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We take pleasure in presenting the August 2014 issue of the monthly *Industrial Law Journal Preview*, authored by the editors of the *ILJ*: C Cooper, C Vosloo and L Williams-de Beer.

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HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Public Service Employees — Discharge by Operation of Law

In *Solidarity & another v Public Health & Welfare Sectoral Bargaining Council & others* (at 2105) the Supreme Court of Appeal considered whether a public service employee who, while on precautionary suspension, took up other employment was deemed to have been discharged by operation of law in terms of s 17(5)(a)(ii) of the Public Service Act (Proc 103 of 1994). The court held that he did not — the employee, although absent from duty, was not absent without permission but absent at the behest of his employer and, not having been assigned duties, could not 'absent himself from his official duties'. Furthermore, the employee's suspension relieved him of his obligation to render his services to his employer, and his only obligation in return for his salary was to make himself available should his suspension be lifted. Similarly, in *Department of Health v Public Health & Social Development Sectoral Bargaining Council & others* (at 2166), the Labour Court found that an employee who reported for work and performed his duties at a workstation not approved by the employer was not absent from work without authorization. The requirements for the deeming provision in s 17(5)(a)(i) of the Public Service Act to come into effect were not present, and the employee had been dismissed.

Where a public service employer refused to reinstate employees discharged by operation of law in terms of s 17 of the Public Service Act without providing reasons, the Labour Appeal Court found that the conduct of the employer was open to review under s 158(1)(h) of the LRA 1995 on the grounds of legality. The requirements of legality prevented the employees from being helpless pursuant to the employer's arbitrary decision. As no reasons were provided for the decisions taken by the employer, especially why the employees' continued employment would have been rendered intolerable, the decision of the employer had correctly been set aside by the Labour Court (*MEC for the Department of Health, Western Cape v Weder; MEC for the Department of Health, Western Cape v Democratic Nursing Association of SA on behalf of Mangena* at 2131). Similarly, in *Public Servants Association on behalf of Smit v Mphaphuli NO & others* (at 2260) the Labour Court found that it is an indispensable part of the judicial review system that a decision maker must give reasons for his or her decision. In the absence of reasons, the decision is irrational and unreasonable, and has to be set aside. This matter was remitted to the employer to consider the employee's representations and to give a reasoned decision.

When an employee of the SA Police Service failed to reconvene a postponed disciplinary hearing within the stipulated time period, the chairperson of the disciplinary hearing invoked the provisions of regulation 18 of the SAPS Discipline Regulations which provides for the deemed dismissal of an employee in such circumstances. The bargaining council arbitrator ruled that he did not have jurisdiction in an unfair dismissal referral because the employee had been discharged by operation of law. On review of the jurisdictional ruling, the Labour Court found that the decision of the disciplinary chairperson remained in force until challenged on review in terms of s 158(1)(h) of the LRA and set aside. It therefore found that the arbitrator had correctly ruled that the council did not have jurisdiction to entertain the dispute (*Public Servants Association on behalf of Lessing v Safety & Security Sectoral Bargaining Council & others* at 2254).

Retrenchment

The Labour Appeal Court has found that there is no justifiable reason why the selection criteria provisions of s 189(7) of the LRA 1995 should not apply to mass retrenchments in terms of s 189A. The two sections should be read together as they both apply to dismissals for operational requirements and have the same objective of 'meaningful joint consensus seeking'. It therefore makes no sense that parties can agree on selection criteria in a s 189 consultation but not in the case of a mass retrenchment. The court concluded that the parties in this matter had been entitled to agree on selection criteria. The court found, however, that the employer had not applied the agreed selection criteria, and this rendered the employee's retrenchment unfair (*Gijima AST (Pty) Ltd v Hopley* at 2115).

The Labour Court found, in *Ndhlela v Sita Information Networking Computing BV (Incorporated in the Netherlands)* (at 2236), that, in determining the substantive fairness of a dismissal for operational requirements, the court is not required to determine whether the employer was making an economically





rational business decision, but is required to establish factually the existence of a genuine operational requirement for the restructuring. Once it has done so, the court has to consider the fairness of the decision to dismiss based on the proven operational requirement.

Transfer of Business as Going Concern

In *Banking Insurance Finance & Assurance Workers Union v Zurich Insurance Co Ltd* (at 2146) the Labour Court found that there is no requirement in s 197 of the LRA 1995 for an employer to consult with a trade union about the transfer of a business as a going concern; however, there is nothing prohibiting the employer from concluding an agreement with a union providing greater rights for employees than those provided for in s 197. Although the employer had entered into such an agreement with the union, the court, in the exercise of its discretion, refused to make it an order of court.

In *Sanlic House of Locks (Pty) Ltd v Strydom* (at 2287) the court confirmed that the mere merger of two businesses does not result in the disposal of one business to the other as a going concern. Whether the merger triggers the provisions of s 197 of the LRA is to be determined objectively on the facts, and those same facts determine whether a restraint of trade agreement forms part of the goodwill of the business transferred as a going concern.

Dismissal – Incapacity

The employee's performance deteriorated as a result of mental ill-health, and the employer, recognizing her mental distress and need for psychological support, placed her on its employee wellness programme. Despite this, her condition did not improve and she continued to underperform. The employee was dismissed for misconduct following a disciplinary enquiry, and her dismissal was upheld at CCMA arbitration proceedings. On review, the Labour Court found that the commissioner had not been called upon to decide whether the employee was medically incapacitated to perform her work functions, she had been called upon to determine whether it was fair to dismiss the employee for misconduct in the face of uncontested evidence that she suffered mental ill-health. The commissioner had therefore fundamentally misdirected herself regarding the nature of the question she was called upon to determine, and her decision was reviewable. The court considered the developments in law which have recognized ill-health as a ground of incapacity separate from misconduct and have imposed distinct requirements for enquiries into ill-health. The court concluded that, in this matter, it had been inappropriate for the employer to pursue misconduct proceedings instead of incapacity proceedings as it fully appreciated the employee's condition. Her dismissal had been substantively unfair and should not have been upheld at arbitration. The award was reviewed and set aside (*L S v Commission for Conciliation, Mediation & Arbitration & others* at 2205).

Dismissal – Intimidation

In *National Democratic Change & Allied Workers Union & others v Cummins Emission Solutions (Pty) Ltd* (at 2222) the Labour Court was satisfied that the applicants, who had been dismissed after being identified as striking employees who had intimidated non-striking employees during a protected strike, had failed to prove that their dismissal was merely the result of their participating in the strike action. Their dismissal was, therefore, not automatically unfair as contemplated in s 187(1)(a) of the LRA 1995. Neither was their dismissal unfair — any threat of violence in the workplace, including intimidation, was serious misconduct that warranted dismissal.

Dismissal – Sexual Harassment

A manager had been dismissed for sexual harassment after he enticed a junior employee into the stockroom and kissed her. In unfair dismissal proceedings in the CCMA, the commissioner found that it was clear from the employee's evidence that she had not complained to the employer and that the manager's conduct was neither offensive nor unwanted. The elements for a charge of sexual harassment were therefore not present, and the manager should not have been disciplined. The manager's dismissal was found to be unfair and the employer was ordered to reinstate him (*Zaindeen and Clicks Retailers (Pty) Ltd* at 2322).

Dismissal – Work Related Misconduct





An employee was reinstated after successfully challenging his dismissal. However, it appeared that the employee had given false evidence at the arbitration proceedings that resulted in his reinstatement. The employer charged him for making a false statement, even though he was not an employee at the time, and he was dismissed. At CCMA arbitration the commissioner found that the employee had knowingly made the false statement with the intention to cause prejudice to the employer and this constituted perjury. His misconduct was sufficiently connected to his employment to justify his dismissal (*National Education Health & Allied Workers Union on behalf of Baba and Department of Home Affairs* at 2329).

Termination of Contract of Employment

A CCMA arbitrator found, in *Venter and Vereeniging Abattoir (Pty) Ltd/Midland Group* (at 2318), that the employer had disguised the employee's probation period in a series of fixed-term contracts, and had then terminated his services for poor performance at the end of the seventh fixed-term contract. The commissioner found that the employer was not entitled to use fixed-term contracts to evade the provisions of the LRA 1995 relating to probation as this would undermine the intention of the Act. The court was satisfied that the employee had been dismissed, that the dismissal was unfair and that the employee was entitled to compensation.

Review of Arbitration Awards

In *Distell Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 2176) the Labour Court found that the CCMA commissioner, who believed that only direct evidence of theft was sufficient and that no amount of circumstantial evidence would satisfy him, had by his attitude towards circumstantial evidence robbed himself of the opportunity to try the matter fairly. This constituted a latent irregularity and the award was reviewed and set aside.

In *Simani v Mosselbay Municipality & others* (at 2295) the court found that, in terms of s 138(1) and (7) of the LRA 1995, an arbitrator must determine the substantive merits of a dispute and provide brief reasons in support of the award. A failure to do so constitutes failure to discharge a statutory duty entrusted to the arbitrator, and he or she thus commits a gross irregularity as contemplated in s 145(2)(a)(ii) of the LRA. In this matter, the arbitrator had simply ignored the employee's evidence without providing any basis for doing so. This constituted a gross irregularity, and the award was reviewed and set aside.

Labour Court Jurisdiction

In *National Democratic Change & Allied Workers Union & others v Cummins Emission Solutions (Pty) Ltd* (at 2222) the Labour Court considered when it was expedient for the court to sit as an arbitrator and determine an unfair dismissal dispute as an arbitrator in terms of s 158(2)(b) of the LRA 1995. It found that it would be expedient where the court had already heard an automatically unfair dismissal claim based on the same facts and evidence, the parties had presented evidence and made submissions and would have to incur further costs in presenting the same evidence before an arbitrator if the unfair dismissal dispute were referred to arbitration.

CCMA Jurisdiction

The Labour Court reaffirmed that the territorial jurisdiction of the CCMA was primarily determined by the locality of the undertaking of the employer. The location of the undertaking of the employer was a question of fact, to be determined by reference to all the available evidence. In this matter the court found that the employer conducted its undertaking in the United Kingdom and, consequently, that the CCMA did not have jurisdiction to determine a dispute arising from the dismissal of an employee who had been recruited, located, remunerated and disciplined in the UK (*SA Tourism v Monare & others* at 2280). Similarly, in *Rocher and Touch Down Likizo Ltd* (at 2309), the CCMA found that it lacked jurisdiction to entertain a claim arising from the dismissal of an employee who had been employed in Tanzania by a Tanzanian company with no links to South Africa.

Collective Agreement — Interpretation

In *SA Police Service v Safety & Security Sectoral Bargaining Council & others* (at 2269) the Labour Court was called upon to review the interpretation of the words 'normal overtime' in SSSBC Agreement 1 of 2010 which regulated the special daily allowance for policing duties at special events.





Employment Relationship — Determination

In *Saveia and Zami Nkululeko Buiding* (at 2313) a CCMA commissioner, relying on the factors set out in the presumption of employment provision (s 200A) of the LRA 1995 and the dominant impression test, found that the applicant was an independent contractor employed by the respondent builder to perform particular electrical jobs for him.

Practice and Procedure

In *Hair Health & Beauty (Pty) Ltd v De Beer & another* (at 2196) the Labour Court found that the applicant's failure to join the commissioner who made the decisions which were assailed on review was fatal to the review application.

In *Basil Read (Pty) Ltd v National Union of Mineworkers & another: In re National Union of Mineworkers & another v Commission for Conciliation, Mediation & Arbitration & others* (at 2153) the Labour Court noted that an employee's job is his or her major asset and he or she is expected to reclaim or protect that asset diligently and expeditiously. It therefore granted an application to dismiss a review application where the employee had delayed excessively in the prosecution of the review. In the same matter the court found that the union lacked locus standi to continue with the review application after the employee died where no executor had been appointed and no authority had been given to the union to proceed with the application on behalf of the deceased estate. The court also considered the requirements for service by registered post in terms of rule 4(1)(a)(vii) of the Labour Court Rules and endorsed the practical guidelines set out by the Constitutional Court in *Sebola & another v Standard Bank of SA Ltd & another* 2012 (5) SA 142 (CC).

Evidence

In *Distell Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 2176) the Labour Court noted that the use of circumstantial evidence is a powerful tool in proving the existence of an issue in dispute. Although laypeople suppose that direct evidence is more compelling than circumstantial evidence, in reality circumstantial evidence may be more persuasive.

Quote of the Month:

Not awarded.

