Dear clients

Enclosed is our first employment law ENSight for 2008. We hope you find it a useful and interesting read.

It's interesting to discover increasingly how many of the issues we face in South Africa are being faced all over the world. Indeed when Rod Harper and I attended the IBA conference in Singapore in October last year, I co-chaired a session on religious symbols in the workplace. It provoked such interesting debate that I have written an article on the subject highlighting the views expressed by our Constitutional Court in the Pillay judgment. These are the sort of trends we need to stay abreast of as South Africa becomes more and more part of the global village.

Even more interesting though, and a real honour for us as Edward Nathan Sonnenbergs, was to discover how highly you, our clients had rated us in a number of surveys. ENS was ranked as the top firm in the South African legal sector for 2007/8 by Top 500 South Africa's Best Companies and as the best large legal firm in South Africa for 2007/8 by PMR.africa. ENS was also ranked one of South Africa's Top Empowered Companies for 2007/8 and as the Best Employer in the legal sector and in the Top 10 Best Employers overall by CRF Best Employers South Africa 2007.

The Legal 500 2007 – an international publication – ranked ENS in the top tier for Labour and Employment and PLC Which Lawyer 2007 – another highly regarded international publication – ranked ENS as a leading firm for Labour & Employee Benefits, acknowledging four of our senior lawyers either as leading, highly recommended or recommended individuals.

This all means that we owe a huge thank-you to you, our clients, because these awards are based on your comments and the feedback obtained from many of South Africa's major corporates. So, thank you for your support of our team during 2007.

We have every intention of working hard in 2008 to live up to these accolades and also look forward to seeing you at our client conference in May. Please highlight now already this important date in your calendar, or pin up the calendar we have marked for you on the reverse side of this letter. A detailed program and registration form will be sent out towards the end of March.

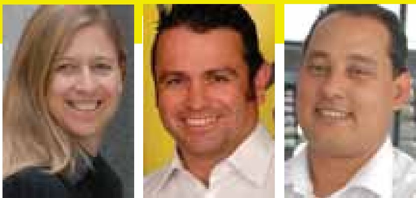
We look forward to being of service to you in 2008 and we promise to strive to continue to add value to you when providing legal advice, and to stand by you when there are strategic battles to be fought.

Kind regards

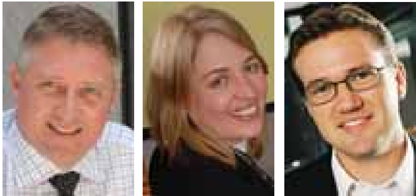
Susan Stelzner

(Head of Employment Law)

employment law


susan stelzner director - cpt/jhb | ross alcock director - jhb | bradley conradie director - cpt

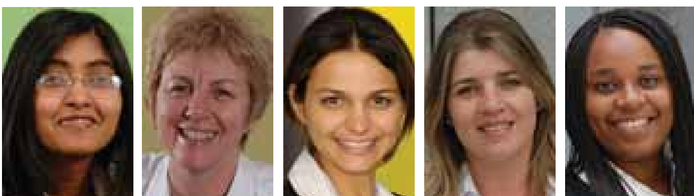
rod harper director - jhb | stuart harrison director - cpt/jhb | fritz malan director - jhb


anton steenkamp director - cpt | penny bosman senior associate - jhb | edwin ellis senior associate - cpt

alex ferreira senior associate - jhb | karen michael senior associate - jhb | nicolene vd westhuizen senior associate - jhb

ebrahiem abrahams associate - cpt | roewayda abrahams associate - jhb | kelsey allen-yaman associate - jhb

pareen camay associate - jhb | thandeka dube associate - jhb | itayi gwaunza associate - cpt


suemeya hanif associate - jhb | annie erwin associate - cpt | charmaine lack associate - jhb | keren machanik associate - cpt | chola makgamathe associate - cpt

employment law | client conferences 2008

january | 08

s	m	t	w	t	f	s
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

february | 08

s	m	t	w	t	f	s
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	

march | 08

s	m	t	w	t	f	s
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	**21**	22
23	**24**	25	26	27	28	29
30	31					

april | 08

s	m	t	w	t	f	s
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	**28**	29	30			

may | 08

s	m	t	w	t	f	s
				1	2	3
4	5	6	7	**8**	**9**	10
11	12	13	14	**15**	**16**	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

june | 08

s	m	t	w	t	f	s
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	**16**	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

july | 08

s	m	t	w	t	f	s
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

august | 08

s	m	t	w	t	f	s
					1	2
3	4	5	6	7	8	**9**
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

september | 08

s	m	t	w	t	f	s
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	**24**	25	26	27
28	29	30				

october | 08

s	m	t	w	t	f	s
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

november | 08

s	m	t	w	t	f	s
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30						

december | 08

s	m	t	w	t	f	s
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	**16**	17	18	19	20
21	22	23	24	**25**	**26**	27
28	29	30	31			

NB: Client Conferences

8 or 9 May - Cape Town

15 or 16 May - Johannesburg

johannesburg +2711 269 7600
cape town +2721 410 2500
durban +2731 301 9340
info@problemsolved.co.za
www.problemsolved.co.za

law | tax | forensics | advisory

edward nathan sonnenbergs

ens problem solved

religious symbols and customs in the workplace

by susan stelzner

The debate about religious symbols and customs in the workplace is a lively one because it involves the balancing of competing views and interests. These are some of the questions raised by the debate. What qualifies as a religion or a religious symbol? Must it be an obligatory part of the religion or are voluntary practices also protected? Where does the line get drawn between the requirements of the business or the job and the rights of the individual? How far must reasonable accommodation go? How should the concept of undue hardship be defined?

Cases in the news

We have seen a number of cases in the news in the recent past. For example, the Department of Correctional Services fired a social worker for wearing a headscarf and refusing to tuck in her shirt. She referred a dispute to the Labour Court. A few months later the case was settled after intervention by the Muslim Judicial Council. She was reinstated and discussions ensued around changes to the Department's dress code.

Department of Correctional Services fired a social worker for wearing a headscarf and refusing to tuck in her shirt

five prison warders were dismissed at Cape Town's Pollsmoor Prison for refusing to cut their Rastafarian dreadlocks

More recently five prison warders were dismissed at Cape Town's Pollsmoor Prison for refusing to cut their Rastafarian dreadlocks. Their union has appealed and indicated it is prepared to take the case to the Constitutional Court.

A Labour Court ruling upholds the workplace rule

In 2006 the matter of *Dlamini v Green Four Security* was decided by the Labour Court. A number of security guards were dismissed for failing to adhere to the company policy to be clean shaven. They alleged that their religion did not permit them to shave or trim their beards. They were members of the Baptised Nazareth Group.

The Labour Court held that they had to prove that shaving their beards was prohibited as an essential tenet of their faith. This was not demonstrated. The company applied its policy consistently to all employees irrespective of their religion. There was no proof of discrimination on account of religious beliefs. In any event, the rule was justified as an inherent requirement of the job. The court accepted on the evidence that standards of neatness are high in security services. The rule was therefore neither arbitrary nor irrational. There was no apparent reason for the existence of the religious rule whereas the workplace rule was well motivated. Therefore, the workplace rule had to prevail. Reasonable accommodation was not relevant in this case because the employees weren't seeking an accommodation but rather a full waiver of the rule.

What the Constitutional Court had to say about the protection of religious and cultural rights

In October 2007 our Constitutional Court gave judgment in the matter of *MEC for Education, KwaZulu-Natal and others v Pillay*. The judgment

the judgment provides a detailed discussion on the extent of the protection afforded to cultural and religious rights

provides a detailed discussion on the extent of the protection afforded to cultural and religious rights in the public school setting and possible beyond. These were the facts. When Sunali Pillay applied for admission to the school her mother signed a declaration that stated she would ensure her daughter complied with the school's code of conduct. The code prohibited the wearing of jewellery except plain earrings. Sunali was prohibited from wearing her nose-stud which was worn as part of a time-honoured family and cultural tradition. The wearing of a nose stud was a voluntary expression of South Indian Tamil Hindu culture, intimately intertwined with the Hindu religion.

Sunali was prohibited from wearing her nose-stud which was worn as part of a time-honoured family and cultural tradition

The Constitutional Court said the following on the important issues of principle.

- Our Constitution protects voluntary as well as obligatory practices – this is part of the commitment to affirming diversity. In fact, said the court, in this context, the protection of voluntary cultural practices may even be more vital.
- When it comes to the centrality or importance of the belief what is relevant is its meaning to the person involved.
- On the issue of reasonable accommodation, the state / employer / school must take positive measures and possibly incur additional hardship or expense to allow all people to participate and enjoy all their rights equally. These steps could be as simple as granting an exemption from a general rule or may require that rules or practices be changed. However, the principle of reasonable accommodation is particularly appropriate in localised contexts such as an individual workplace or school, where a reasonable balance between conflicting interests may be more easily struck.
- Undue hardship depends on the context but something more than mere negligible effort is required. An exercise in proportionality, which depends on the facts, is required.

Freedom of religion and cultural expression promotes the sort of society envisaged by our Constitution

On the facts of this case the Court accepted that discipline and education are legitimate goals. However, it was not satisfied that the admiral purpose of having uniforms was undermined by granting religious and cultural exemptions. The Court went on to say that exemptions have the added benefit of inducting learners into a multi-cultural South Africa. Freedom of religion and cultural expression in schools promotes the sort of society envisaged by our Constitution. The Court commented further that the position may be different in private schools even though discrimination is not allowed BUT a mere desire to promote uniformity, absent real evidence that academic standards or discipline will be threatened, will not justify refusing an exemption.

The school was ordered to consult regarding its Code and to make amendments, allowing provision for reasonable accommodation of deviations on religious and cultural grounds.

exceptional circumstances may allow for more emphasis on the workplace rule but the employer would have to justify its position

The approach of the Constitutional Court in *Pillay* differs markedly from that of the Labour Court in *Green Four Security*. It is not only concerned with preventing or eliminating discrimination but with the positive promotion of diversity. Given the broad and principled nature of the Constitutional Court's comments it is suggested that the *Pillay* case should in the future inform decisions taken on religious and cultural freedom by employers in both the public and the private sector and that all our courts, including the Labour Court, will be guided by the Constitutional Court's approach. Employers may well have to err on the side of accommodation and promoting diversity when making a call on whether or not to allow religious or cultural expression in the workplace. Exceptional circumstances may allow for more emphasis on the workplace rule but the employer would have to justify its position.

'second generation outsourcing' revisited: the tide goes out on *zikhethele*

by stuart harrison

A few years ago, somewhat controversially the Labour Court ruled in *COSAWU v Zikhethele Trade (Pty) Ltd and Another* (2005) 26 ILJ 1056 (LC) that so-called second generation outsourcing attracted the application of section 197 of the Labour Relations Act. So-called second generation outsourcing takes place where a company that has previously outsourced particular functions to a third party service provider, awards the contract for the outsourced work to a new service provider following the termination of the contract with the old service provider. The Labour Court in *Zikhethele* had acknowledged that an ordinary reading of the express language of section 197 precluded its application to second generation outsourcing where nothing is transferred "by" the old employer to a new one because the definition of "transfer" in section 197 refers to a transfer of a business "by" the old employer to the new employer and this is not what occurs in a situation where an institution, on termination of a contract which it had concluded as principal for the provisions of services, contracts with another provider for the provisions of the same services. However, the Court ruled that a less literal and more purposive approach was justified in the context of section 197 and that a mechanical application of the literal meaning of the word "by" in the definition of "transfer" in section 197 would lead to the anomaly that workers transferred as part of so-called first generation contracting out would be protected whereas those in a second generation scheme would not be. In short, the Court in *Zikhethele* advocated that the definition of "transfer" should be interpreted as applying not only to transfers "by" one employer to another (which covers the so-called first generation outsourcing cases) but also transfers "from" one employer to another (which would cover the so-called second generation outsourcing cases".

Although the *Zikhethele* case was subsequently overturned on appeal by the Labour Appeal Court, the appeal succeeded on a technical ground (the non joinder of a party to the proceedings who should have been joined) and the LAC did not pronounce on the application of section 197 to so-called second generation outsourcing. The issue was therefore left somewhat in limbo.

> **the Court held that the wording of section 197 was clear and that the legislature only contemplated so-called second generation outsourcing**

A case about the outsourcing of non-core activities

A few months later, the issue came before the Labour Court in *Aviation Union of South Africa and Others v South African Airways (Pty) Ltd and Others* (unreported case number J2206/07). In that matter a contract that SAA had with an entity to which it had previously outsourced certain non core activities, namely LGM SA Facility Managers and Engineers (Pty) Ltd, was cancelled and a new contract awarded by SAA to a new service provider. The Aviation Union of South Africa (AUSA) contended that the original SAA employees, who had transferred to LGM in the first outsourcing, should transfer by the application of section 197 from LGM to the new service provider, based on the arguments endorsed in *Zikhethele*.

AUSA accordingly applied to the Labour Court for an order declaring that section 197 applied to the so-called second generation outsourcing and that the LGM employees in question were therefore transferred to the new service provider. The Labour Court disagreed with the conclusion reached in *Zikhethele*, however, and held that in articulating section 197 and the definition of "transfer" therein, the legislature had only contemplated a transfer by an old employer to a new employer (i.e. so-called first generation outsourcing) and not so-called second generation outsourcing. The Court held that the wording of section 197 was clear in this regard and gave rise to no ambiguity or doubt as to what the legislature had intended.

A little over a month after the judgment in the *AUSA* matter was handed down, the Labour Court gave a further judgment in another matter, *Crossroads Distribution (Pty) Ltd t/a Jowells Transport v Clover SA (Pty) Ltd and Others* (unreported case number P100/06). The matter had in fact been argued more than a year previously and it involved a situation where the service provider (Clover) to whom a dairy known as Woodlands Dairy had previously awarded a contract to provide milk transportation and related services, had cancelled its contract with Woodlands. Woodlands had then awarded a new contract to Jowells Transport. Clover asserted - on the strength of the authority of *Zikhethele* - which had not been overturned on appeal at the time, that section 197 applied to the so-called second generation outsourcing with a result that the employees employed by Clover to render the service to

Woodlands must be taken to have transferred to Jowells Transport. Jowells Transport, on the other hand, took the view that section 197 had no application given that there was no transfer of a business as a going concern by Clover to Jowells Transport.

Clover had employed one manager, four supervisors and 31 drivers for purposes of rendering the services in question to Woodlands but, before the scheduled termination of its contract with Woodlands, it had informed Jowells Transport that it intended retaining the services of the manager, three of the supervisors and eleven of the drivers. Jowells Transport had then offered employment to all of the drivers who were not going to be accommodated by Clover and pursuant to this 16 former Clover drivers where employed by Jowells Transport. Clover also sold a few pieces of office furniture, one appliance and a wash bay structure and cleaning equipment (used for cleaning out the tankers that transport the milk) that had been installed by Clover at a premises in Humansdorp that was used as the principal base of the transport operations. The transactions between Clover and Jowells Transport in relation to the aforegoing were separate transactions which were not incorporated in the agreement between Woodlands and Jowells Transport. Clover did not sell any of the tanker vehicles used by it in the milk transportation service to Jowells Transport and Jowells Transport in fact invested in 14 new tanker vehicles at the cost of some R23 million in order to service its new contract with Woodlands.

Before the Labour Court, Clover relied on the conclusion of the contract between Woodlands and Jowells Transport (which contract was preceded by its own very similar contract with Woodlands which had come to an end) to argue that there was a transfer of a business as a going concern as contemplated by section 197. While the Labour Court accepted that an entity that provides services is capable of being transferred as a going concern within the meaning of section 197, it held that the same reasoning did not apply to the contract which governed the terms and conditions upon which such services are rendered, which itself was not capable of transfer in terms of section 197.

companies involved in the awarding or winning of outsourcing contracts can enjoy greater flexibility

The court also agreed with the approach taken to second generation outsourcing in the *AUSA* matter and thereby added its voice to the rejection of the thinking followed in *Zikhethele*. The court held that the entity which provided the service in this case (Clover) was not transferred at any stage. There was no transfer of any kind only the conclusion of separate transactions starting with the termination of one contract and ending in a new contract. The court endorsed the example made in argument on behalf of Jowells Transport that where a municipality had a contract with a car hire company (company A) to meet the travel needs of its employees and it then terminated that contract and concluded a contract with a new car hire company (company B), section 197 could hardly be said to operate in such an instance to transfer all of the employees of company A to company B.

The fact that some employees employed by Clover had commenced working for Jowells Transport did not mean, so the court held, that they were automatically transferred to Jowells Transport. On the contrary, they had accepted offers of employment and concluded their own separate contracts of employment and there had been no statutory obligation on Jowells Transport to employ them nor had they been obliged to commence working for Jowells Transport. Clover was still in business although it no longer carried on the business of providing transportation and logistics to Woodlands and Woodlands had never been the employer of any of the employees in question. Therefore, the court held, there was no old employer / new employer relationship between the relevant parties which would invoke the operation of section 197 and nothing tantamount to a going concern had been transferred by Clover - or Woodlands - to Jowells Transport given that amongst other things key assets such as the tankers had not been transferred by Clover to Jowells Transport.

We now have useful authority that so-called second generation outsourcing transactions do not attract the application of section 197

The tide therefore appears to have turned against *Zikhethele* in the Labour Court and there is now useful authority that so-called second generation outsourcing transactions do not attract the application of section 197. The issue is still likely to come before the Labour Appeal Court at some stage, given its significance, but until then, companies involved in the awarding or winning of outsourcing contracts can enjoy the greater flexibility that results for them in section 197 not being applicable, whilst those companies who lose outsourcing contracts need to plan on dealing with the employees used by them to service the contract through appropriate retrenchment processes if they cannot be accommodated elsewhere in the organization.

Note: ENS acted for the applicant in this case

warning: there is no limit to the amount payable on reinstatement

by pareen camay

Section 193 (1) of the LRA provides an employee who has been unfairly dismissed with three possible remedies. The employer may be ordered to reinstate or to re-employ the employee or to pay compensation. In the earlier case of *Chemical Workers' Industrial Union v Latex Surgical Products (Pty) Ltd* the LAC held that in the case of an ordinary unfair dismissal it is not competent to order retrospective operation of a reinstatement order in excess of 12 months. This case was good news for employers and we reported on it at the time at our client conference.

Now in the recent case of *Republican Press (Pty) Ltd v CEPPWAWU & Gumede and Others* the Supreme Court of Appeal has decided differently, with important implications for employers.

The facts of the case in brief are as follows: the Company decided to retrench approximately 150 workers with effect from 6 September 1999, amongst them the 40 employees involved in this matter. The employees and their trade union challenged the fairness of the dismissal in the Labour Court. The court found that the employees were not selected in accordance with fair and objective selection criteria and ordered that 28 of the 40 employees be reinstated with effect from 7 September 1999.

The Company contested the order for reinstatement in that it was made some six years after the event occurred. The SCA examined the reasons why it took six years for the dispute to be resolved and cast the blame for this unreasonably lengthy delay squarely at the feet of the Union who in the eyes of the Court were tardy and dilatory in their conduct in progressing the matter and did not act with due diligence.

The Company raised two main arguments to support its contention that the order of reinstatement be set aside. Firstly, it stated that the reinstatement of the employees after a period of some six years was "*wholly inappropriate*" as the positions which they previously occupied had been outsourced, the Company had undergone considerable restructuring since the dismissals and there had been further retrenchments by the Company. Secondly, it stated that the order was in conflict with the decision of the LAC in the *Latex* case (referred to above).

The SCA disagreed with the LAC's reasoning in the *Latex* case and stated that back-pay to which an employee is entitled when an order for reinstatement is made cannot be equated with compensation. Therefore the limit that applies to compensation in terms of section 194 of the LRA doesn't apply to back-pay. Therefore there is no limitation on the amount of back-pay when reinstatement occurs retrospectively beyond 12 months.

However, while making this significant pronouncement and overruling the decision of the LAC in the *Latex* case, the SCA was cautious as to the circumstances within which unlimited retrospective reinstatement should operate. It stated that a court or an arbitrator may decline to make such an order where it is 'not reasonably practicable' for the employer to take the employee back into employment. This will of course depend on the facts and circumstances in each case, however, the court stated that the impracticability of resuming the employment relationship will increase with the passing of time.

On the facts of this case, the SCA held that six years had passed from the time the employees were dismissed (primarily because the Union did not pursue the matter with the required diligence) and this meant it was not reasonably practicable to reinstate or re-employ the employees. Accordingly the reinstatement order made by the Labour Court was "*entirely inappropriate*". The only remedy available was to order the Company to pay to each of the employees compensation limited to 12 months' remuneration.

In a nutshell, the decision of the SCA has both good news and bad news for employers, either way it is a significant judgment. The good news being that where there has been a significant delay in progressing a matter our courts might not order reinstatement. The SCA has made unions accountable for their actions and where they have caused a matter to be prolonged unnecessarily this could have an impact on the eventual outcome of the case. However, the bad news is that the *Latex* case has been overturned and retrospective reinstatement orders are now not limited or capped to 12 months for unfair dismissals. This has serious operational and financial implications for employers.

backpay cannot be equated with compensation

The Union approached the Constitutional Court in seeking leave to appeal against the decision of the SCA who awarded the 28 workers compensation instead of reinstatement as they had been retrenched for longer than five years. The Constitutional Court has dismissed the application for appeal, stating that there were no prospects of success. Accordingly, the decision of the SCA in this regard remains binding.

defending unfounded allegations of discrimination

by alex ferreira

Mr Janda was employed by First National Bank (FNB) as a security officer from 1997 until 2004. That year he was dismissed for assaulting a co-employee whilst on duty. Janda alleged that this dismissal and the reasons given for it by FNB were sinister, leading him to institute proceedings in the Labour Court (*Janda v First National Bank*) claiming reinstatement, alternatively compensation.

Janda alleged that his dismissal was automatically unfair on two separate grounds, namely:

- that he was discriminated against for exercising his rights under the LRA, alternatively that his dismissal was in reality based upon the fact that during 1999 he had been instrumental in lodging a complaint with the Department of Labour (the DOL) about an overtime dispute; and
- that he was also the victim of discrimination based on race in that FNB generally treated black employees more harshly than white employees in matters regarding discipline and that he, a black employee, would not have been dismissed had he been white.

Janda alleged that the company conspired to get rid of him within a climate of racial discrimination

FNB averred that Janda was simply dismissed for misconduct in the form of assault on a colleague

Janda's case was that FNB conspired to get rid of him within the climate of a policy of racial discrimination perpetrated by FNB. The chairman of his disciplinary enquiry was accused of having been used as an instrument to achieve this result. In summary Janda alleged that FNB and its employees had acted in concert and in bad faith.

FNB vehemently denied the allegations and averred that Janda was simply dismissed for misconduct arising from his assault on a colleague (who, like Janda, happened to be a black employee).

Alleged discrimination for exercising legal rights or on arbitrary grounds

The court found that the complaint which had been lodged with the DOL had been resolved. Janda's contention that his participation in this dispute resulted in a conspiracy to victimise him was also not supported by the evidence or by the probabilities. Instead it seemed to be based on speculation. It was also improbable that the alleged conspiracy took nearly five years to come to fruition, and did so only when Janda faced a disciplinary enquiry for assault.

Alleged racial discrimination

The second ground of Janda's case was that he was dismissed as a result of a policy of racial discrimination perpetrated by FNB. Janda compared the cases of two white employees against those of his own and another black employee to support his contention. According to Janda, he knew about these various comparative incidents from his officer in charge at weekly departmental meetings. However, Janda failed to call this person as a witness without giving any reason for the failure to do so. The evidence allegedly conveyed to Janda by the officer in charge was, therefore, treated by the Court as hearsay evidence, to the detriment of Janda's case.

the alleged conspiracy was not supported by evidence or probabilities

The Labour Court's findings

The court held that the evidence of the respective parties must be assessed with the following in mind:

- There was *prima facie* evidence that Janda had committed misconduct. Accordingly, the *prima facie* reason for his dismissal was his misconduct. Janda therefore had an 'evidential burden' to produce evidence that would cast doubt on FNB's stated reason for his dismissal and that the following test must apply in this regard: " *the more serious the*

allegation of the employee, the heavier will be the evidential burden".

the mere existence of disparate treatment does not mean that there is discrimination

- The court agreed with the statement by Landman J in *Louw v Golden Bus Arrow Services (Pty) Ltd (2000) 21 ILJ 188 (LC)*, that: *"[t]he mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment".*

- The court further held that *"[w]hilst it is true that differential treatment, in the sense of different sanctions, combined with the way in which the decision making process played itself out, may provide evidence of discrimination or arbitrariness, the court must be satisfied that* in the context of Janda's allegations of a conspiracy and/or a general racist policy] *it was in the furtherance of a conspiracy and/or general policy of racial discrimination on the part of the respondent and not due to a bona fide error or mistake on the part of the presiding officer."*

The court thus held that the most probable inference to be drawn from the established facts was that Janda

FNB did not victimise or practise a policy of racial discrimination

had been dismissed for misconduct in assaulting a co-employee. FNB had discharged the onus to prove that Janda had not been dismissed for an automatically unfair reason. FNB was vindicated in insisting that it neither victimised its employee nor practised a policy of racial discrimination. In the result, Janda's case was dismissed and he was ordered to pay FNB's legal costs.

Note: ENS acted for FNB in defending this case

payment of overtime and the BCEA threshold

by susan stelzner

In the recent case of *Mondi Packaging (Pty) Ltd v Department of Labour & Others* the Labour Court was required to decide whether overtime pay should be included in the calculation of an employee's earnings in order to decide whether or not he was earning over the threshold and thus whether or not he was entitled to overtime pay for work on Sundays. The employer argued that the two employees involved in this case fell outside of the current annual earnings threshold of R115572, calculated on the basis of gross pay before deductions and were therefore not entitled to overtime pay for work on Sundays. The employer included overtime, as well as certain fund contributions, in its calculation of their annual earnings.

overtime payments should be excluded from the calculation of earnings

The court held that overtime payments should be excluded from the calculation of earnings. Including overtime pay in the calculation, said the court, would not only ignore the social context of the legislation (the social aspect of being away from family and the health consequences associated with working long hours without rest) but would also lead to uncertainty. The court said that an interpretation that includes in it overtime in the calculation of the annual earnings carries with it uncertainty and imposes a burden of unfairness on the employee.

Uncertainty on the part of employers arises in relation to compliance or non-compliance. On the part of an employee uncertainty arises from the fact that because overtime is an ad hoc event largely determined by the employer, the employee would never be able to tell whether he or she fell within the threshold at any given time.

reference checks and information from credit bureaux

by annie erwin

In a previous newsletter we advised on the application of the new National Credit Act (NCA) in the context of staff loans. A further issue for employers to be aware of arising from the NCA is that credit and reference checks with credit bureaux are now regulated by the NCA and it is no longer possible to obtain consumer credit information merely for the asking. Consumer credit information as defined in the NCA includes a person's credit and financial history; education, employment, career, professional or business history; and personal details such as name, date of birth, identity number, marital status, addresses and other contact details.

credit and reference checks with credit bureaux are now regulated by the NCA

Such information may only be provided by credit bureaux for a prescribed purpose or a purpose contemplated in the NCA. The prescribed purposes are listed in Regulation 18 and include the following:

- Considering a candidate for employment in a position that requires trust and honesty and entails the handling of cash or finances (18(4)(c)); and
- Verifying educational qualifications and employment (18(4)(g)).

Importantly, should one require a report for the above purposes, the NCA prescribes that the consent of the consumer must be obtained prior to the report being requested (18(5)).

The bottom line is therefore that no undisclosed checks using credit bureaux may be made on employees or job applicants to verify qualifications and credit standing.

landmark age discrimination case in the UK

In line with the object of keeping you abreast of international trends, here is an interesting bit of news from the UK. When one hears the words age discrimination one generally immediately thinks of age as referring to older people. But age discrimination can happen against a young person as well. A news report refers to a case decided in the UK. A membership secretary of an exclusive London club became the first person to win a discrimination claim for being told she was too young for her job. Megan Thomas (20) claimed she had been dismissed from her post because managers told her she was not old enough to deal with members of the Eight Member Club in central London. The Independent notes that a landmark ruling by a London employment tribunal decided Thomas was unfairly dismissed and discriminated against on the grounds of her age. The newly-enacted UK age discrimination rules were originally aimed at older workers but the latest ruling could help young people who feel they are being discriminated against because of their youth. This is the first time that the UK courts have said age discrimination adversely affects the young and young-looking as well as the old.

legal representation at the CCMA

We find that clients are still frequently confused about their rights to legal representation at the CCMA. The only times when you are not as a company entitled as of right to legal representation is when you are dealing with a dispute about the dismissal of an employee for misconduct or incapacity. In such cases you have to apply for legal representation if you what it.

We find that clients are still frequently confused about their rights to legal representation at the CCMA

In all other cases you have the right to legal representation. This also extends to the arguing of preliminary points (like condonation, whether the person claiming to be in dispute with you is an employee, whether the CCMA has jurisdiction, rescission applications etc). This is the case even if those preliminary points relate to a dismissal case.