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EMPLOYMENT ALERT

IN THIS **ISSUE**

THE BOTTOM-END OF POST-STRIKE AGREEMENTS

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Employers who are tasked with negotiating the terms of a return to work, are often (perhaps too willingly) prepared to agree to lighter sanctions for misconduct perpetrated during the course of strike action, which would otherwise justify a termination under different circumstances.

In the unreported judgement of Le Grange J in the matter of *NEHAWU obo Zitha v Harms N O and Others* (case number JR 1652/13), the Labour Court held that, in determining whether or not to review an arbitration award, the arbitrator is required to take into consideration any collective agreements on sanction for misconduct following a strike. This is notwithstanding whether such agreement is concluded on a spectrum of appropriate sanctions for different offences which appear to be out of kilter with each other and which are difficult to interpret as an internally consistent hierarchy of misconduct.

Le Grange J held that "The fact that the standard originates in a collective agreement settling a dispute arguably requires it to be given greater weight than a standard unilaterally determined by an employer."

In this matter, an employee (a pharmacy clerk and shop steward) was dismissed for indecent exposure during a strike. The employee pulled down her pants and exposed her naked bottom in full view of security officers and vehicles entering and the leaving the employer's premises, which in this instance, was a private hospital.

The employee denied that she exposed herself and challenged her dismissal. The security officers presented evidence that the employee had pulled down her pants and exposed her bottom for a good couple of minutes. At the Commission for Conciliation, Mediation and Arbitration (CCMA), the arbitrator considered the employee's conduct 'disgusting' and found that the employee's dismissal was fair. Thereafter, the employee took the matter on review to the Labour Court.

Despite the Labour Court's finding that it was not unreasonable that the arbitrator at the CCMA found that the security officer's evidence of the employees conduct was more credible, it held that the arbitrator's finding was not one which a reasonable arbitrator could make and held that the employee's dismissal was unfair.

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At the Commission for Conciliation, Mediation and Arbitration (CCMA), the arbitrator considered the employee's conduct "disgusting" and found that the employee's dismissal was fair.

In order to settle the strike, the employer and the trade union had entered into an agreement which set out certain sanctions for certain types of misconduct committed during a strike. In terms of this agreement, the employer was required to at least consider suspension without pay as an alternative to dismissal. Among the misconduct that justified a final written warning was intimidation by preventing people from going to work. The parties agreed that where the employer considered the misconduct to be 'very serious' a disciplinary hearing would be held. Indecent exposure was considered as 'very serious' misconduct.

Thus, in terms of the agreement, the employee's conduct was considered very serious and did not fall into the categories of misconduct identified to only receive a final written warning.

The court held that the agreement was clearly intended to prohibit dismissal as a sanction for misconduct and the employer and the arbitrator were bound to respect and abide by the restrictions on dismissal imposed by the agreement. At the very least the arbitrator ought to have, but failed, to take account of what the parties intended to achieve when entering into the agreement.

The court held that "it is difficult to see how the arbitrator could have rationally accepted the applicant's misconduct belonged in a category of serious misconduct equivalent to assault and more serious than acts of intimidation".

The court held that although the arbitrator had to have regard to the sanctions agreed to by the parties for the misconduct, the arbitrator had to strike a balance between fairness to the employee and the provisions of the Labour Relations Act, No 66 of 1995 (LRA). The court also found that the arbitrator displayed personal bias in deciding whether dismissal was appropriate under the circumstances. In the arbitration award, the commissioner displayed bias in her expression of personal moral outrage at the applicant's conduct.

The court reiterated the ratio in the matter of *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC) which dispensed decisively with the approach that an arbitrator should defer to an employer's decision on sanction. A commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.

In this instance however, where parties have agreed on how they rank different forms of misconduct, that clearly must be one of the relevant circumstances the arbitrator must consider. What *Sidumo* emphasised is the arbitrator has to determine if the applicant's dismissal was fair, not simply by reference to what the parties had agreed, but with reference to the need to strike a balance between fairness to the employer and employee parties and the statutory provisions which the arbitrator is subject to in the LRA without giving in to her own unrestrained value judgment.

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An employer should carefully consider the restrictions to disciplinary action it agrees to in a post-strike agreement, as these restrictions will weigh heavily in determining the fairness of a sanction imposed.

The Labour Court ultimately held that in determining an alternative sanction, something less than dismissal would have been more appropriate and a sanction which is more commensurate with those other forms of misconduct identified for disciplinary sanction in the post-strike agreement.

In conclusion, an employer should carefully consider the restrictions to disciplinary action it agrees to in a post-strike agreement, as these restrictions will weigh heavily in determining the fairness of a sanction imposed.

Michael Yeates

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Our Employment practice's new EMPLOYMENT STRIKE GUIDELINE answers our clients' FAQs.

Topics discussed include strikes, lock-outs and picketing.

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Michael Yeates named winner in the **2015** and **2016 ILO Client Choice International Awards** in the category 'Employment and Benefits, South Africa'.

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