

wanted to obtain certain organisational rights by means of strike action after negotiations with the employer have failed. The employer argued that a minority union cannot partake in protected strike action about the acquisition of organisational rights for which majority status is required. The union argued that this prohibition would constitute a limitation to their right to strike and would be unconstitutional.

According to the Constitutional Court the LRA does not limit the right of minority unions or unrepresented unions to strike. This view differs from the Labour Appeal Court's view in the same matter where it was upheld that the right to strike can be limited where an unrepresented union wants to strike about the refusal to grant recognition for shop stewards.

Although the LRA does not address the issue specifically it also does not contain any indication that a trade union with insufficient representation can be prevented from attempting to acquire such rights by means of collective bargaining. Workers' right of freedom of association would be impaired if workers were forced to be represented in disciplinary and grievance matters by a rival union they did not choose to join. To prohibit a right to strike regarding this demand would constitute an impermissible limitation on the right to strike.

Interpreting the LRA as allowing a minority union to strike in support of a demand to represent its members in such proceedings is more in accordance with the right of freedom of association and other constitutional rights than a contrary interpretation.

According to the Constitutional Court section 21 on its own terms, however, is not available to a union that admits that it is not sufficiently representative as contemplated by the Act. On the other hand, however, section 21 should not be read to deny such unions the right to pursue organisational rights through the ordinary mechanisms of collective bargaining.

Where employers and unions have the right to engage in collective bargaining on a matter, the ordinary presumption would be that both parties would be entitled to exercise industrial action in respect of that matter.

However, the interpretation adopted does not mean that minority unions will be entitled to have their shop stewards recognised. It means only that the recognition of their shop stewards is a legitimate subject matter for bargaining and industrial action. The LRA should therefore be read so as to avoid the limitation of fundamental rights.

MAY 2005

This paper consists of 3 pages.

ANSWER ALL THE QUESTIONS

QUESTION 1

- Describe the entities or parties who may be bound by a collective agreement in terms of section 23 of the LRA, 1995. (5)
- What are the three main tests used by the courts to distinguish between an employee and an independent contractor? (3)
- What are the purposes and primary objectives of the LRA, 1995 in terms of section 1 of the Act, 1995? (4)
- What are the requirements for a valid contract of employment? (5)
- What actions by the employer would constitute a refusal to bargain? (4)

- (f) Section 200A of the LRA creates a statutory presumption that in certain circumstances a worker will be presumed to be an employee. Name the factors set out in section 200A(1)(a)-(g) which will influence this presumption. (4)

[25]

QUESTION 2

- (a) Discuss in light of case law when the employment relationship actually begins. (5)
- (b) Discuss the procedural requirements for a strike about a 'refusal to bargain' to be protected in terms of the LRA, 1995. (5)
- (c) Employer B and Employee A enter into a contract of employment in terms of which A will be entitled to a wage of R3 000 per month and 4 weeks' annual leave. A collective agreement then becomes binding on them that states that A is entitled to R3 500 per month and two weeks' leave per year. Discuss the effect of the collective agreement on the terms and conditions of employment. (15)

[25]

QUESTION 3

Company ABC (Pty) Ltd employs 500 employees and is in the business of tarring roads for Government. Mindful of the dictates of the Employment Equity Act about affirmative action and given the fact that most of the company's employees are white middle aged males (older than 40), the company is faced with the problem of creating more room for affirmative action appointments. Historically, labour turnover has always been low at the company, a fact that adds to the need for the company to do something. Bearing this in mind, briefly express an opinion about the possible legal advantages and/or pitfalls of each one of the following strategies:

- (a) Dismiss all white males older than 55 and justify the dismissals on the basis of affirmative action.
- (b) Continue to pay the senior white male managers, but do not provide them with any work in the hope they will resign.
- (c) Try to get an agreement from the senior employees to have their employment contracts converted into year-long fixed term – agreements are then simply do not renew the contracts at expiry of the period. Discuss also what the employer and the employees can do if the employees refuse to consent to the amendment.
- (d) The company hears that all the senior employees have joined a trade union. Give an opinion, with reference to case law, whether the company can now prohibit these employees from joining the trade union.
- (e) Critically discuss, with reference to case law, whether our law recognises a right to affirmative action. [25]

QUESTION 4

- (a) Employer CDE wants to take disciplinary action against a security guard who assaulted a co-worker (another security guard) after working hours outside a bar (the bar is not situated on the employer's property). The representative of

the security guard is of the opinion that the employer cannot take disciplinary action against an employee for misconduct after working hours and off the employer's premises. Discuss this issue, with reference to applicable case law. (10)

- (b) Briefly discuss the requirement to issue an ultimatum prior to dismissing strikers on an unprotected strike. (8)
- (c) Briefly discuss the right of an employer to lock employees out. Refer in your answer also to the right of an employer to make use of replacement labour. (7)

[25]

[TOTAL: 100]

EXAMPAPER: LML403-Q: OCTOBER 2004

This paper consists of 2 pages.

ANSWER ALL THE QUESTIONS

Please note the following:

- 1 "LRA" refers to Labour Relations Act, 66 of 1995
- 2 "CCMA" refers to Commission for Conciliation, Mediation and Arbitration

QUESTION 1

Write brief notes, referring to applicable case law, on the following:

- (a) The meaning of 'constructive dismissal' as defined in section 186(1)(e) of the LRA. (5)
- (b) The use of replacement labour during a strike. (5)
- (c) Organisational rights and the level of trade union representativity required for each as prescribed by the LRA. (5)
- (d) Who may be bound by a collective agreement in terms of the LRA. (5)
- (e) The procedural requirements for a strike about a 'refusal to bargain' to be protected in terms of the LRA. (5)
- (f) Remedies which may be ordered by the Labour Court or the CCMA in a case of unfair dismissal. Describe the circumstances in which each will be applicable. (5)
- (g) The meaning of the concept of provision of a 'benefit' to an employee in terms of section 186(2)(a) of the LRA. (5)
- (h) The gravity of misconduct as a *factor* when the *appropriateness of dismissal as a sanction* is considered in an instance of proven misconduct. (9)
- (i) The matters on which employers and employees should attempt to reach consensus for a procedurally fair dismissal on operational requirements in terms of section 189(2) of the LRA. (6)

[50]

QUESTION 2

Ms Marais is the principle of a primary school in Pretoria. The school advertises two teaching positions. Ms Marais is anxious to appoint the most suitable persons to these positions. Fifteen women apply for the two positions. After the first round of

interviews, the list is shortened down to ten. As part of the selection process to evaluate practical experience, each of the ten applicants is required to take over a class for a morning. After the completion of the practical tests, the list is further shortened down to six applicants. Of the six applicants, two are black and four are white. A day after the completion of these tests, an incident takes place at the school. One child has bitten another on the arm drawing blood. The parents of the victim suspects that the vicious little biter is HIV-positive because they have heard a rumour that the child is on "pretty heavy medication". As a result of this incident, Ms Marais is bombarded with calls from concerned parents demanding to know what the school is doing about the "HIV-epidemic". Being the conscientious person she is, Ms Marais demands of the remaining six women on the short list to each undergo an HIV-test. Two of the tests come back positive. Ms Marais decides to disqualify the two individuals (Ms A and Ms B) from the short list.

- (i) Ms A and Ms B are extremely unhappy about their disqualification. They approach you for legal advice. Advise them **fully**, with reference to applicable legislation and case law, on their legal position. (13)
- (ii) Assume that the short list is narrowed down to four applicants - two white (Ms M and Ms K) and two black applicants (Ms X and Ms W). Ms Marais decides to appoint the two white applicants notwithstanding the fact that all four remaining applicants on the list are equally qualified to fill the advertised teaching positions. Ms X and Ms W approach you for legal advice. Advise them **fully** on their legal position as well as on the legal avenues open to them should they decide to pursue their grievance further.

Assume that the school employs 30 teachers (of which 3 are black women), 10 administrative staff (of which only one is black), 8 cleaning staff (of which all are black) and 3 in-house psychologists (of which all are white) (who have been appointed to deal with the biting problem at the school). (12)

[25]

QUESTION 3

Write a critical and comprehensive essay on the definition of a 'strike' as found in section 213 of the LRA. You must at least refer to the nature of, and purpose of a strike and the collectivity of the action. Also refer to applicable case law in your answer. [25]

TOTAL: [100]

5 LML403-Q/102

MEMORANDUM OF PREVIOUS EXAM PAPER NOV 04

The following can serve as a memorandum for the above exam paper.

QUESTION 1

(a) Constructive dismissal

Constructive dismissal is where the **employee** terminates the contract (1) with or without notice (1) because the **employer** made continued employment intolerable. ()

The employee had no voluntary intention to resign.(1) The employer's conduct as a whole must be such that the employee was not expected to put up with it.(1) For example *Goliath v Medscheme*, *Smith v Magnum Security*, *Osche Webb*, *Jooste v Transnet*, *Beets v UPE*, *Quince v Pillay* (max 2)

[5]

(b) Use of replacement labour

The employer can use replacement only with a defensive lock-out (1) regardless of the fact whether the strike is protected or unprotected.(1) It is all about tactics - discuss briefly(1) *Technicon SA v NUTESA / Ntimane v Vetsak* (1 max). The employer cannot use replacement labour during protected strike if business is a maintenance service.(1) The employer cannot make use of temporary services or outside contractors.(1)

[5]

(c) Organisational rights

The following 5 organisational rights exist: (a) access to workplace, (b) deduction of subscriptions, (c) the election of trade union representatives, (d) leave for office bearers for trade union activities and (e) disclosure of information.(2 max for mentioning rights) For rights a, b and d **sufficient** representation (generally regarded as around the 30% mark) is necessary.

For rights c and e **majority** representation (50+1) is necessary. (4 max for level of representivity) [5]

(d) The binding effect of a collective agreement

A collective agreement binds the parties to the agreement, (1) each party to the agreement and the members of every other party to the agreement in so far as the provisions of the agreement are applicable to them, (1) the members of a registered trade union that is party to the agreement and employers who are members of a registered employers' organisation that is a party to the agreement (½) if the collective agreement regulates terms and conditions of employment (½) or the conduct of employers in relation to their employees or the conduct of the employees in relation to their employers (½) employees who are not members of the registered trade union or trade unions that are party to the agreement if the employees are identified in the agreement (½) the agreement expressly binds the employees (½) and the trade union represents the majority of employees in the workplace. (½)

[5]

(e) Refusal to bargain

Disputes about a 'refusal to bargain' are first processed in terms of a special conciliation process before the union can resort to a strike. It must first be referred to conciliation (1). If conciliation is unsuccessful, the dispute must be referred for an **advisory arbitration award** in terms of s 135(3)(c) (1). The advisory award must indicate how the dispute should be settled.(1) If the award goes against the union, or if the employer decides to ignore an award in favour of the union(1) the union must give notice in terms of s 64(1)(b) or (c) of the commencement of a strike.(1) [5]

(f) Remedies for unfair dismissal Reinstatement restores the contractual position as if never broken. **(1)** Instances where re-instatement will not be ordered are: (a) if the employee does not want to be re-instated /reemployed (b) if circumstances exist which makes continued employment intolerable (c) if it is not reasonably practicable, (d) if dismissal is only unfair because the employer did not follow fair procedure. **(max 1)** **Re-employment** brings a new relationship into being **(1)** **Compensation** is paid when dismissal is unfair either because of unfair reason or unfair procedure, or both. **(1)** It may **not be more** than **12 months** ($\frac{1}{2}$) remuneration or **24 months** ($\frac{1}{2}$) or automatically unfair dismissal. **[5]**

(g) The meaning of a 'benefit'

Two approaches have developed

- (i) focus on the word 'benefit' and try to define it **(1)**
- (ii) the better approach - concentrate on nature of dispute, namely is this a dispute of right (ie a dispute about existing rights) or a dispute of interest (i.e. no existing rights between parties) **(1)**. If the former (rights dispute), then falls within scope of item 2(1)(b), now s 186(2)(a) of the LRA. **(1)**

Relevant case law:

**Schoeman & another v Samsung Electronics* (first approach)

**SAMRI v Toyota* (first approach)

**SACWU v Longmile/Unitred* (second approach)

**Hospersa & another v Northern Cape Provincial Administration* (LAC)

**Gauteng Provinsiale Administrasie v Scheepers* (LAC)

Last two mentioned cases held that a 'benefit' only includes benefits that already exist in terms of a contract or law. In other words, only disputes of right about already existing benefits can be heard by the CCMA. If a dispute refers to the creation of a new right, it is not a benefit and the parties may strike over it. **(max 3)[5]**

(h) Gravity of misconduct as a factor when the appropriateness of dismissal as a sanction is considered

- * nature of the offence **(1)**
- * circumstances surrounding the commission of the offence **(1)**
- * nature of the work performed **(1)**
- * size of the undertaking **(1)**
- * nature and size of the workforce **(1)**
- * position and profile of the employer in the market place **(1)**
- * nature of work and services rendered by the employee **(1)**
- * relationship between employee and victim **(1)**
- * impact of the misconduct on the workforce as a whole **(1)**
- * relationship between the employer and employee **(1)**
- * ability of the employee to do the job **(1)**

[9]

- (i) **Measures to reach consensus on for a procedurally fair dismissal case operational; requirements**

- * Appropriate measures to avoid the dismissals (1)
- * Appropriate measures to minimise the number of dismissals (1)
- * Appropriate measures to change timing of dismissals (1)
- * Appropriate measures to mitigate the adverse effects of the dismissals (1)
- * Methods of selecting the employees to be dismissed (1)
- * Severance pay (1)

[6]

[50]

QUESTION 2

- 2(a) The first issue is about unfair discrimination and testing. Section 6 of the EEA prohibits direct and indirect **unfair discrimination** against an employee, in any employment policy or practice, on any of the mentioned grounds eg race, sex, age and HIV status. (2) An employee includes an applicant for employment (s 9).(1) Furthermore, s 7(1) of the EEA prohibits medical testing of an employee unless:
- (a) legislation permits or requires the testing; or
 - (b) it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of benefits or the inherent requirements of a job.(2)

Also, s 7(2) of the EEA specifically prohibits testing of an employee to determine the employee's HIV status unless such testing is determined to be justifiable by the Labour Court (LC) in terms of s 50(4) of the EEA.(1) If the Labour Court determines such testing justifiable, it may in its order impose conditions such as the maintenance of confidentiality and the category of employees in respect of which the authorisation for testing applies.(1)

Application on facts: Although Ms A and B are only applicants for employment, they are protected against unfair discrimination. Therefore, it could not be demanded of the women on the short list to undergo HIV tests unless the employer approached the LC first to determine the justifiability of such tests. It appears unlikely that, even if an application was brought, the LC would have declared the testing justifiable in this instance as there are no facts regarding the biter or the 'HIV epidemic'. The allegations seem to be based on rumours and suspicions only and are not substantiated by any numbers or medical evidence. Ms A and B can therefore make out a case on direct discrimination on the listed ground of HIV status (s 1 of the EEA). The dispute must be referred to the CCMA but only after making a reasonable attempt to resolve the dispute. This will of course be difficult for the applicants as they do not have any knowledge of the school's grievance and other internal procedures. If conciliation fails the parties may consent to arbitration or the matter may be referred to the LC for adjudication. If the applicants make out a case of discrimination on a listed ground (ie HIV status), unfairness will be presumed (s 11). The onus then shifts to the employer to show that it was not unfair. The employer can use the defence of an inherent requirement for the job but will have to make out a very strong case that it is essential for a teacher to be HIV negative (which seems unlikely) before they will succeed on this justification ground. The LC will make an order that is just and equitable in the circumstances and may include compensation, damages and orders directing the employer to take preventative steps. It is envisaged that the LC can direct the school to regard Ms A and B as applicants for

the jobs and to take the selection process further from there, if people have not yet been appointed. Appointment can also be ordered. If the process has been finalised already (which is likely), compensation or damages seem appropriate. (3 max). Reference to case law *Hoffmann v SA Airways, I&J (3 max)*, Code of Good Practice: Key aspects of HIV/AIDS and Employment (1)

(13)

2(b) The second issue relates to affirmative action (AA). Chapter 3 of the EEA states that all designated employers must implement AA measures (s 13). (1) for people from designated groups i.e blacks, women and the disabled (s 1). (1) AA measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equally represented in all occupational categories and levels in the work force of a designated employer (1) The purpose of AA is to redress the disadvantages in employment experienced by designated groups (s2(b) of the EEA). (1) It appears that the school is a designated employer as it employs more than 10 people (s 1). (1) This would require of the school as an employer to consult with its employees, do an analysis to identify employment barriers, draw up an employment equity plan and report to the Director-General of the Dept of Labour. (2) Ms X and W generally qualify to be beneficiaries of AA measures as they belong to two of the designated groups i.e they are black women. (1) It is also clear that, if one looks at the numbers mentioned in the set of facts, blacks are under represented in three of the four job categories.

The existence of a designed plan is a prerequisite for AA to come into play. (1) In this instance it appears that no plan has been drawn up. The nature of affirmative action is, however, that of a defence and not a right (1) so the applicants will not be able to rely on AA. Only the employer can rely on the defence should it be challenged on the basis of reverse discrimination when an AA policy is implemented. (1)

Ms X and W can however make out a case of direct discrimination on the ground of race in their capacity as applicants for employment. (1) The same procedures as set out above will have to be followed. (3 max)

Ms X and W can also bring the absence of an AA plan to the attention of e.g a trade union, a labour inspector or the Director-General of the Department of Labour (s 34 of the EEA). (1) An inspector may get an undertaking to comply from the employer or issue a compliance order failing which a fine may be imposed.(1)

(12)

[25]

QUESTION 3

Definition of a strike - 3 elements plus case law

See Essential Labour Law Volume I pages 106-114

refusal to work (9)

collective action (8)

purpose of strike (8)

[25] [100]

2006

ASSIGNMENT 01 - FIRST SEMESTER

Cricket player A is playing for the Proteas as an opening batsman. During one of the test matches he hit a six and in the process injures one of the spectators, Mr B. As a result of the blow to his head, he sustains serious nose injuries. Mr B wants to claim damages from the cricket player or the National Cricket Association. He approaches you for advice. (10)

1. COMMENTARY ON THE ASSIGNMENT

The assignment question was fairly easy, yet students seemed confused about the question.

We specifically expected of you to discuss the labour law implications of the question. The question dealt with vicarious liability.

Vicarious liability means that an employer can be held responsible for the damages caused by an employee if the employee committed a delict within the course and scope of employment.

The three requirements for vicarious liability are therefore:

- there must be an employer-employee relationship;
- the employee must have committed a delict; and
- it must have been committed within the course and scope of employment.

The first requirement, namely the existence of an employer-employee relationship should have been mentioned. In order to determine the exact nature of the relationship between the cricket player and the National Cricket Association, credit was given if a student referred to the various tests used, e.g., the control, organisation or dominant impression test. On the facts it could be assumed that the cricket player was an employee of the NCA. If you argued differently and substantiated your answer, credit was also given.

Students also had to discuss if a delict was committed. In order to prove a delict the spectator will have to prove that the cricket player committed a wrongful act. The spectator will have a problem proving fault. The cricket player did not act with negligence or intent and the spectator voluntarily assumed the risk by attending the cricket match. The spectator also probably agreed by buying a ticket that it will not hold the NCA liable for any loss or damage. Because the spectator will not be able to prove the existence of a delict it will not be able to hold the employer vicariously liable.

The final requirement – “in the course and scope of employment” was self-explanatory.

Case law which could have been referred to was *Viljoen v Smith* (1997) 18 ILJ 61 (L) or *Grobler v Naspers Bpk & another* [2004] 5 BLLR 455 (C). If other relevant case law was discussed credit was given to the students.

Also read par 2.7.4 in the textbook (page 49) on the topic of vicarious liability.

ASSIGNMENT 01 - SECOND SEMESTER

Sara works as a domestic worker for Mrs Smit. She is 7 months pregnant. Mrs Smit is not happy about Sara taking maternity leave. On the day Sara's maternity leave commences, Mrs Smit tells her that she need not return after the baby is born since she

will not be able to afford a domestic worker in future. Sara contacts you for advice. Discuss all her remedies in detail. (10)

COMMENTARY ON THE ASSIGNMENT

The students should have determined if Sara was an employee in order to be entitled to protection under the Labour Relations Act (the LRA). Section 213 of the LRA only excludes independent contractors and excludes certain groups which do not include domestic workers.

It is therefore to be concluded that Sara is an employee.

It appears from the given facts that Sara's employer is not happy with her going on maternity leave. This would be the reason for her employment to be terminated. It should thus be determined if Sara's employer may dismiss her for going on maternity leave. Section 187 (1)(e) states that dismissal of a woman who is on maternity leave is impermissible and constitutes an automatically unfair dismissal.

The facts also state that Sara's employer dismissed her because she will not be able to afford a domestic worker in the future. A case to consider is *Whitehead v Woolworths* (1999) 20 ILJ 2133 (LC) and (2000) 21 ILJ 571 (LAC) where the court found that it would be reasonable for the employer to dismiss an employee for going or being on maternity leave for operational reasons, being financial reasons. In this case the court found that the requirement for uninterrupted job continuity that was applicable to all applicants to a position was rational and commercially supportable and that the applicant's (Mrs. Whitehead's) pregnancy was not the employer's reason for terminating the contract. In other words, she wouldn't be able to work the full period when her services were needed. The court had to determine if this requirement of continuous rendering of services was objectively justifiable and found it to be both unreasonable and unjustifiable. The court stated the reason for this was that at the time when the offer to be employed is made, no person can guarantee that they will fill it. The students must reason that Sara was automatically unfairly dismissed because of her pregnancy, aka going on maternity leave.

Once it is proved that Sara is dismissed in terms of section 187(1)(e), her employer will have no defence (except in limited situations like operational reasons, conduct or incapacity) and she is entitled to the remedies set out in section 193 of the LRA which are reinstatement or, if Sara does not want to be reinstated, compensation. Compensation is regulated by section 194 which allows the court or arbitrator to determine the amount compensation payable to employees automatically dismissed. The amount may not exceed 24 months' remuneration.

The court takes into account other factors e.g. any benefit the employee received like maternity benefits when determining an amount which must be just and equitable in the circumstances.

TOTAL [10]

COPY OF EXAM PAPER: JUNE 2006

QUESTION 1

Answer the following questions with reference to applicable case law:

- 1.1 Discuss the requirements for an employer to be held vicariously liable for an act by an employee. (3)
- 1.2 Discuss the requirements of the Code of Good Practice: Dismissal for the dismissal of a probationary employee. (7)

- 1.3 Discuss the dismissal of an employee due to pregnancy. (6)
- 1.4 Discuss the dismissal of an employee due to making a protected disclosure. (6)
- 1.5 Name the grounds on which discrimination may be justified. (3)
- 1.6 List the 5 organisational rights provided for in the Labour Relations Act, 1995. (5)
- 1.7 Briefly explain the difference between conciliation and arbitration in your own words. (4)
- 1.8 List the three ways in which a trade union can acquire organisational rights. (3)
- 1.9 Can members of the South African National Defence Force become members of a trade union? (5)
- 1.10 Discuss what different types of action on the part of employees may constitute a strike. In your answer also discuss what the meaning of "work" will be in the context of a strike. (8)
- 1.11 Under what circumstances can an employer dismiss employees during a protected strike? (2)
- 1.12 Describe what you understand under the concept "protest action"? (3)
- 1.13 Under what circumstances will the Labour Court not order reinstatement or reemployment? (5)

[60]

QUESTION 2

Mr A works at guesthouse XY. A group of overseas guests arrive late one afternoon for a three week stay. They make enquires about close-by restaurants for supper. Mr A recommends a particular restaurant. After work that night, Mr A turns up at the restaurant he has suggested. He joins the group of guests. Mr A orders supper and has seven beers. Moreover, he offers to organise prostitutes for the guests. When the bill arrives, the guests expect Mr A to pay his share of the bill only to discover that Mr A has no money. The guests settle the bill. Back at the guesthouse with everybody in their rooms, Mr A knocks on the door of one of the guests with a request to borrow some money. The guests consider the behaviour of Mr A irritating and unacceptable. They phone the manager of guesthouse XY and inform her that they have been harassed by Mr A. They are accordingly cancelling their booking.

The next morning the manager of the guesthouse calls in Mr A to discuss the matter. Mr A denies the guests' version of events and states that he has been invited to supper by the guests. The manager suspends Mr A pending an investigation into the matter.

- (i) Mr A is unhappy about this. He approaches you for legal advice. Advise **Mr A fully**, with reference to applicable legislation and case law, on his legal position. You must refer in your answer to discipline in the workplace and the grounds on which Mr A can be disciplined. (15)
- (ii) The manager of guesthouse XY thinks that Mr A has breached the duty to act in good faith. Advise the **manager** fully, with reference to applicable legislation and case law, on what steps can be taken against Mr A. (10)

[25]

QUESTION 3

Sipho works at ABC Production and belongs to XYZ Union. After 5 years of employment at ABC Production he has worked his way up in the rankings of the company and the Union (where he is currently Secretary). He is appointed as Production Manager of the company. The employer says that since Sipho is now part of senior management he must resign as member of XYZ Union. Sipho does not want to resign but does not want to miss out on this chance of promotion either. Advise him with reference to relevant case law and legislation. [8]

QUESTION 4

Big Company and Big Union (the majority union) have concluded a collective agreement. After wage negotiations between Big Company and Big Union it is agreed that all members of Big Union will get a 10% annual wage increase and in return they will work one hour extra a week.

Big Company would like to extend this agreement to all other employees in the workplace but all the other employees belong to no union or either to Small Union with which the employer does not have a very good relationship. Advise Big Company how he can extend this agreement to all employees in the workplace. [7]

TOTAL: [100]

COPY OF EXAM PAPER: OCTOBER 2005

QUESTION 1

- What requirements must be met to extend a collective agreement concluded with a trade union to those employees who are not members of the union? (5)
- Name the common law duties of the employer in terms of the contract of employment. (6)
- What would constitute a constructive dismissal? (5)
- Name the three main elements of a strike. (3)
- Discuss the procedural requirements which must be met for a secondary strike to be protected. Refer to case law and applicable legislation. (8)

TOTAL [25]

QUESTION 2

- Cricket player A is playing for the Proteas as an opening batsman. During one of the test matches he hit a six and in the process injures one of the spectators, Mr B. As a result of the blow to his head, he sustains serious neurological injuries. Mr B wants to claim damages from the cricket player or the National Cricket Association. He approaches you for advice. (10)
- "The Code of Good Practice: Dismissal subscribes to the concept of corrective or progressive discipline as developed by the Industrial Commission" Basson *et al* Essential Labour Law Vol 1 at 81. Discuss what is meant by the principle of "progressive discipline". (8)
- Discuss the findings of *NUMSA v Bader Bop (Pty) Ltd* (2003) 24 ILJ 305 (Ct) with regard to the right to strike. (7)

TOTAL [25]

QUESTION 3

Ms Lindiwe Sono is an accountant who has a contract to work for Accounting Consultants CC. Her contract states that she will act as a tax consultant to the clients of Accounting Consultants CC. She belongs to the corporation's pension and medical aid funds and is paid on a monthly basis. She devotes all her working time to the corporation. For tax purposes, her contract stated that she is an independent contractor. After working for the corporation for two years, Ms Sono believes she is being discriminated against on the basis of both her race and sex because she is given only small firms as clients and her earnings have not improved in the two years she has been with the corporation. The two other white male consultants who were 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 senior member of the corporation, he intimates that some clients have not been satisfied with Lindiwe's performance. She resigns and comes to you for advice.

Advise Ms Sono by critically analysing all possible issues, including the dispute resolution process, referring to legislation and relevant case law.

TOTAL [25]

QUESTION 4

- (a) Discuss, with reference to relevant case law, what procedures must be followed prior to dismissing strikers on an unprotected strike. (20)
- (b) Discuss briefly whether an employer may hold a trade union civilly liable for damages suffered as a result of a strike. (5)

TOTAL [25]

[TOTAL: 100]