INDUSTRIAL LAW JOURNAL PREVIEW

VOLUME 36

FEBRUARY 2015

Dear *Industrial Law Journal* Subscriber

We take pleasure in presenting the February 2015 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.

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, Michelle Govender, mgovender@juta.co.za.

Legalbrief Workplace –the weekly Juta current awareness email service

Legalbrief Workplace provides a concise roundup of a broad sweep of topical news coverage gleaned by our team of seasoned journalists from reputable local and international media sources. Subscribers to this specialist email newsletter will enjoy access to labour-focused news summaries and analysis pieces, latest developments in labour legislation and case law, and relevant parliamentary news drawn from *Legalbrief Policy Watch*. It will prove essential reading to human resource and labour relations practitioners, labour lawyers, CCMA officials, bargaining councils and private arbitrators, labour academics, shop stewards and trade union officials, business leaders and line managers in both government and the private sector responsible for a HR/LR function.

For a quotation or to request a free trial or to subscribe please email: lfaro@juta.co.za or visit www.legalbrief.co.za

We welcome your feedback

Kind regards

Juta General Law

Ground Floor, Sunclare Building, 21 Dreyer Street, Claremont,
Cape Town, South Africa
PO Box 14373, Lansdowne 7779; Docex Number: DX 326, Cape Town
Tel: +27 21 659 2300, Fax: +27 21 659 2360

Website: www.juta.co.za; e-mail:cserv@juta.co.za

Juta and Company Ltd, REG. NO. 1919/001812/06, VAT REG. NO. 4520113319

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Jurisdiction of the Labour Court and Bargaining Councils
The Constitutional Court has confirmed that the Labour Court does not have jurisdiction to adjudicate a dismissal dispute that has not been referred to conciliation — in terms of s 191(5) of the LRA 1995 referral is indispensable and a precondition to the Labour Court's jurisdiction over unfair dismissal disputes. The court also found that the requirement in s 191(3) that a referral must be served 'on the employer' was not met where the applicant union had served a copy of an unfair dismissal dispute referral on only one of several associated employer entities which had dismissed employees following an unprotected strike (*National Union of Metalworkers of SA v Intervalve (Pty) Ltd & others* at 363).

In *Norodien v Ajax Cape Town Football Club (Pty) Ltd t/a Ajax Cape Town Football Club & others* (at 472) the Labour Court found that it did not have jurisdiction to consider a dispute where the applicant alleged that he was not an employee.

In *Transport & Omnibus Workers Union on behalf of Members v SA Road Passenger Bargaining Council & others* (at 491) the Labour Court found that a bargaining council is not bound by a previous award relating to the interpretation or application of a collective agreement by virtue of the fact that such award was unsuccessfully reviewed in the court. The council's jurisdiction to hear a dispute relating to the same collective agreement referred by a different union party to the agreement is not ousted, and the mere fact that the employer might have to participate in numerous arbitrations seeking to interpret the same collective agreement with different collective bargaining partners is immaterial — the employer could resolve this problem by ensuring that all the unions which fall under the collective agreement are joined to the dispute.

Retrenchment
In *Elliot International (Pty) Ltd v Veloo & another* (at 422) the Labour Appeal Court found that, although a union may act on behalf of its members during a compulsory retrenchment process and negotiate a settlement that is binding on them, in the case of a proposed voluntary retrenchment the union can only bind a member if such member has personally agreed to the settlement proposal and has specifically mandated the union to accept the proposal on his or her behalf.

Retirement and Resignation
In *SA Municipal Workers Union & another v SA Local Government Bargaining Council & others* (at 441) the Labour Appeal Court highlighted the differences bex tween early retirement and resignation, in particular that early retirement is bilateral and requires the assent of the employer.

Dismissal — Invalid Dismissal
The CCMA or the Labour Court cannot clothe itself with jurisdiction to decide the fairness of a dismissal until it has determined the validity of the dismissal. In *Chafeker v Commission for Conciliation, Mediation & Arbitration & others* (at 451) the Labour Court found that, where the decision of a close corporation to dismiss a member was not a valid decision in terms of the applicable legislation, his dismissal was void ab initio. The CCMA commissioner, therefore, had no jurisdiction to decide on the fairness of the dismissal. Similarly, in *Radebe v MEC: Health, Eastern Cape & others* (at 478) the Labour Court found that, as the applicant was no longer an employee of the respondent provincial department, its decision to dismiss her was invalid and of no force and effect.

In *SA Municipal Workers Union on behalf of Jacobs v City of Cape Town & others* (at 484) it appeared that, despite the fact that the employer had breached the collective agreement relating to the conduct of disciplinary proceedings, the bargaining council arbitrator had failed to exercise his power to issue a

declaratory order in terms of s 138(9) of the LRA 1995 that the employer was in breach of the collective agreement and, consequently, that the disciplinary hearing was null and void. The Labour Court reviewed and set aside the arbitrator's award and ordered that the employee be reinstated.

Dismissal — Automatically Unfair Dismissal
Where two employees were retrenched for joining a trade union, the Labour Appeal Court found that this violated their right to freedom of association and to join a trade union of their choice and constituted an automatically unfair dismissal in terms of s 187 of the LRA (*Elliot International (Pty) Ltd v Veloo & another* at 422).

Dismissal — Fixed-term Contracts
The employment of the applicants, who were employed on a month-to-month basis, was terminated when they refused to sign backdated fixed-term contracts. Despite the fact that the employer failed to give reasons for imposing a fixed-term contract which distorted the actual history of the employment relationship, the Labour Court declined to grant interim interdictory relief to the applicants. It was not persuaded that their remedies under the LRA 1995 for unfair dismissal would not provide adequate recompense, particularly where the applicants were not in permanent employment and where the granting of interim relief would not alter their precarious employment status (*Mmatli & others v Department of Infrastructure Development (Gauteng Province)* at 464).

Dismissal — Constructive Dismissal
In *Volschenk v Pragma Africa (Pty) Ltd (at 494)* the Labour Court found that it was difficult to see how an employee could succeed in a claim for constructive dismissal, whether at common law or under s 186 of the LRA 1995, in circumstances where he had continued to work for the employer for another two months after he claimed that the employer had breached his contract or had made his continued employment intolerable.

Contract — Professional Football Players
When the Roses United Football Club was sold and the club relocated, several players refused to relocate until the club had given assurances about their families. They were dismissed. The Dispute Resolution Council of the NSL found that the club's conduct did not constitute a breach of contract, but the players' conduct in refusing to relocate and to perform in terms of their contracts constituted a repudiatory breach. The DRC noted that there was no provision in the contracts relating to relocation. However, taking into consideration the principles of fairness and equity and the unique requirements of the football industry, a term could be imported into such contracts which provided that players could not, without compelling reasons, refuse to honour their contracts should the club relocate (*Zimba & others and Roses United Football Club* at 551).

Suspension Pending Disciplinary Proceedings
In *Mashego v Mpumalanga Provincial Legislature & others* (at 458) the Labour Court noted that a suspension pending disciplinary proceedings is a different process to a disciplinary hearing, and an employee is not entitled to a full hearing on the merits before his suspension.

In *Tshali and Petim Brothers CC t/a Food Lovers Market Claremont* (at 546) a CCMA commissioner found that, where an employee had been placed on precautionary suspension and the employer failed to reconvene a postponed disciplinary hearing, the employee remained on suspension until there was an outcome to the disciplinary process. The employee was, therefore, entitled to be remunerated.

Local Government — Legal Representation at Disciplinary Hearings

In *Zondo & another v Uthukela District Municipality & another* (at 502) the Labour Court considered a local government employee's right to legal representation at disciplinary proceedings in the face of a collective agreement which prohibited such representation.

Essential Services — Air Traffic Navigation Services

An Essential Services Committee, in an arbitration in terms of s 74(4) of the LRA 1995, has determined that an earlier designation by the ESC in 1997 that the regulation and control of air traffic is an essential service includes the services delivered by engineering technicians (*Solidarity on behalf of Members and Air Traffic Navigation Services* at 524).

Quote of the Month:
Not awarded.