

JUTA NEWSLETTER 2015 MAY

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📅 Dates to diarise

Your benchmark labour law seminar, with some exciting changes, will once again be held in 6 cities across the country. This year's panel is made up of John Grogan, Puke Maserumule and Avinash Govindjee.

- 13 OCTOBER 2015 CTICC, Cape Town
- 14 OCTOBER 2015 Radisson Blu Hotel, Port Elizabeth
- 15 OCTOBER 2015 Hilton Hotel, Durban
- 20 OCTOBER 2015 CSIR, Pretoria
- 21 OCTOBER 2015 The Forum/The Campus, Bryanston
- 22 OCTOBER 2015 UFS, Bloemfontein

📖 Case law developments

- Insolence or insubordination?
- Dismissal for incapacity
- Affirmative Action
- Paternity Leave

Insolence or insubordination?

Palluci Home Depot (Pty) Ltd v Herskowitz & others Labour Appeal Court case no. CA21/13 dated 12/06/2014, unreported (Musi JA, Murphy AJA & Setiloane AJA)

- The issue in this case was the difference, if any, between 'insolence' and 'insubordination'. Ms Herskowitz protested when her MD told her that an amount had been deducted from her salary for calls made on a communal cellphone. The MD accused her of 'screaming and shouting' at him and calling him 'unprofessional'. She was dismissed for insubordination, poor work performance and refusing to obey an instruction. A CCMA commissioner agreed that she was guilty as charged, and upheld the dismissal. The Labour Court set the award aside on review. The judge reasoned that Herskowitz had merely been insolent, and that dismissal was too harsh a sanction. The Labour Appeal Court found that the court below had drawn too rigid a distinction between insolence and insubordination. Both entail a challenge to the authority of the employer, and insubordination does not necessary entail a refusal to obey an instruction. Herskowitz merely raised her voice in indignation about an unlawful deduction from her salary, and had remonstrated with the MD after

rudely he turned his back on her. This had severely provoked Herskowitz, and that the commissioner had entirely ignored the context. The charge of poor work performance was also unfounded because management had Herskowitz had not failed to meet a known performance standard, and had never been counselled. The Labour Court's order that she was entitled to compensation equal to 10 months' salary could not be faulted. The appeal was dismissed with costs.

Dismissal for incapacity

General Motors (Pty) Ltd v NUMSA obo Ruiters (Labour Appeal Court case no. PA8/12 dated 22/01/2015, unreported (Ndlovu JA, Molemela AJA & Sutherland AJA))

- Mr Ruiters was dismissed for incapacity after injuring himself and reporting that he was unable to perform his normal work as a team leader. A CCMA commissioner ruled the dismissal procedurally and substantively fair. The award was set aside on review by the Labour Court and the dispute was remitted to the commission. On appeal against that ruling, the LAC held that General Motors had failed to prove that reasonable attempts were made to find the employee alternative work as a driver, as had been mooted at the incapacity inquiry. To clinch matters, the company's own doctor had recommended that Ruiters be given alternative work. No serious attempt had been made to explore that possibility. The court reminded General Motors that it would have been far more convenient for all had it not resisted the re-hearing of the matter by the CCMA, and dismissed the appeal with costs. The judgment is a reminder that employers that they should not be too hasty when dealing with sick or injured employees.

Affirmative action

Solidarity and others v Department of Correctional Services and others Labour Appeal Court case no. CA23/2013 dated 10/04/2015, unreported (Waglay JP, Davis JA & Mngqibisi-Thusi AJA)

- The 10 applicant employees in this case, nine of them coloured males, applied for vacant positions in the DCS and all but one were recommended. The DOC declined to appoint them because coloured were 'overrepresented' in the Western Cape region. The employee claimed that they were victims of unfair discrimination. The Labour Court held that the DCS equity plan was defective because its targets were based on national race and gender demographics, and ordered the DCS to take regional demographics into account in future when making appointments (see *Solidarity and others v Department of Correctional Services and others* [2014] 1 BLLR 76 (LC)). Solidarity argued on appeal that the Labour Court had erred by not granting substantive relief. The DCS cross-appealed against the finding that the DCS was obliged to take regional demographics into account. The Labour Appeal Court agreed that the plan was defective because it set targets based only on national demographics. But the court rejected Solidarity's argument that the employees were entitled to be promoted because the plan created quotas and absolute barriers. The court held that quotas (not allowed) differ from numerical targets (allowed) if the targets are applied flexibly. The DCS has proved that exceptions had been allowed, so it could not be said that the employees were confronted with absolute barriers. Importantly, the LAC also held that the DCS

was entitled to favour members of some designated groups over others when striving to achieve 'substantive equality', but declined to prescribe to the DCS how it should combine national and regional demographics in future. Both the appeal and cross-appeal were dismissed.

Solidarity & others v SA Police Services & others Labour Court case no. JS469/12 dated 02/04/2015, unreported (Tlhotlhemaje AJ)

- In this case, Solidarity attacked a collective agreement in terms of which SAPS proposed to fill promotional posts created by its new ranking system according to targets set by its equity plan. That plan was in turn based on national race and gender demographics. The court noted that affirmative action measures may be struck down if they do not comply with the Constitution and the EEA. However, the judge could see nothing untoward about using targets set by an equity plan to guide the process of promotion. To the court, the promotion scheme would have been irrational and arbitrary had it not been based on targets set by the plan. To do otherwise would also have been self-defeating – the promotions would merely have perpetuated the dominance of white males in the ranks concerned. The judge added that anybody is entitled to attack affirmative action measures, but reminded Solidarity that it should not do so merely to preserve white male supremacy. In this case the attack on the promotion scheme was doomed to fail because it was based on the SAPS equity plan, which had been held to be unimpeachable by the Constitutional Court. The application was dismissed with costs.

Paternity leave

Mia v State Information Technology Agency (Pty) Ltd Labour Court case no. D312/2012 dated 26/03/2015, unreported (Gush J)

- Mr Mia applied for maternity leave when in terms of a surrogacy agreement he and his civil union spouse took possession of a baby born of a surrogate mother. SITA refused, and Mia claimed damages for unfair discrimination. The court rejected SITA's argument that maternity leave could self-evidently apply only to women who have given birth to children themselves. That judge pointed out that the Children's Act 38 of 2005 regulates children's constitutional right to parental care. Mia had testified that he needed maternity leave because in terms of the surrogacy agreement he was required to look after the child when it was delivered to them immediately after its birth. The judge could see no reason in these circumstances why Mia should be denied maternity leave – after all, he would be doing precisely what maternity leave was designed to achieve: to ensure that the newborn child received parental care. SITA was declared to have unfairly discriminated against Mia and was ordered to recognise surrogate parents in future when granting maternity leave, and Mia was awarded compensation equal to two months' salary and his costs.