf of Ngwenya and Efficient Engineering* (at 3400) the arbitrator decided that where an employee had been in prison for over a year, his dismissal on the ground of incapacity was substantively fair. The commissioner in *Van der Merwe and Agricultural Research Council* (at 3366) ordered the reinstatement of an employee who had been dismissed for incompatibility, finding that the employer had to make some genuine effort to improve interpersonal relationships with an employee whose work was otherwise satisfactory, and to afford the employee a chance to make amends. Retrenchment The CCMA held that it had jurisdiction to arbitrate a dispute regarding the retrenchment of a single employee in *Mboyi and National Urban Reconstruction & Housing Agency* (at 3344) even though other employees had also been retrenched. The wording of s 191(12) of the LRA refers to a 'consultation procedure which applies to a single employee', and the applicant had been consulted singly and in her individual capacity.

## Unfair Labour Practice — Benefits

The employees in *SA Commercial Catering & Allied Workers Union on behalf of Skosana & others and Triptru (Pty) Ltd t/a Denneboom Station Pick 'n Pay* (at 3356) claimed before the CCMA that their employer had committed an unfair labour practice by failing to pay them an annual bonus, payable in terms of a collective settlement agreement. The commissioner concluded that the annual bonus did constitute a 'benefit' as contemplated in s 186(2)(a) of the LRA, but that the employer was unable to pay it because it was in genuine financial difficulties. It had consulted fairly with the employees over ways to avoid retrenchments, and its failure to pay did not amount to an unfair labour practice.

## Severance Pay

The CCMA ordered the employer to reinstate a retrenched employee with full backpay in *Coca-Cola (Pty) Ltd v Ngwane & others* (at 3155). On review the Labour Court confirmed the award, and further ordered the employee to return the severance package paid to him following his unfair retrenchment.





## Disciplinary Penalty

The Labour Appeal Court dismissed an appeal in *National Union of Mineworkers on behalf of Selemela v Northam Platinum Ltd* (at 3118) from a review finding of the Labour Court, in which that court found an employee's dismissal for insubordination to have been justified. The LAC found that expired warnings for similar past misconduct could be taken into account as they showed the propensity of the employee to commit particular acts of misconduct.

## Legal Representation at Disciplinary Hearing

The court in *Dukada v MEC: Department of Provincial Planning & Treasury, Eastern Cape & others* (at 3220) set aside a ruling by the chairperson of a disciplinary hearing to grant both parties to the proceedings legal representation where the employee party could not afford to bear such legal costs and the employer party was able to select a representative from a wide range of potential representatives throughout the entire civil service. Trade Union Membership and Right to Representation at CCMA The Labour Court held in *National Union of Mineworkers on behalf of Mabote v Commission for Conciliation, Mediation & Arbitration & others* (at 3296) that an employee had an unfettered right to join a trade union and to be represented by a registered union in arbitration proceedings. The fact that the employee was employed in a sector not covered by the union's constitution was immaterial. The court held that this right was in line with the freedom of association guaranteed in the LRA, the Constitution and ILO Convention 87. In *Kalahari Country Club v National Union of Mineworkers & another* (at 3229) the same court granted the employer leave to appeal that decision, finding that the matter raised important issues and constitutional questions which required an answer.

## Practice and Procedure

In *Sondorp & another v Ekurhuleni Metropolitan Municipality* (at 3131) the Labour Court had refused the employees' application to amend their statement of claim, apparently due to their delay in making the application. On appeal the LAC noted that rule 28(10) of the High Court Rules confers a discretion on the court to grant or refuse an amendment to pleadings. This should be exercised with a degree of generosity. Although the application introduced certain new claims, the cause of action remained the same, and the appeal succeeded. The Labour Court granted an application to strike out certain paragraphs of the employee's founding affidavit in *Dukada v MEC: Department of Provincial Planning & Treasury, Eastern Cape & others* (at 3220) in compliance with rule 7(3)(c) of the Labour Court Rules.

## Quote of the Month:

Steenkamp J in *SA Transport & Allied Workers Union on behalf of Rune & others v Bosasa Security (Pty) Ltd* (2013) 34 ILJ 3305 (LC):

... [A]n award of compensation in cases of automatically unfair dismissal is not akin to damages or mere pecuniary loss. It goes further — it contains an element of solatium, and it is also designed ... 'to send a clear message to all employers, who may be tempted to dismiss employees for any of the prohibited reasons, that such conduct is totally unacceptable and would be met with severe disapproval by this court'.

