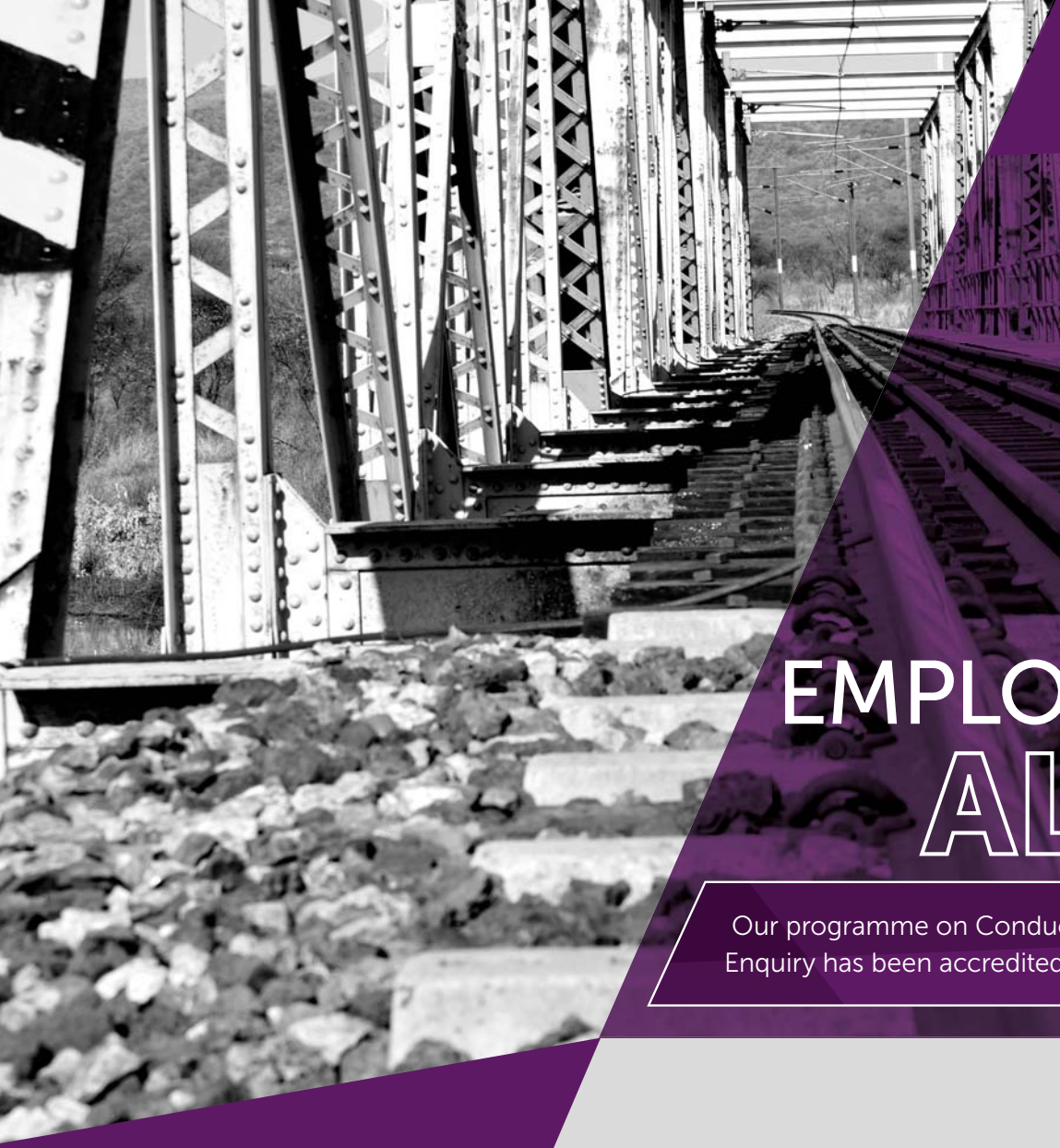

8 AUGUST 2016

EMPLOYMENT ALERT

Our programme on Conducting a Disciplinary Enquiry has been accredited by the Services SETA.

IN THIS ISSUE

RETAINING YOUR VICTORY AFTER ARBITRATION: USEFUL TIPS FOR EMPLOYERS

An employer should realise that an arbitration award in its favour is not necessarily the end of the matter. Trade unions and employees may elect to review the award before the Labour Court.

CLICK HERE to view our NEW Employment Strike Guideline

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RETAINING YOUR VICTORY AFTER ARBITRATION: USEFUL TIPS FOR EMPLOYERS

From time to time documentary records and audio recordings are either lost or of such a poor quality that they cannot be used in the review proceedings.

An employer should realise that an arbitration award in its favour is not necessarily the end of the matter. Trade unions and employees may elect to review the award before the Labour Court.

Successful employers who choose to oppose any such review application will be required to demonstrate the reasonableness of the award made in their favour. Many believe opposing the review application will be a straightforward task having already achieved success before the Commission for Conciliation, Mediation and Arbitration (CCMA) or bargaining council, however certain unforeseen hurdles may arise in the process.

In a review application, the applicant is required to file a record of the proceedings with the Labour Court. From time to time documentary records and audio recordings are either lost or of such a poor quality that they cannot be used in the review proceedings. In these circumstances it may be possible for the applicant trade union or employee to have the entire case remitted back to the CCMA or bargaining council for hearing afresh, before the review has even run its course. This may happen where, among other things, the parties are unable to file a complete or reconstructed record of the arbitration proceedings and due to this failure, the applicant party successfully applies for a directive to remit the matter back to arbitration for a rehearing of the entire case.

The successful employer risks its favourable arbitration award being set aside and being forced to undertake a repeated arbitration, without the benefit of the record that may have contained important earlier concessions, admissions and issues of credibility. A second arbitration is also time-consuming and costly for the employer.

The underlying reason for this remission is premised on the fact that the review court which is bound by and required to consider the record and evidence that was before the arbitrator, is effectively deprived of being able to determine the matter in the absence of such a record or transcript. The successful employer risks its favourable arbitration award being set aside and being forced to undertake a repeated arbitration, without the benefit of the record that may have contained important earlier concessions, admissions and issues of credibility. A second arbitration is also time-consuming and costly for the employer.

So what should employers do to mitigate the risk of their successful matters being remitted back to arbitration?

In the recent decision of *Francis Baard District Municipality v Rex N.O. and Others* (JR1000/2011, JA29/2015) [2016] ZALAC 33 (28 June 2016), the parties were confronted with a review application that was plagued by a missing record. To aggravate matters both the employer and the commissioner did not have any notes to reconstruct the essential portions of the record which were material to the review application. The court specifically mentioned that even though the respondent did not have

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CONTINUED

Employers who intend to defend their successful arbitration awards should ensure that they retain their own detailed records and if permitted by the commissioner, digital recordings of arbitration proceedings as a backup.

the primary obligation in relation to the record, it was nevertheless also a party to the proceedings and thus could have assisted in reconstructing such crucial evidence, a fact which was overlooked by the employer. The employer was ultimately punished for this oversight and instead of remitting the matter back for hearing afresh, the review application was dismissed.

Employers who intend to defend their successful arbitration awards should ensure that they retain their own detailed records and if permitted by the commissioner, digital recordings of arbitration proceedings as a backup.

Furthermore and in cases where employers bring their own review applications, it is important to ensure that every attempt is made to reconstruct the record including seeking the assistance of the commissioner and respondent parties involved, before seeking any directive or order to have the matter remitted back for re-hearing.

This way, employers will also alleviate the risks associated with a second arbitration hearing, as well as the time and costs involved therein.

Nicholas Preston and Sean Jamieson

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

Topics discussed include strikes, lock-outs and picketing.

CLICK HERE TO FIND OUT MORE

CHAMBERS GLOBAL 2014 - 2016 ranks our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2016 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2016 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2016 in Band 3: Employment.

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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BBBEE STATUS: LEVEL THREE CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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