2004

DUE DATE:
FIRST SEMESTER: 23 MARCH 2004
SECOND SEMESTER: 3 AUGUST 2004

ANSWER ALL QUESTIONS

QUESTION 1
Ms Lindiwe Sono is an accountant who has a contract to work for Accountin Consultants CC. Her contract states that she will act as a tax consultant to the client of Accounting Consultants CC. She belongs to the corporation's pension an medical aid funds and is paid on a monthly basis. She devotes all her working tim to the corporation. For tax purposes, her contract stated that she is an independer contractor. After working for the corporation for two years, Ms Sono believes she i being discriminated against on the basis of both her race and sex because she i given only small firms as clients and her earnings have not improved in the two year she has been with the corporation. Th two other white male consultants who wer employed at the same time and on the same basis, have increased their earnings by 50% and both have been given large firms as clients. When she approaches a senic member of the corporation, he intimates that some clients have not been satisfie with Lindiwe's performance. She resigns and comes to you for advice. Advise M Sono by critically analysing all possible issues, including the dispute resolutio process, referring to legislation and relevant case law. [25]

1. COMMENTARY ON THE ASSIGNMENT

QUESTION 1

In Question 1 four aspects needed consideration.

First, students had to distinguish whether Sono was an employee or an independent contractor. Section 213 of the LRA defines an 'employee' as (a) any persor excluding an independent contractor, who works for another person or for the Stat and who receives, or is entitled to receive, any remuneration; and (b) any othe person who in any manner assists in carrying on or conducting the business of a employer.
Three tests had been developed by case law to determine who an employee is These are the control, organisation and dominant impression tests. Students wer expected to discuss these briefly and to refer to relevant case law (for example *Smith*, *Medical Association*, *Borcherds* and *Niselow*). Over and above these tests Martin Brassey ('The Nature of Employment' (1990) 11 ILJ 889-936) mooted th productive capacity test, which basically entails that if the personal capacity to wor is put at the disposal of an employer it would constitute an employment contract a opposed to the independent contractor who only delivers the product of suc capacity, namely the completed work.
Furthermore, s 200A presumes that, until the contrary is proved, a person who work for, or renders services to any other person, regardless of the form of the contract, i presumed to be an employee, if anyone or more of the following factors are present:
(a) the manner in which the person works is subject to the control or direction of

another person
(b) the hours of work are subject to the control or direction of another person
(c) where a person works for an organisation, he forms part of the organisation
(d) the person has worked for an average of at least 40 hours per month over th last three months
(e) the person is economically dependant on the person for whom he works
(f) tools of trade or work equipment is provided
(g) the person only works for one person.

This presumption, does however, not apply to people earning below R115 000. was expected of students to apply the law to the facts given. It could have bee argued that Sono is an employee on the basis that she devotes all her time to th corporation, she is paid monthly, she belongs to the pension and medical funds an she performs her duties personally. The fact that the contract states that she is a independent contractor is not decisive (see the *Briggs* and *Hunt* cases). It is unlikel that Sono would be covered by the presumption in s 200A because she would mos probably be earning in a higher income bracket. But, considering the factors (set ou in s 200A) in determining who an employee is, support could be found for th argument that Sono was an employee and not an independent contractor. Loo particularly at factors (c), (d) and (g).
In this regard it is important to note that if Sono is found to be an employee, sh would be entitled to the protection of the LRA and its remedies of unfair dismissal. not, she can fall back on the contract only. Students got marks both for arguing tha Sono was an employee and an independent contractor.
Second, the issue of a constructive dismissal had to be discussed. If Sono found tha it was intolerable to work for the employer any longer, she could argue that he resignation was a constructive dismissal (s 186(e)). Students were expected t discuss relevant case law (for example, *Goliath v Medscheme, Jooste v Transne Beets v University of PE and Quince Products CC v Pillay)*. In essence the followin questions should have been answered to come to a conclusion:
(a) did Sono intend to bring the employment relationship to an end,
(b) had the working relationship become so unbearable that Sono could not fulfi her obligation to work,
(c) was the intolerable situation likely to continue for a period that justifie termination, and
(d) was termination of the contract the only reasonable option open to Sono?
The onus was on Sono to establish the existence of a constructive dismissa Thereafter the employer could show that it was fair, both substantively an procedurally (s 192). Students got marks for arguing both that it was a constructiv dismissal or not. Students should have pointed out that all constructive dismissal are, however, not unfair.
Sono should have been advised that compensation for a constructive dismissa either because it was substantially (s 194(1)) or procedurally (s 194(1)) unfair, c both, would not be more than the equivalent of 12 months' remuneration.
Third, the issue of discrimination had to be considered. A constructive dismiss based on race and sex would constitute an automatically unfair dismissal (s 187(f) In this instance Sono would have the onus of showing that a dismissal has occurrec There after the onus shifts to the employer to prove that there was no discriminatio or that the discrimination was fair. It does not seem that the escape clause would b relevant in this instance as the inherent requirements of the job and age are nc

relevant. The general principles with regard to discrimination and relevant case law (for example the *McInnnes* and *Johnson & Johnson* cases) must have been discussed. If Sono was successful with an automatically unfair dismissal, the compensation could be more than for a constructive dismissal as set out above.
Such compensation must be just and equitable but not more than 24 months remuneration (s 194(3)).
Fourth, the dispute resolution process for a constructive dismissal: the dispute must be referred to conciliation by a council or the CCMA if the dispute is not settled arbitration by a council or the CCMA is compulsory. Such an arbitration award will be final and may be enforced as if it is an order by the Labour Court.
The pre-dismissal arbitration seems not relevant as Sono has already resigned.
For an automatically unfair dismissal, the dispute process is as follows:
the dispute must be referred to a council or the CCMA for conciliation,
if not resolved, the dispute may be referred to the Labour Court, and
an appeal to the Labour Appeal Court is also possible.
An alternative exist for referring the dispute to the court, namely that all the parties may agree in writing for the resolution of the dispute by way of voluntary arbitration under the auspices of the CCMA (s 14) .

QUESTION 2

"If an employer facing a strike could merely dismiss the strikers from employment by terminating their employment contracts then the strike would have little or no purpose. It would merely jeopardize the rights of employment of the strikers. The strike would cease to be functional to collective bargaining and instead it would be an opportunity for the employer to take punitive action against the employees concerned. The Act contemplates that the right to strike should trump concerns for the economic losses which the exercise of that right causes. That is because collective bargaining is necessarily a sham and a chimera if it is not bolstered and supported by the ultimate threat of the exercise of economic force by one or other of the parties, or indeed by both." - Black Allied Workers Union & Prestige Hotels CC t/a Blue Waters Hotel (1993) 14 *ILJ* 963 (LAC) at 972B - D.

Discuss the above quotation critically. Also discuss, with reference to the Labour Relations Act, 1995 and applicable case law, whether there are, or for that matter should be, any limitations on the exercise of strike action. [25]

Feedback QUESTION 2
This question in essence dealt with the dismissal of striking workers based on operational requirements during a protected strike.
You had to discuss the protection afforded by the Labour Relations Act to striking employees both in the context of protected and unprotected strikes.
The essence of the quotation pertains to the context and reason for the protection. You therefore had to discuss the role of collective bargaining in the labour law and the protection afforded to collective bargaining in terms of the LRA and the Constitution. The LRA supports an explicit right to strike accompanied by strong protection against dismissal and other acts of victimisation. According to Du Toit, the acquisition of the right to strike and the accompanying protection provides trad

unions with the strongest incentive for complying with the Act. You could even refe how this protection is embodied in the new LRA compared to the 1956 act.
Credit were given to students if the following related issues were (briefly) mentionec collective bargaining as the central theme of collective labour law and the ways i which collective labour law is promoted in the LRA, the purpose of collective labou law, the right of employees to strike and the definition and elements of a protecte strike, the limitations to strike action.
Keep in mind that your answer had to contain a discussion and an analysis Students were penalised if they merely copied certain sections of the ac without a clear discussion of the reason why it is included in your answe would have lead to lower marks.
The crux of the discussion had to be about the dismissal of striking employees fc operational requirements during a protected strike. Section 67(5) of the LRA accept that the operational requirements of an enterprise may justify dismissals during protected strike. The crux of the question related to the interpretation by the court c this right. Many employees and trade unions have interpreted this right as an eas excuse for employers to dismiss employees during a strike. Employees are trying t put economic pressure on employers during a strike and if they are successful an employers face economic difficulty then employers can resort to dismissin employees for economic reasons. This might seem to be unfair.
In *BAWU v Prestige Hotels CC* (1993) 14 ILJ 963 (LAC) (which was decided unde the previous Labour Relations Act) stated that the test for dismissals during a strik was whether the employer's **financial circumstances truly warranted the step**. must be motivated by **genuine economic necessity**. The limit of the right to strike i therefore reached at the point where the strike inflicts "**irreparable economi hardship upon an employer**". This contemplates an investigation of the merits c the employer's decision to dismiss.
In *NUM v Black Mountain Mineral Development* (1994) 15 ILJ 1005 (LAC) the cou found the approach in Prestige Hotels too restrictive and allowed for a test where th employer may dismiss employees once there is a **likelihood of substantia economic loss**. The employer should be able to commence dismissal once it ha reached its level of tolerance. This view and judgement has been criticised becaus at the very point at which the strike becomes effective, dismissal of strikers become fair. It also ignores the proposition that dismissing strikers will not necessaril guarantee the survival of the enterprise. This case went on appeal but before th matter was clarified at appeal it lead the way for a number of other judgements t look at the issue in more detail.
In *Cobra Watertech v NUMSA* (1995) 16 ILJ 582 (LAC) the court criticised th decision of *Black Mountain* because it required of the court to look retrospectively t see if the parties acted rationally in the process of bargaining having regard to th employer's financial circumstances. The court moved away from the idea that th answer lies in a fixed test to be applied to the facts. Instead, it held that it wa necessary to look at all the reasons advanced as well as the relevant facts t determine whether a dismissal was fair.
In *NUMSA v Vetsak Co-operative* (1996) 17 ILJ 455 (A) the court said it is nc possible to define a definite test and the ultimate test will lie in the fairness and nc the lawfulness.
On appeal of the *Blackwater* case, in *NUM v Black Mountain Development* (1997) BLLR 355 (A), the court found:

(1) Collective bargaining is the means preferred by the legislature for th resolution of labour disputes and the freedom to strike is fundamental t collective bargaining.
(2) Although an employer may be entitled at common law to dismiss strikin workers for breach of contract such a dismissal may constitute an unfa dismissal in terms of the LRA.
(3) However, unless the dispute is resolved and the employees return to work point must be reached in every strike when the employer in fairness will b justified in dismissing the striking employees.
(4) Whether that point has been reached will depend on all the circumstance and facts of each particular case.
(5) The ultimate determinant is fairness to both the employer and the employe In deciding this question the court must necessarily apply a moral or valu judgement.
(6) Once the facts are established an onus is not appropriate in the evaluation c fairness.

The enquiry is not whether another course of action may have been more successfu in resolving the dispute but whether in all the circumstances the dismissal could b considered unfair. It would be untenable to protect a strike beyond the point where can contribute a solution to the dispute. To do so would be detrimental to th interests of both sides as well as the community at large. In other words strikes tha are not functional to collective bargaining will not be protected and more than legalit is involved in functionality. This issue was again addressed in *SACWU v Afrox Li* (199) 10 BLLR 1005 (LAC). The court found again that operational requirement even where they arise out of a protected strike may justify a dismissal. The tru reason should however be the employer's operational requirements and not th employees' participation in a protected strike. The court must further determin whether the dismissal would have occurred if there was no participation in the strik The second step would be to look at legal causation. Was participation in the strik the main or most likely cause of the dismissal. If so - the dismissal would b automatically unfair. If not, the employer can prove justification on the grounds c operational requirements. Once it is established that the employer's operation requirements were the reason for the dismissal, the burden shifts to the employer t justify the dismissal on grounds of fairness. The court recognised that a strike doe not deserve protection beyond the point where it can contribute to a solution to th dispute. The test therefor lies in the functionality of the strike towards the collectiv bargaining process. Two very important considerations identified in Afrox ar whether the employer considered alternative options to dismissal and whether th employer considered leaving the outcome of strike action to power play leaving th outcome of the strike

The dismissal must comply with the procedural requirements in s 189 of the LRA.

COPY OF THE EXAMPAPER: NOVEMBER 2003

This paper consists of 4 pages.

Instructions:

1 Answer ALL the questions.
2 Candidates are expected to refer to relevant case law.

3 "CCMA" refers to the Commission for Conciliation, Mediation and Arbitration.

4 "LRA" refers to the Labour Relations Act 66 of 1995 (as amended).

QUESTION 1

Briefly discuss the following with reference to case law where applicable:

(a) When dismissing an employee, an employer must act in a *lawful* and *fa* manner.
Discuss the interaction and relationship between these two concepts. (10)
(b) The dismissal of an employee on the grounds of pregnancy. (5)
(c) The requirements for procedural fairness for a dismissal for ill health or injury (5)
(d) Who designated employers are for purposes of affirmative action in terms c the Employment Equity Act, 55 of 1998. (5)
(e) The procedural requirements for a secondary strike to be protected. (5)
(f) The protection of freedom of association of employees. (5)
(g) The circumstances in which the prescribed procedures in terms of sectio 64(3) of the LRA for a strike to be protected need *not* be followed. (5)
(h) The use of replacement labour during the course of a lock-out. (5)
(i) The requirements for a protected picket in terms of the LRA. (5)

[50]

QUESTION 2

Read the following set of facts carefully and answer the questions:

(i) Mr A van Zyl was employed as one of 450 employees by the Very Large Stat Department as a mechanic and auto-electrician. His responsibilities were t see that the fleet of cars belonging to the Very Large State Departmer (VLSD) were in working order, and to do any repairs that were necessary. M van Zyl was assisted by two other employees.
(ii) Mr van Zyl's immediate supervisor was Mr May. Mr May is the official i charge of all transport arrangements for the VLSD. Mr Van Zyl had five years service with the VLSD.
(iii) Mr van Zyl was obliged to work five hours' overtime in terms of his contract c service. However, because Mr May felt that Mr van Zyl could easily finish hi work during normal working hours, Mr May simply cut down the number c hours Mr van Zyl could work overtime to two hours. This decision becam operative at the end of January 2003. Because this entailed a loss of incom for Mr van Zyl, Mr van Zyl was bitterly unhappy about having his overtime cu short, and made no secret of his dissatisfaction and the manner in which M May had cut his remuneration. This led to a strained relationship between M van Zyl and Mr May.
(iv) As fate would have it, Mr van Zyl was dismissed for misconduct on 1 February 2003. The basis for the dismissal was the fact he was involved in a assault on Mr May on 9 February 2003. The incident occurred after workin hours and off the premises of VLSD.

(v) On 9 February 2003, Mr van Zyl received a phone call from Mrs Pless, hi sister-in-law. According to Mr van Zyl, his sister-in-law told him that two male were parked in front of her house, and were blowing the hooter of the car i which they were sitting. Mr van Zyl rushed to the house, and found Mr Ma and Mr Smith in the car. Mr van Zyl asked Messrs May and Smith to remov the vehicle, but Mr May adamantly refused. Mr May took a threatenin attitude, swore at Mr van Zyl ("you stupid dweeb", according to Mr van Zyl and proceeded to assault Mr van Zyl. According to Mr van Zyl, Mr May saic "I've always wanted to beat you up. Now that there is no-one else around t protect you, I can really get you." Mr May denies this version, and claims tha after he and Mr Smith had gotten out of the vehicle, Mr van Zyl approache them, threatened them, and demanded that they leave. According to Mr May Mr van Zyl said the following: "What are you doing here? Get out of her otherwise I'll beat you to a pulp. I've got a gun in the house". According to M May, Mr van Zyl lent force to his threatening attitude by hitting Mr May with hi fist. Messrs May and Smith left the scene, went to a police station, and laid charge of assault against Mr van Zyl. Mr May also laid a disciplinary charg against Mr van Zyl upon his (May's) return to VLSD the next morning. Mr va Zyl neither reported the incident to the police, nor to the VLSD.

(vi) Mr van Zyl appealed against his dismissal, but, on two appeal hearings, th dismissal was confirmed. The date of the last appeal hearing was 3 Marc 2003.

Answer the following questions:

2.1 Discuss the **substantive** and **procedural** fairness of the dismissal of Mr va Zyl with reference to applicable legislation and case law. (12)

2.2 Advise Mr van Zyl of all available dispute resolution procedures should h wish to challenge the fairness of his dismissal. Mr van Zyl also specificall wants to know what the date of his dismissal is and how much time he has t refer the matter. (6)

2.3 Assume that Mr van Zyl successfully challenges his dismissal. Discus whether Mr van Zyl can ask for an order for reinstatement? Now assume tha Mr van Zyl does not want to be reinstated. How much compensation will he b entitled to? (7)

[25]

QUESTION 3

During January 2000 trade union ABC, which is registered in terms of the LR approaches company XYZ and demands the following:

(i) Certain organisational rights, namely access to the workplace, the deductio of union dues and the right to elect trade union representatives for purpose of representing its members in the workplace.

(ii) The institution of a closed shop agreement to the effect that all new hourl paid employees have to belong to trade union ABC.

At the time of the demand, company XYZ has 1000 employees, of which 100 may b described as managerial employees, while the rest (900) are hourly paid employee who work on the production line. On receipt of the demand, company XYZ request trade union ABC to provide proof of its level of membership. ABC provides XYZ wit

proof that 451 of the hourly paid employees are paid-up members of the trade unior On receipt of such proof, the company decides to extend the rights of access an deduction of union dues to ABC and an agreement is reached to this effect. Th company, however, refuses to accede to the union's demand to have the right t elect trade union representatives. As far as the closed shop agreement is concernec a ballot is conducted by the employer in conjunction with the trade union among th whole workforce. The outcome of the ballot is as follows:
551 employees voted: (100 managerial employees and 451 hourly paid employees) In favour of the closed shop: 100 employees Against the closed shop: 45 employees. In view of these results, the employer refuses to agree to the institutio of a closed shop, as the majority of its workforce is not in favour of the closed shop.
Against this background, answer the following questions:

3.1 Advise trade union ABC about any possible options that may be available to to obtain the right to elect trade union representatives. (5)

3.2 What are the basic requirements for a valid closed shop agreement to b concluded in terms of the LRA? Did the ballot concerning the closed sho meet these requirements? (5)

3.3 Suppose the trade union calls a strike in order to obtain the right to elect trad union representatives. The strike takes the form of a ban on voluntar overtime as is practised by the hourly paid employees of company XYZ. Th company is hard hit by the ban because it has to meet an urgent and larg order for its products.

Discuss the options available to the employer by paying attention to the followin aspects:

(i) Whether the action of the employees does, in law, constitute a strike as defined in the LRA? (5)

(ii) Whether the employer may dismiss the employees who are refusing to wor overtime? In addressing this question you have to discuss the right of th employer to dismiss the employees in the case of a protected as well as in th case of an unprotected strike. (10)

(iii) Any other rights and remedies at the disposal of the employer to counter th action of the employees. (5)

[30]
TOTAL: [100]

2005

QUESTION 1

Big Company is a fruit juice manufacturer. It has two functional units on its premise s in the Paarl, namely a processing factory (the factory) and a marketing sectio . Entrance for both the factory and the marketing offices are gained through the sam e gate although they are situated in two separate buildings. There is a director f r Processing Mr P and a director for Marketing Mr M.
Big Company employs 500 employees in total, 400 in the factory and 100 n marketing. Big Company falls in the registered scope of the Fruit and Sale s Bargaining Council and Big Company and Trade Union XYZ are both parties to th s Bargaining Council. Trade Union XYZ currently represents 210 employees in th e factory and 30 in marketing. There is also another trade union CD active in th e workplace. CD represents 55 employees in marketing and 100 in the factory. XY Z and CD have tried to organise the employees in the workplace but was met with st f resistance from the employer. Big Company refuses to recognise any union and o grant any organisational rights.
In two weeks time there will be a public holiday which will fall on a Tuesday. XYZ ha s proposed working one Saturday (the normal work week is from Monday to Friday) n exchange for not working on the Monday before the public holiday - thus ensuring a long weekend for the employees. XYZ is prepared to enter into a written agreeme t to this effect and to support any required application for exemptions from the Bas c Conditions of Employment Act to do so. Unfortunately, some of the supervisors n the factory and some of the secretaries in marketing are not keen to work on th e Saturday because of other commitments - there is a rugby test on that Saturday. n addition they belong to another union.
There is no provision in their contracts of employment in terms of which th e supervisors can be required to work overtime.
Mr P and Mr M are assigned by Big Company to seek legal advice on these tw o pressing issues namely the right of the two unions to organise the workers at B g Company and the issues surrounding the public holiday. They approach you f r advice. Advise them.
(25)

(a) PROBLEM REGARDING THE PUBLIC HOLIDAY

Section 23(1)(d) of the LRA states that a collective agreement can bind employee s who are not members of the trade unions who are party to the agreement if thre e conditions are met: (1)
(a) employees are identified in agreement,
(b) agreement expressly binds employees,
(c) trade union holds majority status in the workplace. (1)

Definition of workplace, s 213. Also see ELL (II) p. 53. (1) Reference to *Speciali r Stores SACCAWU v The Hub* (1) Factory and office are separate workplaces.( ) XYZ holds majority in factory (210 of 400) but not in marketing (30 of 100). ( ) Supervisors can be compelled in factory (1)- not secretaries in marketing (1 . Confirmed in *Fidelity Guards v PTWU* (1998) 19 ILJ 260 (LAC) that the legal effect f a collective agreement is that it may bind non-parties to the agreement and anothe r

is that where applicable a collective agreement varies any contract of employmer .
(1) **(Marks 5)**

(b) PROBLEM REGARDING ORGANISATIONAL RIGHTS

Issues to be looked at:
There are basically 5 organisational rights: trade union access to the workplac , deduction of trade union subscriptions, trade union representatives, leave of offic s bearers for trade union activity, disclosure of information. (5)
Trade unions can either be sufficiently represented (1) or majority union.(1) Nature c f representation will determine the rights they will have access to.(1) Unions must als) be registered in order to claim organisational rights.(1)
Majority trade union can have access to all 5 organisational rights,(1) sufficient / representative can have access to access to the workplace, deduction f subscriptions and also leave for union activities for office bearers.(2)
XYZ is a member of the bargaining council. In terms of section 19 – if a trade unic ı is a member to a bargaining council, the trade union automatically (1) have access) s 12 & s 13 rights (access & deduction) regardless of level of representation.( )
Purpose of s 19 is to promote collective bargaining at sectoral level in stead of t plant level.(1)
Organisational rights may be obtained in one of the following ways:
* collective agreement(1)
* employer is a member of a bargaining or statutory council(1)
* s 21 procedure(1)
* if all else fails the trade union can strike about this.(1)
Trade union XYZ automatically gets access to organisational rights for both facto / and marketing.(1) Trade union CD has a majority in marketing and will not even b s sufficiently represented in factory.(1) They can work together to be a majority ı both.(1) In terms of the Bader Bob case a minority union can strike to attempt) acquire organisational rights.(1)
Marks were given for discussion of s 21 procedure. (ELL 54-55) (3) and f r discussion of definition of workplace, if not yet discussed under first part. (3)
(Marks 20)
TOTAL QUESTION 1 [25]

QUESTION 2

Company X (where there is a workplace forum in place) is increasingly experiencir problems with employees spending too much time on the internet during workir hours. Company X has never really had a policy on the use of the internet for priva purposes and decides to formally introduce a disciplinary code in this regard. Befo finalisation of the disciplinary code and procedure Company X caught Mr A whi accessing a pornographic website. Company X dismisses Mr A, who feels aggrieve about this. He threatens to take the matter to court.
Mrs B, who is also employed by Company X, complains about the fact that she ha been sexually harassed by the conduct of Mr A.
Advise Company X whether they were entitled to take disciplinary action against M r A and what to do about Mrs B.

QUESTION 2

Mr A
(ELL 174-191)
Disciplinary action based on misconduct, specifically substantive fairness requires:
* whether rule was contravened
* if yes, was the rule valid and reasonable
* employee was aware or reasonable be expected to be aware
* consistently applied
* dismissal was appropriate sanction
New rules where workplace forum, change of disciplinary codes and procedures i matter for joint-decision making. For definition of joint-decision making see ELL 192.

Mrs B
Sexual harassment definition ELL 312-316.
Not serious enough to constitute harassment.
TOTAL QUESTION 2 [25]
TOTAL [50]

QUESTION 1

Union A writes to Employer X claiming to represent a large number of its employees Several meetings between the union and the employer then take place at which th union seeks to persuade the employer to grant it the organisational rights in terms c the LRA. It is, however, common cause between the parties that Union A does nc represent a majority or even a sufficient portion of the workforce, but only about 269 of the workers at the employer''s workplace. The employer's attitude is that it i willing to afford the union access to its premises as contemplated by section 12, an stop-order facilities as contemplated by section 13. As the union is not representativ of a majority of its workforce, it is not willing to recognise the union's shop stewards nor is it willing to bargain collectively with the union. The union then declares dispute over the question of organisational rights and, in particular, the question c the recognition of its shop stewards and its right to bargain collectively on behalf c its members. The dispute is referred to conciliation at the Commission fc Conciliation, Mediation and Arbitration (the CCMA) but, despite a meeting at th CCMA, remains unresolved. Thereafter the union informs the company that it intend to institute strike action in terms of Chapter IV of the Act. The employer's view is tha the union is not entitled to take strike action to demand the recognition of its sho stewards and it accordingly approaches the Labour Court for an interdict. Will th employer be successful in its application? Discuss with reference to applicable cas law and legislation.

ANSWER

This assignment question was fairly difficult and students had to read the relevar case law in order to have been able to answer the question. Especially the case c *NUMSA v Bader Bop (Pty) Ltd* (2003) 24 *ILJ* 305 (CC) was crucial in answering c this question. Students who did not discuss the case of *Bader Bop* did not do well i this assignment.

Sections 12-16 of the LRA deal with the granting of organisational rights. The fiv organisational rights are: trade union access to the workplace, deduction of trad union subscription levies, the election of trade union representatives, leave for offic bearers for trade union activities and disclosure of information. Organisational right are important in making it possible for a trade union to establish a collectiv bargaining relationship with an employer or an employers' organization.

Only a registered trade union can exercise organisational rights in terms of the LR/ The availability of organisational rights is however dependent on the level of trad union representivity. The LRA distinguishes between majority representative an sufficiently representative trade unions. A majority trade union will be able to acces all five organisational rights while a sufficiently representative trade union will be abl to access all rights except access to information and the election of trade unio representatives. The level of representivity of Union A was not really in questio since the assignment question clearly stated that the union was not sufficientl represented. Credit were however given if students briefly discusse representativeness, and mentioned the matter of *Komming Knitting , Marle Flooring, Sheraton Textiles* and *Feltex Foam.*

There are three ways in which a trade union can acquire organisational right namely:

(a) the union may conclude a collective agreement with the employer,
(b) a trade union may also obtain organisational rights in respect of an employer' undertaking because it is a member of a bargaining council or statutor council
(c) organisational rights may also be obtained by using the procedure set out i section 21 of the LRA.

The section 21 procedure entails the following: The union must notify the employer i writing that it seeks to exercise one or more of the organisational rights, its level c representativeness and the manner in which the union wants to exercise thes rights. The union must also attach a copy of its certificate of registration. Within 3 days of receiving the notice the employer must meet with the union and the partie must try to conclude a collective agreement regulating the manner in whic organisational rights will be exercised. If there is no settlement between the partie and no agreement can be reached the matter is referred to the CCMA fc conciliation. The CCMA must attempt to settle te matter within 30 days. If the matte cannot be resolved through through conciliation the trade union can choose to refe the matter to arbitration or to strike. This creates an exception to the rule that n person may take part in a strike or a lock-out if the issue in dispute is one that a part has the right to refer to arbitration or to the Labour Court in terms of this Act. (65(1)(c)). It provides that despite section 65(1)(c), a person may take part in a strik or lock-out or in any conduct in contemplation or in furtherance of a strike or lock-ou if the issue in dispute is about any matter dealt with in sections 12 to 15. If a unio opts for strike action, however, it may not then refer the matter to arbitration for period of 12 months from the date on which it gives notice of the strike in terms c section 64(1) of the Act.

Students were also given credit if they argued that it may be possible to strike on th basis of a refusal to bargain. Then there is an added procedural requirement that ha to be met, namely that the strike must be referred to advisory arbitration befor notice of the strike is given.

The facts in this assignment question is similar to the facts of the Bader Bop- case In this case NUMSA who did not qualify as a sufficiently representative trade unio