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We take pleasure in presenting the June 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.

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HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Transfer of Business as Going Concern

The Constitutional Court has, in *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd & others* (at 1423), confirmed the decisions in both the Labour Appeal Court and the Labour Court (see (2014) 35 ILJ 2757 (LAC) and (2013) 34 ILJ 905 (LC)) that the cancellation of service agreements for the operation of an electricity network in Alexandra Township had triggered the transfer of the employment contracts of the service provider's employees to City Power prior to the appointment of a new service provider. The court considered what constitutes the transfer of a business as a going concern in terms of s 197 of the LRA 1995, and noted that, on the facts, there was no dispute that City Power had taken over the full business 'as is', with all of the complex network infrastructure, assets, know-how and technology required to operate the network. The business was identifiable and discrete and it was now conducted by a different entity. The court also addressed the lower courts' concerns relating to the impact of the application of s 197 on organs of state. Having considered the provisions of the Local Government: Municipal Systems Act 32 of 2000, the court was satisfied that both City Power and the service provider were organs of state for purposes of the public functions they performed in terms of the service level agreements. As the provisions of the LRA prevailed over those of the Systems Act and s 197 was not in conflict with the Constitution, s 197 was applicable to City Power and other municipal entities.

Retrenchments

In *Edcon v Steenkamp & others* (at 1469) the Labour Appeal Court has found that the earlier decisions in *De Beers Group Services (Pty) Ltd v National Union of Mineworkers* (2011) 32 ILJ 1293 (LAC) and *Revan Civil Engineering Contractors & others v National Union of Mineworkers & others* (2012) 33 ILJ 1846 (LAC), which found that operational requirements dismissals which failed to comply with the time-limits set out in s 189A(8) of the LRA 1995 were invalid and of no force and effect, had been wrongly decided. The court examined the meaning and purpose of s 189A(8), which sets out time periods for notice of termination where a facilitator has not been appointed, against the historical background of the law of dismissal, and found that the concept of an invalid dismissal is incompatible with the scheme of ss 189 and 189A. It could, therefore, not have been the intention of the legislature that a failure to comply with the provisions of s 189A(8) would be visited with invalidity.

In *Ketse v Telkom SA SOC Ltd & others* (at 1592) the Labour Court confirmed the hierarchy of consulting parties recognised in s 189(1) of the LRA and found that, as the employee had not been a consulting party during the consultation process, he had no locus standi to bring an application in terms of s 189A(13). The court found further that, in terms of s 189A(4), the consulting parties are at liberty to select the best facilitator, who need not necessarily be a CCMA commissioner.

Dismissal - Dishonesty

In *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer & others* (at 1453) the Labour Appeal Court found that the CCMA commissioner's conclusion that dismissal was the appropriate sanction for an offence involving dishonesty and deception was correct. In this matter the employee's acceptance of a favour from a supplier in contravention of the employer's policy prohibiting acceptance of gifts and favours and his lack of remorse destroyed the employment relationship, thereby justifying the sanction of dismissal.

A CCMA commissioner upheld the employee's dismissal for failure to follow the employer's banking procedures where the employee was unable to substantiate her argument that the employer had acted inconsistently when it did not dismiss other employees who had committed similar transgressions (*SA Commercial Catering & Allied Workers Union on behalf of Mothibedi and Lewis Stores (Pty) Ltd* at 1634).

Dismissal - Insubordination and Insolence

In *Palucci Home Depot (Pty) Ltd v Herskowitz & others* (at 1511) the Labour Appeal Court confirmed the distinction between insubordination and insolence and noted that dismissal is only justified if the employee's insubordination or insolence is wilful and serious. Relying on these principles, the court found that the employee's 'screaming and shouting' at the managing director did not constitute insubordination, especially where her outburst had been provoked by the employer's conduct.

Dismissal - Incapacity

Where an employee who has sustained a non-work related injury is dismissed for incapacity, the onus rests on the employer to show that the dismissal is fair and this includes showing that it has fulfilled its duty of investigating all possible alternatives short of dismissal before dismissing the employee. In *General Motors (Pty) Ltd v National Union of Metalworkers of SA on behalf of Ruiters* (at 1493) the Labour Appeal Court found that the CCMA commissioner had failed to take into account that the employer did not properly investigate the employee's possible alternative placement. The Labour Court's decision that the commissioner had committed an irregularity was therefore correct, and its order that the matter be remitted for a new arbitration hearing was upheld.

Dismissal - Under the Influence of Alcohol

Where the employee had been dismissed for being under the influence of alcohol, a CCMA commissioner found that the employer had failed to prove that the employee had in fact been intoxicated or that his faculties had been impaired. In the absence of such evidence, the charge against the employee was not proved and his dismissal was consequently unfair (*Workers' Association Union on behalf of Malinga and Choppies Superstores* at 1664).

Dismissal - Constructive Dismissal

The Labour Court found that, in a constructive dismissal, the employee makes the final decision, with or without notice, when he or she ceases providing services to the employer. Therefore, s 190(1) of the LRA 1995 does not apply as the date of termination of the contract of employment and the date of leaving the service of the employer are contemporaneous (*Helderberg International Importers (Pty) Ltd v McGahey NO & others* at 1586).

Dismissal - Existence of Dismissal

In *Botha v Commission for Conciliation, Mediation & Arbitration & others* (at 1463) the Labour Appeal Court upheld a decision by the Labour Court (see (2013) 34 ILJ 2212 (LC)) that an employee who had merely refused to relocate to another area to perform her work had not been dismissed.

In *Pretorius and Beta Steel & Billets (Pty) Ltd* (at 1670) a bargaining council arbitrator found that the employee had resigned and not been dismissed. This was the only reasonable conclusion to draw from the fact that the employee had submitted a written resignation letter and, after taking legal advice, amended the letter claiming that distress had led to the use of incorrect terminology. It was improbably that the employee did not know the difference between a resignation and a dismissal. As the probabilities favoured the conclusion that the employee had resigned, he had not been dismissed.

Dismissal - Unlawful Dismissal

The Labour Court, in *Ravhura v Zungu NO & others* (at 1615), refused to grant the employee an urgent order declaring his dismissal to be unlawful. It found that the LRA 1995 does not distinguish between lawful and unlawful dismissals, but deals with unfair dismissals and the courts have not recognised unlawfulness as a stand-alone ground justifying intervention in favour of an aggrieved party in a dismissal case.

Employee or Independent Contractor

In *Phaka & others v Bracks NO & others* (at 1541) the Labour Appeal Court found that former employees of a courier company who had entered into owner-driver contracts with the company were not employees but independent contractors. Similarly, in *Beya & others v General Public Service Sectoral Bargaining Council & others* (at 1553) the Labour Court found that foreign language interpreters engaged to render services at various courts were not employees of the Department of Justice & Constitutional Development but independent contractors.

Employment Equity Act 55 of 1998

The Gauteng Department of Finance refused to promote the selected candidate, a black male, to a senior manager post on the ground that it only appointed females to senior manager posts. In unfair discrimination proceedings, the department admitted that it did not have an employment equity plan as required by s 20 of the Employment Equity Act 55 of 1998. The Labour Court found that the department clearly applied quotas to senior manager positions and, in the absence of an employment equity plan, its measures to achieve the required female representation did not comply with the EEA or the Constitution and could not be relied on as a valid and lawful basis to refuse to approve the employee's promotion (*Mgolozeli v Gauteng Department of Finance & another* at 1602).

Residual Unfair Labour Practice

After the employee had been selected for promotion to an advertised post in the SA Police Service, the national commissioner of the SAPS withdrew the post, but failed to give reasons for the withdrawal as required by National Instruction 1 of 2007. The Labour Court agreed with the bargaining council arbitrator's reasoning that the decision to withdraw the post, coupled with the national commissioner's failure to give reasons for that decision, could mean that the decision was arbitrary and therefore unfair to the employee. However, the court found that relief in the form of protective promotion was not appropriate where the post did not exist and nobody else unduly benefited from the employee's unfair treatment. The appropriate relief was compensation by way of a solatium to the employee for his manifestly unfair treatment (*SA Police Service v Gebashe & others* at 1620).

In *Thiso & others v Moodley NO & others* (at 1628) the court found that a dispute relating to the employer's refusal to upgrade the employees' positions was a dispute concerning the provision of a benefit. Applying the dictum in *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2013) 34 ILJ 1120 (LAC), the court found that the employees were permitted to refer an unfair labour practice dispute to the CCMA instead of following the collective bargaining route. The CCMA commissioner's ruling that he had no jurisdiction was therefore wrong and fell to be reviewed.

Sexual Harassment

In *SA Transport & Allied Workers Union on behalf of Mphahlele and Passenger Rail Agency of SA t/a Metrorail Gauteng North* (at 1642) a CCMA commissioner had to determine whether the employee's dismissal for sexual harassment was unfair. The commissioner noted that the complainant and the employee presented mutually opposing versions and that the complainant's version was inconsistent. In the circumstances the probabilities favoured the employee's version that the complainant had falsely accused him of sexual harassment to avoid disciplinary action for her own fraudulent conduct. The commissioner concluded that the employer had failed to prove the allegations of sexual harassment and ordered it to reinstate the employee.

Review of Arbitration Awards

On review the Labour Court found that it could not be concluded that a bargaining council arbitrator had failed to apply his mind to certain facts where those facts were never placed before him and were unknown to him at the time he made his decision (*Department of Labour v General Public Service Sectoral Bargaining Council & others* at 1575).

Practice and Procedure

In *City of Johannesburg & others v SA Local Authorities Pension Fund & others* (at 1439) the Supreme Court of Appeal found that members of the respondent pension fund should have been joined as parties to proceedings by the pension fund in the High Court. The members had a direct and substantial interest in the litigation as the order could have a prejudicial effect on their rights and interests. The High Court should, therefore, not have dismissed the appellants' non-joinder objection, and its ruling was overturned.

Evidence

On appeal to the Supreme Court of Appeal, the appellant, an employee dismissed for misconduct, sought leave to introduce new evidence that had not been presented at his disciplinary hearing and subsequent arbitration. Relying on the powers conferred on it by s 22 of the Supreme Court Act 59 of 1959 the court ordered that the matter be remitted to the relevant bargaining council for the hearing of the new evidence solely for the purpose of determining de novo whether the employee's dismissal was substantively unfair (*Mkhize v Department of Correctional Services & others* at 1447).

Quote of the Month:

Not awarded.