Unlocking labour laws

From this edition *Labour Bulletin* will take queries from workers, shop stewards and organisers on matters of labour law where information or clarification is needed. We received these queries recently and **SALB's** (friendly) labour lawyer, gives some answers.

One of the companies where we organise re-opened a disciplinary enquiry into the same offence after our member had been found not guilty of that offence. Can the company do this?

Yes it can, but only in exceptional circumstances.

In BMW (South Africa) versus *Van der Walt* [2000] 2 BLLR 121 (LAC), the Labour Appeal Court (LAC) held that the opening of a second disciplinary hearing against an employee would depend on whether it is, in all the circumstances, fair to do so. However, it noted that this could not take place if the disciplinary code and procedure did not allow for it. It also noted that it would only be fair in 'rather exceptional circumstances'. The LAC quoted with approval the judgment of Commissioner Rycroft in the case of Frost v Telkom SA (2001) 22 ILJ 1253 (CCMA) where he stated: "The norm in assessing the fairness of a disciplinary offence is a single disciplinary enquiry conducted in compliance with the employer's disciplinary code. Where there has been compliance with the company's disciplinary code and the first enquiry has adequately canvassed the facts involved, it will be unfair to hold a second enquiry."

In Branford v Metrorail Services (Durban) & others [2004] 3 BLLR 199 (LAC), the majority of the LAC came to the conclusion that the concept of fairness is the overriding test. The court explained that fairness in this context applies not only to the employee, but also applies to the employer, and that the overall circumstances of each case should be considered.

In arguments on this issue, you often hear about the principle of *autrefois acqui,* or what the Amercians call 'double jeopardy'. This is a defence in criminal law, which says that a person cannot be tried twice for the same offence. In the BMW case, JA Conradie cautioned against the importation of the principles of *autrefois acquit* into labour law. Despite this caution, it is sometimes a useful principle to refer to because it demonstrates the unfairness of being charged twice for the same

offence.

Therefore an employer who wants to re-open a disciplinary enquiry better have a good reason. They will have to show why they did not lead all the evidence at the first enquiry and why it is fair in the circumstances to allow for the presentation of new evidence. If the employer knew about the evidence at the time that the first enquiry took place, then it is unfair to allow the company to start a new enquiry and it must live with the decision not to give that evidence at the first enquiry.

An employee should also strongly object if the employer introduces a new charge where the new charge is based upon the same set of facts that gave rise to the old charge. This may be a trick to get around the fact that it failed to put forward evidence at the first enquiry. The employer must justify why it did not institute the new charge in the first place and why it did not tender the evidence in the first place. It would have to also justify the fairness of this.

One of our shop stewards was dismissed for insubordination. He was dismissed without the company first informing and consulting with the union. Does this make his dismissal procedurally unfair?

No, not necessarily. Item 4(2) of Schedule 8 of the Labour Relations Act (LRA) states that discipline against a trade union representative (a shop steward) or an employee who is an office-bearer or official of a trade union should not take place without first informing and consulting the trade union. However, in NCBAWU v Masinga & others [2000] 2 BLLR 171 (LC), AJ Sutherland held that this was only a guideline and that the employer's failure to notify the union does not

mean that the dismissal was necessarily unfair.

You will have to demonstrate, with supporting facts, that the employer's failure to notify the union, which went against item 4(2) of schedule 8, led to an unfair dismissal.

When we go on strike and march, the police and the municipalities tell us we have to comply with the Regulation of Gatherings Act. Is this true?

In general yes. The Regulation of Gatherings Act applies to gatherings and demonstrations in public places. However, it does not apply to pickets that comply with section 69 of the LRA.

'Picket' is not defined in the LRA. It is defined in the Oxford dictionary as "men stationed in a body or singly by a trade union to dissuade men from work during a strike, etc." Presumably, the Oxford dictionary means to include women as well!

The LRA deals with pickets, and not marches. A march is usually different from a picket. Therefore, if your members and supporters intend to march, you must comply with the Regulation of Gatherings Act. Some 'bush lawyers' have tried to argue that a march is covered by the LRA because a march is a moving picket. But in most contexts this is pushing the boundaries of sensibleness.

The Regulation of Gatherings Act does not apply if your strike is protected and the picket complies with section 69 of the LRA. To comply with section 69:

- the picket must be authorised by your trade union and the trade union must be registered under the LRA;
- the picketers must be members or supporters of the trade union;
- the purpose of the picket is to peacefully demonstrate in support of the protected strike or in opposition to any lock-out (whether the lock-out is protected or not); and
- the picket must be held "in any place to which the public has access but outside the premises of an employer" or with the permission of the employer, inside the employer's premises. (After complying with procedures set out in section 69, the CCMA may overrule the employer's refusal to grant permission to hold the picket inside the employer's premises.)

The reason why the Regulation of Gatherings Act does not apply to section 69 pickets is because section 69(2) contains the phrase "despite any law regulating the right of assembly". You should also remember that in terms section 210 of the LRA if there is a conflict between the LRA and any other law, except the Constitution, the LRA is applicable. Therefore, if the picket complies with the four elements set out above, then the ordinary laws regulating the right of assembly do not apply. These laws include the common law, municipal by-laws and