

**NEW CHALLENGES:
SHIFTING POWER IN
UNCERTAIN TIMES**
12-14 August 2009



22nd ANNUAL LABOUR LAW CONFERENCE

Substantive law questions

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Jointly organised by:



The Institute of
Development and
Labour Law,
University of
Cape Town



Centre for Applied
Legal Studies,
University of
Witwatersrand



The Faculty of
Law, University
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- Reasonable expectation of renewal – roll over contracts – not renewed – bad attitude/poor performance
- Fixed term contract – suspension: too sick to attend; resigns without finding against him



- Dismissal for a reason related to conduct; some time later another employee is given a final written warning for same reason. Does this give rise to a claim for unfair inconsistency by the dismissed employee?



- If 'charge' against an employee is statutory offence must it be proved in a court of law before employer can initiate disciplinary measures arising from same cause?



- Collective guilt?
- 'Gross' in misconduct, meaning of



- Alcohol in the workplace conduct/capacity
- employee imprisoned for an issue which is not work-related.
- Resignation – withdrawal of – permissible?



- Constructive dismissal – employee AWOL 2 weeks employer plans to initiate measures
- Employee in competition / concurrence with employer.
- Relevance of disciplinary records prior records

Scope of collective agreements

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- OSD for ‘legally qualified personnel’ – does such OSD extend to employees who are in fact legally qualified but not designated as such e.g. labour relations officers?

Unfair investigation

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- E'er does not consult/interview e'ee later accused of misconduct/ failure of investigation witness at the 'scene' is later said to be hostile witness: incompetent or dishonest investigation
- Investigation of own dept – conflict of interest

Unfair disciplinary hearings

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- Lengthy suspension (14 months) is enquiry too late; may e'ee resign /avoid
- Alleged abuse of disciplinary process: splitting of charges
- If chair finds that the allegations invalid would it be appropriate /fair for chair to advise employer that may initiate new charges? -
- Specificity of allegations



- Prosecutor/chair
- Bias? outside chair ; drives to hearing with management
- An outside prosecutor becomes a complainant and the real complainant becomes a witness?
- Role of labour relations officers in internal disciplinary proceedings



- Delay in initiating disciplinary measures or concluding appeal processes? – may employer be estopped? –
- Failure to inform un-unionised employee of rights re CCMA/BC?
- Validity of separation agreements



- Provincial jurisdiction – does one province have jurisdiction to deal with a matter than arose in another province. - Skype – video conference
- Service by email
- General re process
 - CCMA proceedings a informal why lay reps not allowed



- Jurisdictional ruling – review when: prior/post arbitration
- May issues not raised in LR 7.11 be raised in arbitration
- Conciliation to identify issues in dispute, if raised in conciliation may be confirmed in LR 7.13 request for arbitration. But if a con-arb and no objection, may not raise new issues. Test: whether matter conciliated

Quality control CCMA/ bargaining councils

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- Measures adopted by CCMA to create consistency
- Incorrect citation of parties –
- Remedy – tell them
- CCMA settlement rate? How is the CCMA doing in settling mutual interest disputes?

Jurisdiction – CCMA/ Bargaining councils

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- Condonation
 - Factors to consider; weighting of ‘reason for delay’ / prospects of success?
- Contract of employment pte arb - may CCMA/BC take jurisdiction?
- No shows by referring parties. Amendment to CCMA rules post Premier Gauteng v Ramabulana

ULP

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- Inconsistent application of wage increases - CCMA jurisdiction?
 - Promotion disputes
 - When does cause of action arise: recommendation/appointment
 - Joinder of successful incumbent in ULP re promotion



- Merit increases – may employer withhold merit increase if funds not available
 - Could plead as a breach of collective agreement?
 - Grading
- Matters of mutual interest – essential services
- How should bargaining council deal with such matters?
- Salary disparities

Arbitration

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- Process - condonation requirement
- Referral form LR 7.13 - material difference from LR 7.11
- Identify real cause: alleged conduct but finding re capacity
- May commissioner express opinion about outcome before closing arguments



- Arbitrator duty to explain procedure
- Evidence: cautionary rules: single witness, hearsay evidence
- Remedies - conditional award(a), failing which (b)?

High Court / labour court

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- May high court enforce labour court order?

Policy questions

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- Adequacy of protection against abuse of labour court review mechanisms