



## **INDUSTRIAL LAW JOURNAL PREVIEW**

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

### Public Service Pension Benefits

Following his contested dismissal for financial misconduct, and while claims and counterclaims arising from that dismissal were still pending, the public service employee in *Kotze v Mpumalanga Department of Education & others* (at 2361) applied to the High Court for an order compelling his employer to pay him his outstanding salary and leave pay, and to authorize the payment to him of his pension benefits. The employer counterclaimed for a stay of the proceedings, alternatively for an order attaching his pension benefits, pending the determination of its own action against the employee. The court ordered the payment of salary and then considered the wording of s 21(3) of the Government Employees Pension Law 1996, which permits a deduction from an employee's pension benefit to cover an employer's losses caused by the employee's misconduct in certain specific circumstances. Following the decision of the Supreme Court of Appeal in *Highveld Steel & Vanadium Corporation Ltd v Oosthuizen* (2009) 30 ILJ 1533 (SCA) the court placed a purposive interpretation on s 21(3), to include the power to withhold payment of the benefits pending the determination in court of the employee's liability towards the employer.

### Protected Disclosures Act 26 of 2000

In *SA Municipal Workers Union National Fund v Arbuthnot* (at 2434) the Labour Appeal Court considered the terms and purpose of the Protected Disclosures Act 26 of 2000 and emphasized that although s 9 does not require that the information disclosed must be objectively true, it must be made in good faith and the discloser must reasonably believe it to be true in order for it to be protected. In the case before it the timing of the employee's disclosure indicated that it was not reasonable to make it and that the employee had not acted in good faith. The disclosure was therefore not protected and her dismissal for making it was not automatically unfair.

Similarly, in *Beaurain v Martin NO & others* (1) (at 2443) the Labour Court found that a hospital employee who posted comments and photographs on Facebook concerning sanitary conditions at the hospital had not acted reasonably or responsibly, and that his disclosures were not protected.

Conversely, in *Potgieter v Tubatse Ferrochrome & others* (at 2419) the LAC found on appeal that an employee who, after his dismissal for insubordination but before the hearing of his appeal, had released a report to the media disclosing inadequate water pollution measures taken by his employer, had done so in good faith, that he had a legal duty to make such disclosures, and that his disclosure was protected. The court noted that s 31 of the National Environmental Management Act 107 of 1998, which also applied, protects whistleblowers regarding the disclosure of information in the public interest and in the interest of protecting the environment, and that its protection is not afforded only to employees.

### Occupational Detriment for Whistleblowing

The Labour Court determined in *Independent Municipal & Allied Trade Union & another v City of Matlosana Local Municipality & another* (at 2459) that a disclosure made by a municipal employee to the SA Police Service relating to alleged tender fraud on the part of the municipal manager was a protected disclosure in terms of the PDA 2000. However, the court could not find that subsequent disciplinary action for wasteful expenditure taken against the employee was taken on account of the disclosures he had made. The charges against him did not therefore constitute an occupational detriment and his dismissal was not automatically unfair. In *Maqubela v SA Graduates Development Association & others* (at 2479) the court refused to grant an interim order interdicting the suspension of the applicant pending disciplinary proceedings against him, finding no nexus in terms of s 3 of the PDA between disclosures that he claimed he had made and the proposed action against him.





The employee party in *Motingoe v Head of the Department, Northern Cape Department of Roads & Public Works & others* (at 2492) similarly made application for an interim order suspending disciplinary proceedings against him pending the determination of disputes in terms of both the PDA and the Labour Relations Act 1995 which he had referred to a bargaining council. He claimed that the action had been taken against him as the result of his disclosure of serious financial irregularities within the respondent department, and constituted an occupational detriment. The court was satisfied that the report had been made in good faith and amounted to a protected disclosure. In this case it was satisfied that a sufficient nexus had been established between the disclosure and the subsequent disciplinary proceedings and that the employee had shown a *prima facie* right to interim relief, and it therefore granted the order applied for. On the issue of intervening in uncompleted disciplinary proceedings the court found that the principle that it should only intervene in exceptional circumstances should not be applied in matters based on the PDA as there were public interest considerations involved.

The nexus between disclosure and subsequent disciplinary proceedings was again considered in *Ngobeni v Minister of Communications & another* (at 2506). In that case the court restated the principles and purpose of the PDA and found that, although s 3 prohibited an employer from subjecting an employee to an occupational detriment on account of his making a protected disclosure, it was not the intention of the Act to exonerate whistleblowers from the consequences of their own independent acts of misconduct. The court found that, while the employee had bravely exposed wrongdoing by the department in which he was employed, the subsequent disciplinary action taken against him had been brought partly because of his protected disclosure and partly because of his own alleged misconduct. He had to answer to those allegations even if they appeared to be spurious, and it would be contrary to the letter and the spirit of the PDA to interfere with that internal process.

### **Automatically Unfair Dismissal**

On appeal the Labour Appeal Court in *Ekhamanzi Springs (Pty) Ltd v Mnomiya* (at 2388) upheld the judgment of the Labour Court in *Memela & another v Ekhamanzi Springs (Pty) Ltd* (2012) 33 ILJ 2911 (LC), which had held that an unmarried woman who was denied access to her workplace by her employer's landlord because she had fallen pregnant had been automatically unfairly dismissed by her employer. The LAC found that, although the landlord was a church mission which imposed its own code of conduct, the employer that leased the land was entitled to the use and enjoyment of the leased property and its failure to intervene on the employee's behalf to facilitate her access to the workplace amounted to a repudiation of her contract of employment. Similarly, in *Martin & East (Pty) Ltd v National Union of Mineworkers & others* (at 2399) the LAC endorsed the finding of the court below that shop stewards who had been singled out for dismissal after taking part in an unprotected strike, while the other strikers all received final warnings, had been automatically unfairly dismissed for taking part in union activities.

### **The Review of Arbitration Proceedings**

The Labour Appeal Court in *Blue Financial Services Ltd v Commission for Conciliation, Mediation & Arbitration & others* (at 2368) reviewed and set aside an arbitration award where the commissioner had refused to allow a party to call a further witness to contradict the evidence of its own witness, whose testimony was not favourable to the party calling him, finding that it would not have affected the outcome. The LAC found that the commissioner could not anticipate the outcome if the further witness had been called, and that the court below had been incorrect in upholding his award.

### **The Probative Value of Polygraph Tests**

On appeal the Labour Appeal Court in *DHL Supply Chain (Pty) Ltd v De Beer NO & others* (at 2379) upheld the finding by the court below (see (2013) 34 ILJ 1530 (LC)) that in disciplinary proceedings the result of a polygraph test, unsupported by other evidence, was insufficient to establish an employee's guilt. The court further expressed the view that the respectability of polygraph evidence remains an open





question, and that any litigant seeking to introduce it into court or arbitration proceedings must adduce expert evidence of its conceptual cogency and the accuracy of its application in every given case.

### **Proof of Employment Relationship**

The applicant in *Sewram and Freethinking Business Consultants (Pty) Ltd* (at 2542) maintained that he had received an unconditional offer of employment from the respondent and had later been unfairly dismissed. The respondent claimed that the offer was subject to a suspensive condition that was never fulfilled. At CCMA arbitration the applicant produced an unconditional offer of employment, which he claimed had been emailed to him and called an expert witness to verify its authenticity. The commissioner noted that the applicant bore the onus to prove the existence of an employment relationship, but found that his expert witness had failed to prove his version of events as he had offered no proper reasons in support of his opinions. Taking also into account various other inconsistencies in the applicant's case the commissioner found that his claim was clearly untrue and that he had failed to prove the existence of an employment relationship.

### **Trade Union Membership — Right to Represent Employees in Arbitration Proceedings**

In arbitration proceedings concerning an alleged unfair dismissal in *SA Transport & Allied Workers Union on behalf of Panziso and Transnet Port Terminals* (at 2578) two trade union representatives appeared to represent the same employee, and the arbitrator was called on to determine which of them could do so. The arbitrator ruled in favour of the union of which the employee was a member at the time the dispute arose, namely SATAWU, and further ruled that that union could not subsequently unilaterally withdraw that dispute from arbitration. The employee had joined NUMSA only three days before the arbitration, and was unemployed at the time. After reference to NUMSA's constitution, which did not permit unemployed persons to become members, the arbitrator ruled that NUMSA lacked locus standi to represent the applicant.

### **Disciplinary Code and Procedure**

The commissioner in *Haroun and Exotix Chauffeur Services CC t/a MK Exotic Tours* (at 2533) found the dismissal of an employee for contravening road traffic regulations and disregarding the employer's rules for the use of vehicles to be unfair where the chairperson at his disciplinary enquiry had taken into account unrelated factors both in finding the employee guilty of the charges, and when imposing the sanction of dismissal. There was no evidence proving the actual charges against the employee. In *SA Municipal Workers Union on behalf of Thusi & another and Umhlathuze Municipality* (at 2551) the parties were bound by a collective disciplinary agreement which provided that employees should only be dismissed following a disciplinary hearing and that the duty to decide on sanction should be delegated to the chairperson of the hearing. The employer dismissed certain employees on notice without completing a disciplinary enquiry into their alleged misconduct, and claimed that its municipal manager was empowered in terms of the Local Government: Municipal Systems Act 32 of 2000 to exercise his discretion in matters of discipline. In proceedings before the relevant bargaining council the arbitrator found that the collective agreement clearly specified that termination was subject to the provisions of the LRA 1995 and that the employer had to have a valid reason for dismissal and to follow the procedures set out in the collective code.

### **Disciplinary Penalty**

In *National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section)* (at 2406) the Labour Appeal Court endorsed the need for an employer to maintain consistency when meting out penalties for misconduct among its workers. However, the court upheld the finding by the court below and at arbitration that the dismissal for gross negligence of a mining engineer, charged with managing its safety programme, was fair although his subordinates had been subjected to lesser penalties. It was illogical to compare the duties of care of the manager, responsible for managing the entire safety programme, with those of his subordinates, who had no managerial role. Further, the court





found that if a party wished to raise the issue of inconsistency he should do so clearly at the commencement of proceedings, and not as an afterthought.

### **Applications for Leave to Appeal**

After finding in *Martin & East (Pty) Ltd v National Union of Mineworkers & others* (at 2399) that there were no grounds to appeal an earlier decision of the court below, the Labour Appeal Court urged labour courts, when considering applications for leave to appeal their decisions, to ensure a balance between the expeditious resolution of disputes and the rights of the losing party. Where no novel point of law arose, and there was no misrepresentation of existing law, the matter should end in the Labour Court. The Labour Court later applied these comments in *Beurain v Martin NO & others (2)* (at 2454), in which the court dismissed the applicant's leave to appeal its earlier decision with costs.

### **Practice and Procedure**

In *SA Municipal Workers Union & another v SA Local Government Bargaining Council & others* (at 2528) the applicants applied in the Labour Court to vary an earlier order reviewing and setting aside an arbitration award by adding an order reinstating a dismissed employee. They claimed that the order had been erroneously granted. After noting the extent of its powers in terms of s 165 of the LRA 1995 to vary court orders, the court found that the original order had not been erroneously granted because the relief granted was what the applicants had sought. A party who by its own mistake or negligence fails to pray for a particular order cannot later seek to have the judgment varied to address its own mistake.

### **Quote of the Month:**

Tlhotlhemaje AJ in *Ngobeni v Minister of Communications & another* (2014) 35 ILJ 2506 (LC):

'In the face of the powerful, greedy and politically connected officials within the public service, whose pastime is looting public funds, there will always be honest and brave South Africans in the form of whistleblowers. They will take upon themselves to continue to expose the rot and those public officials with itchy fingers. These are our unsung heroes and heroines, the faithful servants of the people of our beloved country. They should be commended, encouraged and supported in their quest for making public officials accountable, with the knowledge that they continue to do so at great risks to themselves and their careers. ... The whistleblowers are patriotic individuals, who are now the face of our new struggle against such evil and wanton looting. These are public servants who are taking the meaning of "public service" to new levels, and who are prepared to practice and uphold the principle of "Batho Pele" rather than merely paying lipservice to it.'

