



## INDUSTRIAL LAW JOURNAL PREVIEW

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We take pleasure in presenting the March 2014 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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## HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

### Administrative Law — Public Service

Three years after the apparently irregular promotion of two public service employees, the Labour Court, and subsequently the Labour Appeal Court, granted an application by the MEC of the government department concerned to review the administrative acts of the officials who had promoted the employees. The courts found the promotions to have been irregular and set them aside, subject to certain conditions. The Constitutional Court has now in *Khumalo & another v Member of the Executive Council for Education: KwaZulu-Natal* (at 613) unanimously upheld an appeal by the two employees, and has found that the MEC's unreasonable and unexplained delay in bringing the application had non-suited her before the Labour Court, which should not have considered her challenge to the two appointments. The majority court found the true nature of the application to be one for judicial review under the principle of legality in terms of s 158(1)(h) of the LRA. Although there is no prescribed time-limit for launching such a review either under s 158(1)(h), or under the Public Service Act (Proc 103 of 1994), the court found the three-year delay to be unjustified, and not to be condoned. Two members of the court considered that, in any event, the application did not fall under the LRA but was governed by the Promotion of Administrative Justice Act 3 of 2000, s 7(1) of which required that the application should have been made not later than 180 days after the MEC became aware of the decisions she sought to have reviewed.

Two public service employees in *Nothnagel & another v Karoo Municipality & others* (at 758) successfully applied to have pending disciplinary proceedings against them set aside. The Labour Court found that the appointment of the municipal manager, who had initiated the proceedings, had been declared null and void, and that all subsequent acts by him were therefore not legally valid.

### Dismissal for Unprotected Strike Action

The Labour Appeal Court in *National Union of Metalworkers of SA & others v CBI Electric African Cables* (at 642) considered the requirements to be met by an employer before dismissing employees for taking part in unprotected industrial action, bearing in mind that the mere illegality of the strike did not automatically render the dismissals fair. The employees had ignored both the employer's assurance that their complaint was being addressed, and an ultimatum warning them of the possibility of dismissal should they fail to complete their designated working shift. The LAC found their dismissal to be substantively fair, but also found it to be procedurally unfair because the employer had failed to engage with their union before issuing the ultimatum, or to afford the employees an opportunity to be heard after its expiry.

### Extra-territorial Jurisdiction of the Labour Courts

In *MECS Africa (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 745) the Labour Court considered whether it had jurisdiction to consider an employment dispute in which the employee had been recruited in South Africa by a TES to perform work for a client elsewhere. Following the LAC decision in *Astral Operation Ltd v Parry* (2008) 29 ILJ 2668 (LAC) the court held that it only had jurisdiction over a dispute that arose within South Africa's borders, but that as s 198 of the LRA stipulates that an employee is employed by a TES, not by its client, and as the TES conducted its business in South Africa, found that it had jurisdiction to hear the matter.

### Consultation Prior to Retrenchment

In *Forbes & others v SA Municipal Workers Union* (at 687) an employer with more than 50 employees decided to relocate its head office, and thereafter consulted unsuccessfully with those employees who did





terms of s 189A(13)(d) of the LRA on the ground that the retrenchments were procedurally unfair. The Labour Court found the wording and purpose of s 189A(13) to be to provide a procedure to force an employer to follow a proper consultation process before dismissal. The employees had raised no objection to the relocation of the head office, and in fact supported it. The consultations had been extensive and the fact that they did not lead to an agreement did not taint the procedure with unfairness.

### **Dismissal of Probationary Employee**

The Labour Court in *Ismail v B & B t/a Harvey World Travel Northcliff* (at 696) considered the requirements of the Code of Good Practice: Dismissal in relation to the dismissal for poor performance of a probationary employee who was the sole employee of a small partnership. The court noted that the code did not prescribe a strict formula for the nature of the training, evaluation and guidance to be given to the probationer. It was sufficient merely to identify her shortcomings and to provide an opportunity for her to rectify them. The termination had, in any event, been by mutual consent.

### **Other Unfair Dismissals**

The applicant employee in *Legobate v Quest Flexible Solutions & others* (at 738) was dismissed for posting criticism of his TES employer on the intranet at the invitation of his employer's client, and the CCMA found that the dismissal was fair. On review, the Labour Court noted that the client had initiated the ill-conceived process, that there was no indication that negative comments could result in discipline, and held that dismissal was not an appropriate sanction. The commissioner in *Matlhong and JS Corporate Security (Pty) Ltd* (at 790) considered the meaning of the terms 'incitement' and 'intimidation' and found no evidence that the employee party had been guilty of either form of misconduct, and that his dismissal for misconduct was unfair. Where the employee in *Mfebe and Strategic Liquor Services t/a BMP* (at 802) had deliberately disobeyed his employer's reasonable instruction, and challenged the employer's authority, the CCMA commissioner found his dismissal for insubordination to be fair.

In *Smit and Rawplug SA (Pty) Ltd* (at 814) the applicant resigned from his employment and then later, after negotiations with his employer, attempted to withdraw his resignation. The CCMA commissioner noted that there were conflicting versions of the circumstances of the resignation, and preferred the employer's version as being the most probable. A resignation could not be withdrawn without the employer's consent, and as no agreement had been reached on the matter the resignation stood, and there had been no dismissal. The arbitrator in *SA Transport & Allied Workers Union of behalf of Mosothoane and Transnet Freight Rail* (at 837) considered the legal requirements to prove a constructive dismissal, and found that an employee who had resigned after being transferred to another position against his wishes, but in accordance with his contract of employment, had not been constructively dismissed.

### **Residual Unfair Labour Practice — Benefits**

The CCMA commissioner in *Ngwanamoklane and Stallion Security (Pty) Ltd* (at 811) found that the withdrawal of a monthly allowance which had been paid to an employee for over a year amounted to an unfair labour practice relating to a benefit. However, in *National Union of Metalworkers of SA on behalf of Jooste and Atlantis Foundries (Pty) Ltd* (at 829) the arbitrator found that the withdrawal of an acting allowance to an employee after he was permanently appointed to a higher post did not amount to an unfair labour practice.

### **Restraint of Trade**

In *Jonsson Workwear (Pty) Ltd v Williamson & another* (at 712) the Labour Court had to consider whether an employee who left his employment and took up work with a competitor remained subject to a restraint of trade agreement entered into with his previous employer. The court enumerated the legal





that the employer had not shown that it had a protectable interest, and that enforcement of the restraint would be unreasonable.

### **Disciplinary Code and Procedure**

The Labour Court in *Carolissen v City of Cape Town & others* (at 677) granted an employee of the respondent municipality, who was facing disciplinary proceedings for financial misconduct, an order requiring the municipality to disclose to the employee particulars of a forensic report on which the charges against him were based. The report was not privileged and the information in it was required to enable the employee to prepare for the hearing. The court also considered the legal principles relating to bias, review, and the condoning of undue delay in the initiation of disciplinary proceedings.

### **Disciplinary Penalty**

In *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* (at 656) the appellant employer entered into a collective agreement which expressly conferred on the chairperson of a disciplinary enquiry the power to impose a final sanction for misconduct, and not merely a recommendation. When the chairperson later imposed a sanction that was short of dismissal the employer decided not to accept it and dismissed the third respondent employee. On appeal the Labour Appeal Court found that the collective agreement prohibited the employer from substituting its own sanction for that imposed by the chairperson, and that by doing so it had acted *ultra vires* the agreement. The Labour Court found in *Afrisix (Pty) Ltd t/a Afri Services v Wabile NO & others* (at 668) that the dismissal for misconduct of an employee who was already on a final written warning for the same offence was justified.

### **Review of Arbitration Awards**

The respondent commissioner in *Afrisix (Pty) Ltd t/a Afri Services v Wabile NO & others* (at 668) based his finding that the third respondent employee had been unfairly dismissed on an issue that was not raised during arbitration and on which he had not invited the parties to address him. On review the Labour Court found that the commissioner had exceeded his powers, and set his award aside.

### **Practice and Procedure**

In proceedings before the CCMA the commissioner had ruled that the proceedings be stayed and that the applicant should refer a contractual claim to a civil court or the Labour Court within 60 days. When the matter came before the Labour Court in *SA Commercial Catering & Allied Workers Union on behalf of Makubela v Development Bank of SA* (at 778) the court held that it was not bound by any rulings made by the CCMA, and that the claim was subject to the normal periods of prescription set by the Prescription Act 68 of 1969. The CCMA commissioner in *Smit and Rawlplug SA (Pty) Ltd* (at 814) allowed the transcript of a tape-recorded conversation between an employee and his employer to be led in evidence, finding that no right to privacy of the employee had been breached.

### **Costs**

The Labour Court in *Rudman v Maquassi Hills Municipality & others* (at 765) considered the rules of practice which have evolved over the years regarding awards of costs *de bonis propriis*, and awarded such costs on an attorney and client scale against a municipal manager and a firm of attorneys, both of whom it found had acted grossly improperly and without any authority.





**Quote of the Month:**

Skweyiya J in *Khumalo & another v Member of the Executive Council for Education: KwaZulu-Natal* (2014) 35 ILJ 613 (LC):

'Public functionaries, as the arms of the state, are further invested with the responsibility, in terms of s 7(2) of the Constitution, to "respect, protect, promote and fulfill the rights in the Bill of Rights". As bearers of this duty, and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. This is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration.'

