

UNIVERSITY OF FORTHARE
NELSON R. MANDELA SCHOOL OF LAW
EAST LONDON
COLLECTIVE LABOUR LAW AND EMPLOYMENT EQUITY
LEL 321 E

DEGREE EXAMINATIONS

October/November 2019

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Time: 3hrs

Subject: Collective Labour Law and Employment Equity

Marks: 100

This paper consists of 4 pages including the cover page

Internal Examiners

Mr N Ndlovu

Adv V Booysen

External Examiner

Instructions

- This paper consists of 4 questions
- Answer all questions
- It is in your best interest to write neatly

QUESTION 1

What is collective bargaining? In your answer explain whether there is a duty to bargain in terms of the LRA 66 of 1995. Refer to specific provisions and case law (10)

Describe in detail the concept of unfair labour practice as contemplated in section 186 (2) of the LRA. (15)

Question 2

Themba JayT applied to FlySAFair for employment as a cabin attendant. He went through a four stage selection process and was found, together with eleven other applicants, to be a suitable candidate for employment. The decision however, was subject to a pre-employment medical examination which included a blood test for HIV/Aids. He was found to be clinically fit. However, his blood test showed that he was HIV positive. He was therefore, regarded as unsuitable for employment as a cabin attendant and was not employed.

Themba JayT now approaches you as a labour law expert seeking legal advice as to whether his non appointment amounts to discrimination. In your answer you are required to refer to constitutional provisions, legislation and relevant case law. (25)

Question 3

In January 2019, Mr Matthew Krieger ('Krieger'), an adult male person residing at 12 Arnold Road, East London, attended an interview for a position as security officer with main duty to perform security checks on male passengers at the East London Airport. Krieger is in possession of the necessary certificates from the Private Security Industry Regulatory Authority to perform such security work. Krieger was offered employment by the by the Airports Company (Proprietary) Limited (registration number 1999/012345/09), a company registered in terms of the company laws of the Republic of South Africa, with its head office at Gasson Park, East London, during February 2019. Krieger duly accepted the offer. However, Krieger then announced on 1 March 2019 to the Airports Company that he wanted to undergo a gender-reassignment process (sex change) from male to female. This gender-reassignment process was discussed with the doctor and agreed upon during June 2017 and Krieger received hormonal supplements for the months

after that. The Airports Company terminated Krieger's contract of employment with immediate effect as Krieger had failed to disclose his intention to undergo the procedure during the interview. The Airports Company stated that the omission to disclose the intention amounted to misrepresentation and dishonesty and thus argued that Krieger repudiated the employment contract. Krieger referred an unfair discrimination dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation and to the Labour Court for adjudication. The parties therefore agreed that the following questions of law are in dispute before the Labour Court:

1. Whether the Labour Court has jurisdiction to adjudicate this dispute:
2. Whether, during the interview, Krieger was under any legal duty to disclose to the Airports Company that he was in the process of undergoing a gender reassignment process that will result in his gender being changed from male to female;
3. Whether such non-disclosure was material that it justified the summary termination of the applicant's contract of employment;
4. Whether the termination of Krieger's employment by the Airports Company constituted unfair discrimination of Krieger by the Airports Company and, if so, on which grounds and in terms of which legislation, if applicable;
5. Whether Krieger is entitled to any possible relief;
6. Whether Krieger or the Airports Company will be required to pay the costs of this suit;
7. Whether there is a possibility of an order granting further and/or alternative relief.

You are required to draft the memorials for Mr Krieger (employee/applicant) and the Airport Company (employer/respondent)

Note: The use of legal authority is critical to the success of your argument. (25)

Question 4

On 22 August 2019, members of NTEU engaged in a protected strike. During the course of the weeks-long strike, several acts of serious violence, intimidation and damage to property were alleged to have occurred. As a result, UFH (employer) dismissed the workers who had been involved in the strike. Sixty-five of these workers were not positively and individually identified as being present when the violence was committed, but were dismissed nonetheless for derivative misconduct. NTEU disputed the fairness of these dismissals and successfully saw the workers reinstated after an arbitration process. UFH then appealed the arbitration award at the Labour Court. Both the LC and the LAC held that, in the present case, there was a duty on the employees to assist their employers identify the perpetrators and that, by remaining silent, the employees made themselves guilty of derivative misconduct. The LC set aside the arbitration award and the majority in the LAC confirmed the order of the LC.

Violent strikes not only affect employers but also have a detrimental effect on employees who do not participate in the strike. The perpetrators of these acts typically hide themselves in the crowds. Frustrated by the difficulty in identifying these perpetrators and the group's failure to expose them, the employer is tempted to simply "get rid of the whole lot of them". **Are employers entitled to do this? Are employers precluded from fairly dismissing an employee in terms of the LRA for a reason related to the employees' misconduct during a lawful strike? In your answer, discuss derivative misconduct in our labour law jurisprudence? Be sure to refer to legal authority.**

(25)