

# HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

## Review of Arbitration Awards — Disciplinary Penalty — Appropriate Sanction

A CCMA commissioner found that, although the employee had breached a safety rule, the sanction of dismissal imposed by his employer had been too harsh taking into account that the employee admitted breaching the rule; the employer had not suffered actual harm; and there was no evidence of a breakdown in the trust relationship or that corrective discipline was not appropriate in the circumstances. On appeal, the Labour Appeal Court found that the commissioner's decision was not unreasonable, and upheld it (*Bridgestone SA (Pty) Ltd v National Union of Metalworkers of SA & others* at 2277).

Several night shift employees had been dismissed for switching off their machines and sleeping during their shift. A bargaining council arbitrator found that, although the employees were guilty of dishonesty, it was not serious, and that the sanction of dismissal had been too harsh taking into account several factors, including the employees' long and unblemished service. On appeal, the Labour Appeal Court upheld the arbitrator's award. It found that he had reasonably engaged in a rational gradation of the offence of dishonesty and found that the employees' conduct was not an egregious form of dishonesty. It found further that the arbitrator had not improperly or unreasonably exercised his discretion when reinstating the employees without retrospectivity and on a final written warning (*Marthinussen v Metal & Engineering Industries Bargaining Council & others* at 2292).

A CCMA commissioner upheld the dismissal of an employee for breach of a company rule. On appeal, the Labour Appeal Court found that the employer had failed to prove the content, scope and application of the rule allegedly breached by the employee. Moreover, the commissioner had not considered the appropriateness of the sanction of dismissal — it was far from obvious that the employee’s conduct, even if it had constituted a breach of a company rule, warranted dismissal in the light of his long and unblemished service (*Dikobe v Mouton NO & others* at 2285).

An employee had been dismissed for clocking in and not proceeding to his workstation. At arbitration a CCMA commissioner found that the employee was guilty of fraud and dishonesty, and upheld his dismissal. On review, the Labour Court found that the commissioner had misdirected himself by finding the employee guilty of a charge not levelled against him before his dismissal. It found that serious charges could not be implied to fall within the earlier charges for less serious misconduct for which the employee had already been dismissed. (*Phuthi v Commission for Conciliation, Mediation & Arbitration & others* at 2417).

Similarly, in *SA Municipal Workers Union & another v Ngaka Modiri Molema District Municipality & others* (at 2430), the Labour Court found that a bargaining council arbitrator could not craft a new charge not contemplated by the employer when it dismissed the employee. The arbitrator was not at large to formulate a charge that attracted the sanction of dismissal, and was obliged to apply his own sense of fairness to determine whether the misconduct for which the employee was dismissed warranted the sanction of dismissal.

### Reinstatement

The Labour Appeal Court, in *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha & others* (at 2313), gave meaning to the words ‘not reasonably practicable’ in s 193(2)(c) of the LRA 1995. It found that the phrase ‘not reasonably practicable’ did not equate with ‘practical’; it referred to the concept of feasibility — something was not feasible if it was beyond possibility. The employer had to show that the possibilities of its situation made reinstatement inappropriate. Reinstatement had to be shown not to be reasonably possible in the sense that it might be potentially futile.

In *Dikobe v Mouton NO & others* (at 2285) the Labour Appeal Court confirmed that the lapse of time after dismissal was not, on its own, relevant where there was no evidence of the intolerability or impracticability of reinstatement of the unfairly dismissed employee.

### Arbitrators — Functions and Duties when Conducting Arbitration Proceedings

In *Satani v Department of Education, Western Cape & others* (at 2298) the Labour Appeal Court restated the functions and duties and the appropriate conduct expected of commissioners and arbitrators when conducting arbitration proceedings. It found that in this matter the arbitrator’s conduct had given rise to a reasonable apprehension of bias and that she had overstepped the fine line between legitimate intervention and assistance/ advancing one party’s case at the expense of the other.

## Dismissal — Unprotected Strike

In *Association of Mineworkers & Construction Union & others v AngloGold Ashanti Ltd* (at 2320) the Labour Court found that the refusal of over 500 AMCU members to work on a particular Saturday in support of AMCU's campaign to change the Saturday working arrangement at the employer's mine constituted an unprotected strike. It found, however, that several issues impacted on the fairness of the dismissal of the AMCU members: The productive operations at the mine had been suspended by a notice in terms of s 54 of the Mine Health and Safety Act 29 of 1996, and this severely blunted the impact of the one-day work stoppage. Only AMCU members who advanced lack of transport as the reason for their failure to report for duty were dismissed. No non-AMCU members who relied on lack of transport were disciplined. The court found that this disparity of treatment was not justifiable and discriminated against the AMCU members on the ground of their union membership. Their dismissals were found to be automatically unfair. The court found, regarding the remaining members of AMCU who had been dismissed, that their dismissal was neither substantively nor procedurally fair. It ordered the retrospective reinstatement for a period of 12 months for most of the dismissed AMCU members and similar relief for the balance.

## Dismissal — Witchcraft

An employee was found to have placed muti on the vehicle of the HR manager and was dismissed. At bargaining council arbitration the arbitrator noted that cultural beliefs had to be respected and not viewed through western societal norms. Witchcraft has far-reaching consequences for the black community, and the HR manager in this matter had been genuinely distressed by the incident. The placement of the muti was an attempt psychologically to exploit her and create fear and panic in her, for herself, her family and her possessions. This behaviour amounted to serious intimidation and could not be tolerated in the workplace. The employee's dismissal was upheld (*National Sugar Refining & Allied Industries Union on behalf of Mngomezulu and Tongaat Hulett Sugar Ltd (Darnall)* at 2441).

## Evidence — Witness Credibility

In *Department of Health (Western Cape) v Democratic Nursing Organisation of SA on behalf of Cloete & others* (at 2398) the Labour Court upheld a bargaining council arbitrator's decision that the employee had not been guilty of sexual harassment and ordering his reinstatement. The court confirmed that, on review, a court will not lightly interfere with an arbitrator's findings on fact, on credibility and on the probabilities. In this matter the arbitrator had correctly applied the cautionary rule with regard to single witness testimony, and found that the witness's evidence was limited to reporting what she had allegedly been told by the complainant. At best the witness's evidence amounted to hearsay. Properly construed, it amounted to an impermissible attempt at so-called self-corroboration of the complainant's evidence.

### *Quote of the Month:*

Not awarded.