

EMPLOYMENT ALERT

DISMISSAL OF STRIKING DOCTORS UNFAIR?

Over 400 medical doctors have reportedly been dismissed for their participation in unprotected industrial action. Striking medical personnel are demanding that the Department of Health comply with undertakings made two years ago of introducing increases in remuneration specific to various professions. The Occupation Specific Dispensation ("OSD") would see the remuneration of professionals like medical doctors increase dramatically over that of other state employees. However, doctors and other professionals are frustrated by the State's unwillingness to implement the OSD and went on strike in support of their demand for the implementation of the OSD.

Following a court order declaring the strike action unprotected, the KZN Department of Health reportedly dismissed more than 400 medical doctors for their participation in the illegal strike. The colleagues of the striking workers are now demanding their reinstatement. Do they have a point?

The Constitution guarantees every worker the right to strike. This right is then limited in the Labour Relations Act ("the LRA") which lays down certain procedural requirements before protecting workers against dismissal for participating in strike action. For instance, a dispute must have been referred to the CCMA or a bargaining council before a strike. The matter must be conciliated first and the workers must then give notice of their intention to strike before actually embarking on industrial action. The LRA also limits the right of workers to strike in that workers employed in essential services, like hospitals and emergency services, may not strike. Illegal strikers may be dismissed for misconduct (which refers to their conduct in taking part in unprotected strike action).

So, it would appear that the striking doctors only have themselves to blame for their dismissals and that they should not get much sympathy from the Labour Court when disputing the fairness of their dismissals. Or would they? Can they not expect some support when voiding their

frustrations about their employer's recalcitrance in implementing agreed increases? The doctors and emergency centre personnel complain bitterly that the State is exploiting the limitation placed on their right to strike in reneging on its agreements, leaving the workers with very little alternative but to take matters into their own hands. When one considers decisions of the Labour Court in previous matters, there appears to be some glimmer of hope for the embattled doctors.

The Labour Court has previously held that the unjustified conduct of an employer prior to the strike is a valid consideration to take into account when determining the fairness of such admissal. Where employers provoke their employees into striking, the Court will be more sympathetic to those employees striking illegally than it otherwise may have been. For instance, where an employer outright refused to recognize a trade union or manhandled a trade union representative or where the employer otherwise acted provocatively prior to the strike, illegal strikers may be afforded some relief by the Labour Court. The Department of Health would thus have to explain its refusal to implement the OSD and the process it followed to address the employees grievances. If no reasonable explanation is forthcoming, the Department may well be faced with the prospect of re-instating the dismissed doctors.

Notwithstanding that, employees should refrain from embarking on illegal industrial action in support of their grievances, however legitimate their concerns may be. This is especially true for those employed in essential services that may have their disputes arbitrated under the LRA and are thus afforded an alternative remedy to strike action. To rely on the employer's unfair conduct prior to the illegal strike is risky, at best. However, considering the facts faced by the medical professionals, it is not improbable that they may find a sympathetic judge wishing to administer his own medicine to an apparently obstinate employer.

Johan Botes, Director

CONTACT US

For advice please contact any member of our Employment team listed below.



Aadil Patel
Director
National Practice Head
T +27 (0)11 290 7212
E aadil.patel@dclacdh.com



Faan Coetzee
Director
National Practice Head
T +27 (0)11 286 1101
E faan.coetzee@dclacdh.com



Gillian Lumb
Director
Regional Practice Head
T +27 (0)21 481 6315
E gillian.lumb@dclacdh.com



Retha Beerman
Director
T +27 (0)11 286 1145
E retha.beerman@dclacdh.com



Johan Botes
Director
T +27 (0)11 286 1131
E johan.botes@dclacdh.com



Melanie Hart
Director
T +27 (0)11 286 1460
E melanie.hart@dclacdh.com



Fiona Leppan
Director
T +27 (0)11 290 7175
E fiona.leppan@dclacdh.com



Tim Mills
Director
T +27 (0)11 290 7157
E tim.mills@dclacdh.com



Danie Pretorius
Director
T +27 (0)11 286 1441
E danie.pretorius@dclacdh.com



Gavin Stansfield
Director
T +27 (0)21 481 6314
E gavin.stansfield@dclacdh.com



Michael Yeates
Senior Associate
T +27 (0)11 290 7202
E michael.yeates@dclacdh.com



Adelaide Davids
Associate
T +27 (0)21 481 6313
E adelaide.davids@dclacdh.com



Sherisa Rajah
Associate
T +27 (0)11 290 7240
E sherisa.rajah@dclacdh.com

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JOHANNESBURG

6 Sandown Valley Crescent
Sandown
Sandton 2196
Private Bag X40
Benmore 2010
South Africa
Dx 154 Randburg
T +27 (0)11 286 1100
F +27 (0)11 286 1264
E jhb@dclacdh.com

1 Protea Place
Sandown
Sandton 2196
Private Bag X7
Benmore 2010
South Africa
Dx 42 Johannesburg
T +27 (0)11 290 7000
F +27 (0)11 290 7300
E jhb@dclacdh.com

CAPE TOWN

11 Buitengracht Street
Cape Town 8001
PO Box 695
Cape Town 8000
South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300
F +27 (0)21 481 6388
E ctn@dclacdh.com

5th floor Protea Place
Protea Road
Claremont 7708
PO Box 23110
Claremont 7735
South Africa
Dx 5 Cape Town
T +27 (0)21 683 2621
F +27 (0)21 671 9740
E ctn@dclacdh.com