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We take pleasure in presenting the July 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.

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.

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

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Juta General Law





HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Automatically Unfair Dismissal

The Supreme Court of Appeal, in *National Union of Public Service & Allied Workers on behalf of Mani & others v National Lotteries Board* (2013) 34 ILJ 1931 (SCA), upheld a decision of the Labour Court in which that court found the dismissal of the employees for insubordination after they petitioned the National Lotteries Board to dismiss or arrange for the resignation of the CEO of the board to have been justified and fair. On further appeal to the Constitutional Court, the majority found that the employees had not demanded the dismissal or resignation of the CEO, but had merely recommended it. It found further that the employees' petition and their association with their union's conduct constituted participation in lawful union activity as provided for in s 4(2)(a) and s 5(2)(c) of the LRA 1995. Their dismissal for this conduct was, therefore, automatically unfair as envisaged by s 187(1)(d)(i)-(ii) (*National Union of Public Service & Allied Workers on behalf of Mani & others v National Lotteries Board* at 1885).

In *Solidarity on behalf of Wehncke v Surf4Cars (Pty) Ltd* (at 1982) the Labour Appeal Court upheld a Labour Court decision that the employee's dismissal after he refused to accept his employer's demand to sign a contract of employment was not automatically unfair in terms of s 187(1)(c) of the LRA. Applying the interpretation of s 187(1)(c) approved by both the Supreme Court of Appeal and the LAC that only conditional dismissals fall under the section, the court was satisfied that in this matter the dismissal was not conditional, but was final and irreversible.

Right to Strike

Where an employer had refused to bargain with a non-party trade union over matters provided for in an agreement promulgated as a sectoral determination in terms of the Basic Conditions of Employment Act 75 of 1997, the Labour Court found that the determination did not prevent the union and its members from embarking on protected strike action provided the refusal to bargain was first referred to advisory arbitration in terms of s 64 of the LRA (see *Concor Projects (Pty) Ltd t/a Concor Opencast Mining v Commission for Conciliation, Mediation & Arbitration & others* (2013) 34 ILJ 2217 (LC)). On appeal, the Labour Appeal Court found that sectoral determinations were not collective agreements — sectoral determinations and collective agreements were separate legal instruments governed by different Acts and having different purposes. A sectoral determination did not preclude employees from bargaining for better wages and conditions than those stipulated in the determination, nor did it preclude employees from embarking on protected strike action once an advisory award had been issued (*Concor Projects (Pty) Ltd t/a Concor Opencast Mining v Commission for Conciliation, Mediation & Arbitration & others* at 1959).

Contract of Employment

In *Jorgensen and Ikat Computing Ltd* (at 2046) an employee who had not been paid his salary declined to attend an enquiry into his work performance and was dismissed for insubordination. A CCMA arbitrator found that, as payment of an employee's salary is a material and fundamental obligation of an employer, the employee was in the circumstances justified in refusing to attend the enquiry and the employer's instruction that he do so was neither reasonable nor lawful. The arbitrator found further that, whilst an employer is at liberty to discipline an employee, an employee is not obliged to present himself to be disciplined, although he does so at his own peril.

Dismissal

Where a senior employee had been dismissed for poor performance, the Labour Appeal Court found that, although a senior employee is expected to be able to assess whether he is performing according to the required standard and does not need the degree of regulation or training that a lower skilled employee requires, the employer is not absolved from providing him with resources that are essential for the achievement of the required standard. Where that employee is still on probation, less compelling reasons

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for dismissal are acceptable, but the fairness of those reasons has to be tested against the requirements of item 8 of the Code of Practice: Dismissal (*Palace Engineering (Pty) Ltd v Ngcobo & others* at 1971).

In *National Education Health & Allied Workers Union on behalf of Thomo and University of Johannesburg* (at 2064) a CCMA commissioner declined to interfere with the employer's decision to dismiss the employee for poor work performance. He found that a commissioner should only interfere when the employer's standards are manifestly unlawful, irrational or unfair.

In *SA Municipal Workers Union on behalf of Damens v Breede Valley Municipality & others* (at 2018) the Labour Court held that, where the employee had acted dishonestly and there was sufficient direct evidence at arbitration of a breakdown in the trust relationship between the parties, the arbitrator's decision that dismissal was appropriate was justified. However, in *Banking Insurance Finance & Allied Workers Union on behalf of Thabethe and Document Exchange (Pty) Ltd* (at 2032), a CCMA commissioner found that, where the employer failed to provide any evidence of a breakdown of the trust relationship, it did not automatically follow from a finding that the employee was guilty of an offence that she should be dismissed.

Basic Conditions of Employment Act 75 of 1997

The Labour Court found, in *Padayachee v Interpak Books (Pty) Ltd* (at 1991), that s 34 of the BCEA confers on an employer the right to make a deduction from an employee's remuneration for damage or loss caused by the employee, but the employer must comply with the formalities set out in s 34(1)(a) and 34(2), which formalities include a fair internal hearing to determine the liability of the employee, a written agreement by the employee to reimburse the employer, and a liquid document. Similarly, in *SA Medical Association on behalf of Boffard v Charlotte Maxeke Johannesburg Academic Hospital & others* (at 1998), the Labour Court found that the employer could not rely on s 34 to deduct money for alleged unauthorized leave where there was no evidence that the employee had taken unauthorized leave. In this matter the court also found that the employer's further reliance on s 38 of the Public Service Act (Proc 103 of 1994) to recover alleged overpayment of remuneration to the employee was misplaced. Such a deduction was only permissible with the approval of the treasury and, in the absence of such approval, it was not lawful.

In *Aaron and Grid Construction (Pty) Ltd* (at 2025) a CCMA commissioner found that the provisions of s 41(2) of the BCEA are peremptory. An agreement in terms of which the employee purported to agree that he was not entitled to severance pay on dismissal for operational requirements was irrelevant, as the parties were restricted by law from contracting out of the statutory right to severance pay.

Breach of Contract by Football Player

In *Amazulu Football Club and Issah* (at 2072), the football club approached the Dispute Resolution Chamber of the NSL seeking damages for breach of contract by a player who had absconded. The arbitrator found that the player had deserted without just cause and that the club was entitled to claim damages. In determining the quantum of damages, the arbitrator considered the specific nature of a football contract compared to a normal employment contract, the facts of the matter before him, and both South African law and decisions of the Court of Arbitration for Sport.

Evidence

Where a bargaining council arbitrator had relied on his own powers of observation to conclude that initials on an amended document had been photocopied from the original document, the Labour Court on review found that the arbitrator had been entitled to do so, and did not have to rely on a handwriting expert or direct testimony of the signatories to the original document. His observation was not one that required special expertise. The arbitrator had evaluated the probability of an identical alignment of the initials occurring from one document to the next, and his conclusion that the coincidence was improbably could not be said to be unreasonable (*SA Municipal Workers Union on behalf of Damens v Breede Valley Municipality & others* at 2018).

Practice and Procedure

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In *Colett v Commission for Conciliation, Mediation & Arbitration & others* (at 1948) the Labour Appeal Court reaffirmed that, where there has been an unreasonable delay in referring a dispute to the Labour Court and the explanation provided therefor is unsatisfactory and unacceptable, the court may refuse condonation without considering the prospects of success. In *SA Municipal Workers Union & others v Commission for Conciliation, Mediation & Arbitration & others* (at 2011) the Labour Court confirmed that the withdrawal of a CCMA referral is akin to an order for absolution from the instance and does not prevent the employee from making a second referral.

Quote of the Month:

Not awarded.

