Contemporary Labour Law

Vol 16 No 5 December 2006

Picketing and the dismissal of strikers

Three new Labour Court decisions

by P A K Le Roux & Carl Mischke

While many legal principles relating to strikes and lock-outs appear to have been settled through interpretation by the Labour Court and the Labour Appeal Court, some issues remain unclear. Three new decisions of the Labour Court have focused on some specific aspects relating to picketing (especially where the picket has to be held) and the perennial issue of the dismissal of striking employees. Perhaps some of these decisions will attract controversy, but there is no doubt that they make a real contribution to the jurisprudence relating to strikes.

Where to picket

The place of the picket — where employees picket in support of a strike — remains a difficult issue. For the picketers, the main consideration is to make the greatest possible impact in communicating the demands and persuading other employees to join the strike. For the employer, the primary concern is to ensure that the picket is conducted peacefully and that it does not obstruct entrances, hamper deliveries or turn away customers. It is about balance, as the Labour Court pointed out in the recent decision of **Shoprite Checkers (Pty) Ltd v CCMA & others** (unreported, J1404/06; September 2006):

> *"The matrix of permissible conduct that evolves ultimately as the picketing rules is a particular permutation that balances logistics, the nature of the business, the industrial relations history of the enterprise and the union with the impact of the picket so that the rules are determined not too narrowly or too broadly to exacerbate industrial conflict or obstruct the substantive resolution of the dispute. Thus rules that put the pickets "out of sight and out of mind" of the employer, a phrase coined in this application, could, on the one hand, prevent intimidation of non-striking workers and customers. On the other hand, it can be counter-productive to workplace peace in the longer term if the picketers became increasingly frustrated as they would be if their picket has*

Managing Editor : P A K Le Roux
Contributing Editor : Carl Mischke
Hon. Consulting Editor : A.A. Landman

Published by Gavin Brown & Associates
Box 31380 Tokai 7966
Tel : 021 788-5560 Fax: 021 788-1811

little impact. The employer's incentive to resolve the dispute substantively could also diminish if the striking employees are out of sight and out of mind." (at [31])

First and foremost, the issue of where the picket takes place is something that may be agreed on by the employer and the union in the picketing rules. The Labour Relations Act, 66 of 1995 (the LRA) unequivocally places this responsibility for drawing up picketing rules on the employer and the union. But given the fact that the parties are locked in conflict, reaching consensus on where and how the picket will be conducted may be easier said than done. If no consensus can be reached, ss 69(4) and (5) of the LRA provide that either the employer or the union may then approach the CCMA for assistance: the CCMA must attempt to secure an agreement between the parties on the picketing rules.

The recent decision of the Labour Court in the **Shoprite Checkers** case focused on the procedure set out in ss 69(4) and 69(5) and the CCMA's power to make picketing rules if the consensus-seeking process fails.

The issue in this case was the union's demand that it be permitted in-store picketing. The union wanted 20 such pickets. The employer refused to agree to this. This dispute had to be considered by the CCMA in terms of s 69. The commissioner decided to permit a maximum of 6 in-store picketers. This decision was taken on review to the Labour Court by the employer.

In deciding the issue the Labour Court found itself in a unique position: it was necessary to deal with the procedure set out in s 69 of the LRA and various jurisdictional issues — these issues not being, perhaps, immediately apparent upon reading s 69. The relevant provisions read as follows:

"(2) Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1), may be held-
(a) in any place to which the public has access but outside the premises of an employer; or
(b) with the permission of the employer, inside the employer's premises.
(3) The permission referred to in subsection (2)(b) may not be unreasonably withheld.
(4) If requested to do so by the registered trade union or the employer, the Commission must attempt to secure an agreement between the parties to the dispute on rules that should apply to any picket in relation to that strike or lock-out.
(5) If there is no agreement, the Commission must establish picketing rules, and in doing so must take account of-
(a) the particular circumstances of the workplace or other premises where it is intended that the right to picket is to be exercised; and
(b) any relevant code of good practice.
6) The rules established by the Commission may provide for picketing by employees on their employer's premises if the Commission is satisfied that the employer's permission has been unreasonably withheld."

The Labour Court began its analysis of these provisions by indicating that the processes described in these provisions are not conciliation and arbitration: the s 69 procedure commences with a consensus-seeking exercise. Rules can be made only if this process fails, but this rule-making is also a flexible process of decision-making. It entails a rational decision being made by a CCMA commissioner, a decision based on relevant and reliable information placed before the Commissioner. Evidence may be led to ensure that the information is reliable. The rule-making process flows from the consensus-seeking process and the deliberations during the first process are not automatically confidential or without prejudice. Parties should know that the information disclosed during the first stage of the process may be taken into account to reach a decision in the rule-making stage.

Making picketing rules constitutes a decision made by a CCMA commissioner in terms of the LRA and therefore constitutes an adjudicative decision — the decision as to the rules cannot be taken from thin air and the submissions of the parties must be weighed and evaluated. The decision is fact-bound and, the Court added, a useful safeguard is for the commissioner to test the proposed rules with the parties before they are established to ensure that they are clear and practically viable.

In respect of where the picket should be held, the Labour Court agreed that the union bore the onus of proving that the employer's refusal to grant in-store

picketing by 20 workers was unreasonable. It is at this point that a "hidden" jurisdictional argument arose, namely that the commissioner had failed to establish that the employer's refusal of permission to picket in the stores was unreasonable before making her own decision as to what would be reasonable.

The argument was raised (and accepted by the Court) that the CCMA commissioner did not expressly find that the employer's refusal was unreasonable. The Court also accepted that a "substantive enquiry" as regards the reasonableness of the employer's refusal had to be undertaken before the commissioner invokes his or her power to make his or her own decision. In other words: before a commissioner makes a decision permitting picketing on the employer's premises, there must be a enquiry into the reasonableness (and a finding of unreasonableness) of the employer's refusal to permit picketing on its premises. The commissioner's failure to determine the reasonableness of the employer's refusal to permit picketing in-store was held to be fatal to the commissioner's decision: the commissioner's discretion to allow picketing on Shoprite Checkers's premises only came into play, if it was found that its refusal was unreasonable.

Dismissing strikers: a third procedural requirement

In **Modise & others v Steve's Spar Blackheath** (2000) 21 ILJ 519 (LAC) the Labour Appeal Court set two procedural requirements for the fair dismissal of striking workers, namely that there should be some form of hearing (albeit perhaps in an attenuated collective form) prior to dismissal and that there should be a fair and reasonable ultimatum. Although this was not finally decided in the **Steve's Spar** decision, the Court expressed the view that a hearing should precede the ultimatum.

The recent decision of the Labour Court in **NUM & others v Billard Contractors CC & another** [2006] JOL 17286 (LC) raises the possibility of a second opportunity to state a case or to be heard. To understand the Court's reasoning it is necessary to describe the circumstances in which the strike took place. The employer in this matter, Billard Contractors, was a temporary employment service that supplied a large number of workers to a client, Midway Bricks. A large number of the employees employed by Billard were members of the National Union of Mineworkers(NUM).

On 16 May 2002 Billard suspended one of the NUM's shop stewards pending a disciplinary enquiry. On 17 May a strike took place between 7h00 and 12h00 hours. On 22 May a meeting took place between Billard and the NUM shop stewards during the course of which various grievances were discussed. A decision was then taken by Billard to uplift the suspension of the shop steward. However, this decision was rescinded because of pressure placed on Billard by Midway Bricks. This led to a strike that took place between 7h00 and 12h00 hours on 23 May. The employees returned to work after the intervention of a union official. A further strike took place on 27 May but the strikers again returned to work after the intervention of the union official and an ultimatum. A fourth strike took place on 28 May, but the strikers again returned to work after an ultimatum had been issued. During the course of a meeting held with shop stewards on 28 May they were informed that the next unprotected strike would lead to dismissals.

On 29 May a strike again took place. Billard's management then issued a notice to all employees in which it was pointed out that the strike was the most recent of a number of strikes and that the strike was unprotected. Billard also invited the employees to provide reasons why the strikers should not be dismissed — these reasons could be given either individually or through the shop stewards. This notice was apparently regarded as an ultimatum by Billard and over 200 workers who did not return to work were dismissed. With the exception of 39 employees, who Billard could not show had been on strike on 29 May, all the applicant strikers were held to have been dismissed for a substantively fair reason. However, the dismissals were held to be procedurally unfair.

The Court found that the meeting on 28 May 2006 constituted a hearing as envisaged in the **Steve's Spar** decision. It also found that the notice given on 29 May was not an ultimatum as contemplated by law. Nevertheless, in these circumstances the employer could fairly dispense with giving an ultimatum. What

made the dismissal procedurally unfair was the fact that Billard's management should have given the union an opportunity to be heard on 29 May 2002 prior to dismissing the strikers. The reason for this was that "something new" may have occurred on 29 May which made dismissal inappropriate, or that there may have been a misunderstanding or miscommunication as to the outcome of the meeting held on 28 May.

Thus far, this decision can be seen arguably harsh - based on the peculiar facts of the case and illustrating the difficulties faced by employers when dealing with recurring or intermittent strikes. But the Court also suggested a more far- reaching principle dealing with the situation where an ultimatum is indeed given.

The Court found that the pre-dismissal ultimatum is akin to a final warning to strikers, a warning of the consequences of continuing with their misconduct. The ultimatum is a special kind of warning issued in the context of collective action — with the purpose of providing a cooling-off period for striking workers before any final decision is taken to dismiss.

A hearing, the Court continued, is required to deal with the question whether it is fair to issue a final warning in the form of an ultimatum. Relevant considerations would include whether the strike is protected (it would not, after all, be fair to issue a final warning to employees who are not engaged in misconduct) and whether it would be fair to impose the sanction of dismissal on the strikers who fail to comply with the ultimatum. But this hearing, focusing on whether the ultimatum should be issued, cannot deal with the question whether or not the workers then complied with the ultimatum or even attempted to comply. These questions can only be resolved after the ultimatum has expired:

> *"Those questions can only be resolved after the expiry of the ultimatum. It may, for this reason, be inevitable that the audi rule must be observed both before issuing a final warning in the form of an ultimatum, and after the ultimatum has expired, whether before or after workers have been dismissed" (at [51]).*

The Court accepted that this additional requirement may prove complicated in the context of a strike dismissal and may cause uncertainty about the status of the workers. It raised the possibility that employees should, in certain circumstances, be suspended pending some form of hearing. It also raised the possibility that the hearing need only, in appropriate circumstances, take place after the dismissal. Finally, the hearing could be of a collective nature and need not be formal.

If this suggestion by the Court is followed, it would clearly place a significant additional burden on employers faced with unprotected strikes. Why the Court found it necessary to suggest this principle in a case where it found that no ultimatum had been given, and need not have been given, is unclear.

In most cases it will be self-evident whether or not a body of strikers has complied with the ultimatum. It seems that the Court's main concern was with the situation where individual strikers may be prevented from complying with an ultimatum because of circumstances beyond their control.

The one option envisaged by the Court is that, **prior to** dismissing the strikers after an ultimatum has expired, the employer has a duty **to initiate and hold** some form of hearing to determine whether or not the strikers, or some of them, had a good reason for not complying with the ultimatum. At an individual level this would presumably require the employer to distribute some form of invitation to the strikers to make submissions to the employer as to why they should not be dismissed for failing to comply with the ultimatum.

That an employer can comply with such a requirement in the heat of a strike where communication with employees is, at best, difficult, seems at least debatable. Quite apart from the possibility of bad faith representations from employees, the delays in this "individual approach" would be significant. The Court seems to accept that this could cause problems for employers, not least the delays and uncertainty created by this type of approach.

One could argue that these delays and the uncertainty could be alleviated by simply giving the union an opportunity to make collective representations. Whether this would serve any useful purpose in most cases is doubtful. Even if one accepts that the union will act in good faith in this regard in the heat of the moment, the question must be asked whether the union will be able to adequately address the issue — will it know at that stage whether employee X was unable

to comply with the ultimatum because he did not have knowledge of it, or that employee Y was unable to comply with the ultimatum because of personal circumstances?

To delay the hearing until such a time as all these individual issues have been clarified is simply not practicable from an employer perspective. The proposal of suspension is also, it is submitted, not a solution. What does it help to suspend employees who are in any event probably not willing to work? In any event, this does not prevent the uncertainty and the delay in finalising the matter. If employees tendered their services after the ultimatum had expired, would the employer have to pay them during the suspension?

Some form of hearing **after the dismissals** is, of course, more feasible. But is it necessary for the employer to be required **to initiate** such a hearing? If an employee or a union raises such an issue, a competent employer faced with such an issue will consider it carefully. But why should a burden be placed on an employer to invite ex-employees or to a union, to make representations as to why they should not have been dismissed for failing to comply with the ultimatum? In any event, the employee has a remedy. If he or she had a good reason for not complying with the ultimatum the dismissal will be substantively unfair. This would be the case whether the employer gave a hearing or not.

Dismissing non-union members

In **SATAWU & another v Equity Aviation Services (Pty) Ltd** [2006] 11 BLLR 1115 (LC) deals with the question of the dismissal of employees who were, at the time of the protected strike, not members of the union who had called the strike. SATAWU, a majority union, had been recognised by the employer as the collective bargaining agent; a number of minority unions were not recognised by the employer. When SATAWU went on strike in support of its wage demands, the minority unions indicated that they would not take part in the strike and the strike notice the employer had received was seen as relating to SATAWU members only. But when the strike began, a number of employees who were not SATAWU members at the time joined the strike — their actions did not relate to a different demand but was in support of the demand tabled by SATAWU.

The employer's argument was that the employees were dismissed because they were not members of SATAWU and that only members of SATAWU could embark on a strike. In respect of the non-members, the strike did not enjoy protection — only SATAWU members enjoyed protection against dismissal. On the facts before it, the Labour Court was unable to accept that the 63 individual employees who had been dismissed were not members of SATAWU (some issues had arisen in respect of the stop order forms submitted by the union in respect of these employees).

The Labour Court held that the purpose of the notice of the commencement of a strike is to inform the employer of the time of the strike. The union has no obligation to indicate the number of employees involved, nor does it have to indicate on whose behalf the notice is being given. As long as the dispute has been referred to conciliation and s 64(1) of the LRA has been complied with, every employee is entitled to join the strike (unless the employee's participation is limited by the provisions contained in s 65). To limit the strike to those employees whose union had issued a strike notice would, in effect, be to deny those employees their fundamental right to strike. In this case the non-union members who had participated in the strike were directly affected by the wage dispute and they worked for the same employer — their strike was not in support of a different demand and therefore a separate referral to conciliation and another strike notice was not

Contemporary Labour Law
is published monthly from August to July of each year. Annual Subscription: R 910.29 including VAT and storage binder. Visit our website at *www. workplace.co.za* for information and subscription details.

Subscription Enquiries :
Gavin Brown & Associates
INDUSTRIAL RELATIONS

Tel : (021) 788-5560 Fax : (021) 788-1811
e-mail : cll @ workplace.co.za

The Labour Court held that the purpose of the notice of the commencement of a strike is to inform the employer of the time of the strike. The union has no obligation to indicate the number of employees involved, nor does it have to indicate on whose behalf the notice is being given.

(SATAWU & another v Equity Aviation Services)

necessary. The effect of this decision is that once the procedures laid down in s 64 have been complied with and the employer knows of the impending strike, the employer is not entitled to anything else: it is not necessary for employees who do not belong to the union or who belong to unions who are not recognised or who fall outside the bargaining unit to refer their own dispute:

> *"Once the strike is protected, co-employees are entitled to strike in support of this demand. The LRA does not limit the strike to those whose union has given notice. This is supported by the fact that the strike notice does not have to state on whose behalf the notice is being given or how many employees are to participate. All that is required is a warning to the employer." (at [43])*

The employer must, in other words, be warned — and once warned, the employer is not entitled to more. The warning may well notify the employer that a strike is pending, but the employer may well be surprised as to exactly who will be participating in the strike. Does this mean that the employer should assume that its entire workforce will be on strike? ■

Remedies for unfair labour practices

Compensation and other remedies for an employer's unfair actions

by Dawn Norton

Section 194(4) of the Labour Relations Act 66 of 1995 (the LRA) states that when an arbitrator has found that an employer has committed an unfair labour practice the arbitrator may determine the dispute –

> *"on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation."*

Although the "standard' remedies applied in unfair dismissal cases are also available here, the LRA clearly also permits some discretion in fashioning a remedy which is wider than these three remedies.

This article explores the different orders granted for different species of ULPs. If an employer is found to have committed an ULP, what sanctions have in practice been imposed? If an employee has been the victim of an ULP, or reasonably suspects that an ULP is about to be committed, what relief can she or he realistically expect?

The concept of an ULP has a long and not always unproblematic history in South African labour law. After the ground-breaking amendments to labour legislation in the early 1980s, arising from the recommendations of the Wiehahn Commission, the ULP definition served as the cornerstone of the jurisprudence developed in the Industrial Court. At that time the definition of an ULP was extremely wide. The LRA diminished the scope of the definition of an ULP and the concept (excluding dismissals) clung precariously to life in Schedule 7 – Transitional Arrangements (the Schedule).

The Employment Equity Act , 55 of 1998, repealed the unfair discrimination provisions in the Schedule and

shifted the resolution of unfair discrimination disputes into s 10 of that Act. In 2002, the remaining ULP provisions in the Schedule were inserted into chapter 8 of the LRA, a chapter originally dealing with dismissals.

The definition of an ULP was extended to protect whistleblowers who disclose the criminal or irregular conduct of employers.

An ULP is defined in s 186(2) of the LRA as —

> *"any unfair act or omission that arises between an employer and an employee involving:*
> - *unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;*
> - *the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;*
> - *a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and*
> - *an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000, on account of the employee having made a protected disclosure defined in that Act."*

The process of dispute resolution and statutory remedies

If there is a dispute about an ULP, an aggrieved employee may refer the dispute in writing to a bargaining council or statutory council, if the parties to the dispute fall within the registered scope of that council, or to the CCMA if there is no council with jurisdiction. The referral must be made within 90 days of the act or omission which allegedly constitutes the ULP, or within 90 days of the date on which the employee became aware of the act or occurrence.

The council or the CCMA (as the case may be) must attempt to resolve the dispute through conciliation, but if the dispute remains unresolved the council or the CCMA must arbitrate the dispute. An employee who alleges an ULP in terms of the Protected Disclosures Act may refer the dispute to the Labour Court after the conciliation stage.

Promotions

Most alleged ULP's, especially in the public sector, are concerned with disputes concerning the failure to promote an employee. The remedies the CCMA and courts have ordered upon a finding of a promotion-related ULP are: to compel an employer to promote an aggrieved employee, to set aside an irregular promotion, to correct an improper procedure and, in the public service, to grant so-called protective promotions.

In **Walters v Transitional Local Council of Port Elizabeth & another** [2001] 1 BLLR 98 (LC) the employer appointed a person to the post of principal personnel officer on the basis of race despite the appointee's lack of knowledge and experience pertinent to the post. A dissatisfied employee who had scored the highest marks in the interviewing process referred both a delictual claim based on her constitutional right to equality and, in the alternative, an ULP claim to the Labour Court. The Labour Court dismissed the delictual claim (on the basis that the litigant had an adequate remedy in terms of the ULP jurisdiction of the Labour Court) and found that the employer had committed an ULP.

The Labour Court ordered the employer to appoint the applicant to the post retrospective to the date of the interview with all benefits. Landman J referred to the following statement by Ngcobo JA in the case **Hoffmann v South African Airways** [2000] 12 BLLR 1365 (CC)-

> *"An order of re-instatement, which requires an employer to employ an employee, is a basic element of the appropriate relief in the case of a prospective employee who is denied employment for reasons declared impermissible by the Constitution. It strikes effectively at the source of unfair discrimination. It is an expression of the general rule that where a wrong has been committed, the aggrieved person should, as a general matter, and as far as is possible, be placed in the same position the person would have been but for the wrong suffered. In proscribing unfair discrimination, the Constitution not only seeks to prevent unfair discrimination, but also to eliminate the effects thereof. In the context of employment, the attainment of that objective rests not only*

upon the elimination of the discriminatory employment practice, but also requires that the person who has suffered a wrong as a result of unfair discrimination be, as far as possible, restored to the position in which he or she would have been but for the unfair discrimination." (at para [50])

The Labour Court was unmoved by the fact that the employer had made a different appointment knowing that litigation on the matter was pending. Landman J commented:

"The actions of the Council are, I believe, irrelevant to the relief that the applicant claims. It made a decision and it must have foreseen that there was a possibility that Ms Walters would be reinstated*." (at para 49)*

The CCMA has also set aside promotions which arise from an ULP. In **NUTESA v Technikon Northern Transvaal** [1997] 4 BLLR 467 (CCMA) the employer, motivated by transformation considerations, appointed five black employees to newly created posts in secret and without advertising the new posts in violation of agreed procedures which included advertising vacant or newly created posts. The union, NUTESA, referred a dispute to the CCMA. The CCMA Commissioner commented:

"It may well be that those appointed are the most suited for the position and would have been appointed in any event. But without the observance of the proper process, the appointments are fatally flawed." (at para 6.3)

In **Great North Transport v Legodi & others** [2004] 1 BLLR 51 (LC) the employer was reprimanded for failing to adhere to proper procedures and ordered to correct an improper procedure which had given rise to an ULP. The CCMA held that an employer committed an ULP by not promoting an employee to the post of typist in circumstances in which the evidence showed that she was the strongest candidate. The CCMA ordered the employer to re-test the employee with a view to making the promotion. The Labour Court upheld the award on review.

Remedies for demotion disputes

In **Bensch v Phalaborwa Transitional Local Council** [1997] 9 BLLR 1163 (LC) the Labour Court granted an interim interdict pending an arbitration of an ULP dispute involving alleged unfair conduct relating to demotion. An aggrieved chief executive officer / town clerk sought an interdict restraining his employer from advertising his post and argued that any subsequent appointment would inevitably entail his dismissal or demotion. An interim order was granted restraining the employer from advertising the post pending the arbitration of the dispute.

In various cases arbitrators and the Courts have granted compensation and/or ordered reinstatement as remedies in the case of demotions found to be unfair. See, for example, **van Niekerk v Medicross Health Care Group (Pty) Ltd** [1998] 8 BALR 1038 (CCMA) and **Egerton v Mangosuthu Technikon** [2002] 1047 (CCMA) circumstances in which a demotion led to a constructive dismissal.

Demotion disputes and constructive dismissal cases can overlap. In **Van Wyk v Albany Bakeries Ltd & others** [2003] 12 BLLR 1274 (LC), for example, a regional manager was demoted when appointed to the post of branch manager, although his salary and terms of conditions remained unchanged. He claimed that he had been constructively dismissed and referred a dispute to the CCMA. He was unsuccessful and approached the Labour Court on review.

Ndlovu AJ found that the demotion amounted to a unilateral variation in the applicant's conditions of service and that the commissioner had misdirected himself by finding that the applicant had not been constructively dismissed. He set aside the award and awarded him compensation equivalent to six months remuneration.

The court noted that although an employee may have a remedy to refer an ULP dispute to the CCMA the employee could elect to accept the employer's repudiation of the employment contract and sue for compensation.

See also in this regard **Mhlabi v CCMA & others** [2006] 4 BLLR 348 (LC) where Revelas J, referred to the **Van Wyk** decision and held that a —

"unilateral demotion is a form of repudiation of the contract of employment, amounting to a constructive dismissal." (at para 15)

Remedies for the provision of benefits disputes

The payment of compensation is the usual remedy granted to employees where it has been found that an ULP relating to the provision of benefits has been visited upon them.

In **Protekon v CCMA & others** [2005] 7 BLLR 703 (LC) the employer, a Transnet owned company, withdrew a travel benefit from middle managers and replaced the benefit with a salary increase. The salary increase was worth approximately 1/3rd of the travel benefit. An employee upset at the loss of the travel benefit referred an ULP dispute to the CCMA. The CCMA found that the withdrawal of the travel benefit constituted an ULP and ordered the employer to pay the applicant the difference between the value of the travel benefit and the amount actually received for a period of one year (from the date of the withdrawal of the benefit to the date of the arbitration). The Labour Court agreed with this computation.

In **SACCAWU V Garden Route Chalets (Pty) Ltd** [1997] 3 BLLR 325 (CCMA) the union representing seven workers resident in George, referred an ULP dispute to the CCMA. They were covered by a collective agreement, operative from November 1996 to August 1997, in terms of which the employer agreed to transport employees living in Rondevlei, Smutsville and Barrington to and from work. The parties agreed that an outstanding issue was the transport of employees resident in George and that this issue would be referred to the CCMA for determination.

The union argued that it was unfair for the employer to provide transport to workers resident in Smutsville, Barrington and Rondevlei but not to extend that benefit to workers resident in George. The employer argued that the employer's cost in transporting workers was R98,78 each per month but the cost to and from George would be approximately R700 per month per employee (as the distance was greater) and the employer would need to purchase a vehicle at a cost of around R60 000. The CCMA commented:

> *"...it is clear that the employer in excluding the George employees from the transport benefit has a legitimate objective connected to business needs and economic factors ... The crisp issue for determination, however, is whether a blanket refusal to extend the benefit is the necessary means for securing those legitimate business needs. While it would be unfair and unreasonable for an arbitrator to award a massive increase such as would result from an award ordering the employer actually to transport the George workers, there are other compensatory options which by their nature amount to more proportional forms of differentiation permissible in terms of Item 2(1) (b). Instead of denying the George employees any form of transport benefit, the employer should have compensated them for their disadvantage in some other way. The most obvious solution would be to grant them, for the period of the collective agreement, a travel allowance based on the average monthly cost of the transport benefit received by the other workers, viz R98,78 per month.*
>
> *Although the average monthly cost does not accurately reflect the exact benefit received by each worker, it is the most practical and convenient yardstick to apply. Such an arrangement would render fair the employer's prima facie unfair conduct." (at para 6 and 7)*

The CCMA ordered the employer to pay a transport allowance of R98,78 per month to the George workers for the duration of the collective agreement.

In **Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others** [1997] 11 BLLR 1438 (LC) Seady AJ ordered the parties to fashion their own remedy, failing which the Labour Court would impose one. In this case the Labour Court found that the employer had committed an ULP by reserving membership to a staff benefit scheme (a registered Staff Benefit Fund) to monthly paid employees (mainly white) thereby excluding weekly paid employees (mainly black). Weekly paid employees belonged either to a registered pension fund or an unregistered provident fund. The employer contributed disproportionately to the schemes – 10% of an employee's wage to the Staff Benefit Fund and 5% to the pension and provident funds.

The LC considered the financial complexities in the matter, the lack of expert evidence led on the financial

implications of correcting the rules of the benefit scheme, and the negotiation processes taking place between the parties and ordered the parties to fashion a suitable remedy. The parties were given 10 weeks to do so, failing which the LC would impose an outcome on the parties.

Remedies for unfair suspension and unfair disciplinary action short of dismissal disputes

The remedies of reinstatement and orders restoring the original terms and conditions of employment are usually applied in granting remedies for this type of ULP.

In **Saloojee v McKenzie NO & others** [2005] 3 BLLR 285 (LC) Ngcamu, AJ ordered the Independent Complaints Directorate to reinstate the applicant (the Head of the ICD, Western Cape Office) pending his appeal against a sanction imposed at an internal disciplinary enquiry. In this case the employee gave an interview on national television without the requisite approval. The employer held a disciplinary enquiry and imposed the sanction of a reduced salary for one year and a final written warning for misconduct. The employee appealed.

Within 2 days of giving notice of his intention to appeal the employer suspended him (by placing him on "special leave") and notified him of its intention to transfer him to its offices in Mpumalanga.

The Court found that the transfer was a demotion which was carried out in bad faith and with an ulterior motive (to achieve what in essence the disciplinary hearing had not – dismissal). The Court accordingly reviewed and set aside the decision to transfer the employee and ordered his reinstatement pending his appeal.

In **SAPU & another v Minister of Safety and Security & another** [2005] 5 BLLR 490 (LC) Farber AJ ordered the employer to lift the sanction of suspension imposed on police employees and to restore their salaries and benefits with retrospective effect (to the date of the suspension). In this case the employer sought to transfer staff from Port Elizabeth to Bisho to improve policing services in that area. Staff resisted the transfer and did not take up their new posts in Bisho. Instead they submitted medical certificates indicating that they suffered from post traumatic stress. The employer suspended them without salaries and benefits.

The Court found that the suspensions contravened procedural steps set out in regulations gazetted in terms of the South African Police Service Act 68 of 1995. The suspensions without remuneration we re declared to be invalid and of no force or effect.

Remedies for protected disclosure disputes

In **Grieve v Denel (Pty) Ltd** [2003] 4 BLLR 366 (LC) the Labour Court granted an interim interdict pending the determination of an ULP concerning an "occupational detriment" which contravened the Protected Disclosures Act, 2000. The applicant approached the Labour Court for relief when he was charged with misconduct and summoned to attend a disciplinary enquiry after he made disclosures to his employer's Board about a managers alleged financial wrong-doing.

The Labour Court held that the disclosures appeared to be *bona fide* and, if true, revealed possible criminal conduct. The applicant had made out a *prima facie* case that the employer had committed an ULP and the Labour Court granted him interim relief.

Conclusion

Whilst the remedies provided by the LRA to remedy alleged unfair dismissals do not necessarily always enable an arbitrator to fully redress the losses suffered by an employee, (e.g., compensation and reinstatement orders cannot be more than the equivalent of one year's remuneration) the remedies available to arbitrators in the case of ULP disputes are relatively flexible and usually serve to provide adequate relief.

Dawn Norton