

2 OCTOBER 2017

EMPLOYMENT ALERT

LET OUR STRIKE GUIDELINES BE THE STARTING POINT FOR YOUR STRIKE STRATEGY

At Cliffe Dekker Hofmeyr we pride ourselves in providing our clients with practical solution driven information in line with the current challenges faced by our clients.

Due to the increase in strikes and strike violence in South Africa, our employment practice developed useful strike guidelines for our clients' benefit. These guidelines will provide clients with practical information about strikes, lock-outs and picketing and answer some of the more complex questions around these topics. The guidelines are definitely the starting point when considering a strike strategy and when preparing for industrial action. Our strike guidelines can be accessed on our website.

IN THIS ISSUE

YOU SAY DEMOTION, I SAY DISMISSAL

The recent Constitutional Court case of *South African Revenue Service v CCMA and Others* (the Kruger case) dealt with whether an employer can change a chairperson's sanction.

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The arbitrator agreed and found that in terms of the Public Services Act the Department could not change the chairperson's sanction to a harsher one.



The recent Constitutional Court case of *South African Revenue Service v CCMA and Others* (the Kruger case) dealt with whether an employer can change a chairperson's sanction.

The findings of the Labour Appeal Court (LAC) in *Moodley v The Department of National Treasury and Others* [2017] 4 BLLR 337 (LAC) affirms the principles established by the Kruger case.

In the Moodley matter, National Treasury employed the employee as director: facilities management. Her duties included procurement. The employee was charged with 11 counts of misconduct including non-compliance with procurement procedures, failure to disclose her interests and the receipt of a gift.

The employee was found guilty of nine of the 11 charges. The chairperson, an independent advocate, imposed a sanction in respect of each charge – and then imposed an overall sanction in respect of all the charges. In respect of five of the nine charges against her, the chairperson imposed a sanction of dismissal.

Strangely, the chairperson's overall sanction was "dismissal with an alternative of demotion". This was a competent finding in terms of the department's employee relations guideline.

Not surprisingly, the employee elected demotion.

Despite the employee's election, the department informed her that she was dismissed with immediate effect. The employee then referred an unfair dismissal dispute to the bargaining council. No evidence was led at the bargaining council. An agreed bundle

was handed in and the matter was argued before the arbitrator. The only issue was the fairness of the sanction. The employee contended that having made her election the department could not substitute the chairperson's sanction with that of a dismissal. The arbitrator agreed and found that in terms of the Public Services Act the Department could not change the chairperson's sanction to a harsher one. As a result, the dismissal was unfair. The arbitrator awarded reinstatement and stated that "[t]he sanction of demotion should stand."

The department took the award on review to the Labour Court. The court found that the arbitrator misconceived the nature of the enquiry and arrived at a decision that fell outside the bounds of reasonableness. The court remitted the matter back for rehearing to the bargaining council to determine whether the dismissal was fair.

The employee appealed to the LAC. The grounds of appeal raised by the employee included that the court had erred in finding that the arbitrator's award was unreasonable and in finding that the department could change the chairperson's sanction even though the sanction was not a recommendation.

Referring to the Kruger case, the LAC agreed that an arbitrator is enjoined by law, namely s193(2) of the LRA to determine whether reinstatement is an appropriate remedy. In terms of s193(2)

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Two lessons can be learned from this decision.



the LC or an arbitrator must reinstate or re-employ an employee where a dismissal is substantively unfair unless the employee does not want to be reinstated, the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable, or it is not reasonably practicable to do so.

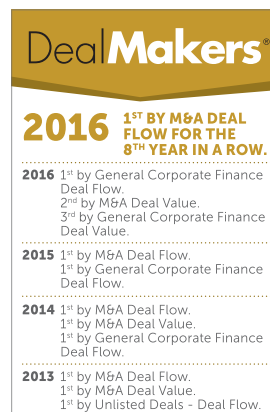
The LAC found that the arbitrator did not apply s193(2) of the LRA and he failed to consider the seriousness of the misconduct and the effect of the misconduct on the workplace. It held that "[t]he arbitrator's failure to do so, in circumstances where she, or he, was legally obliged to do so, is justifiably criticised as being unreasonable and as

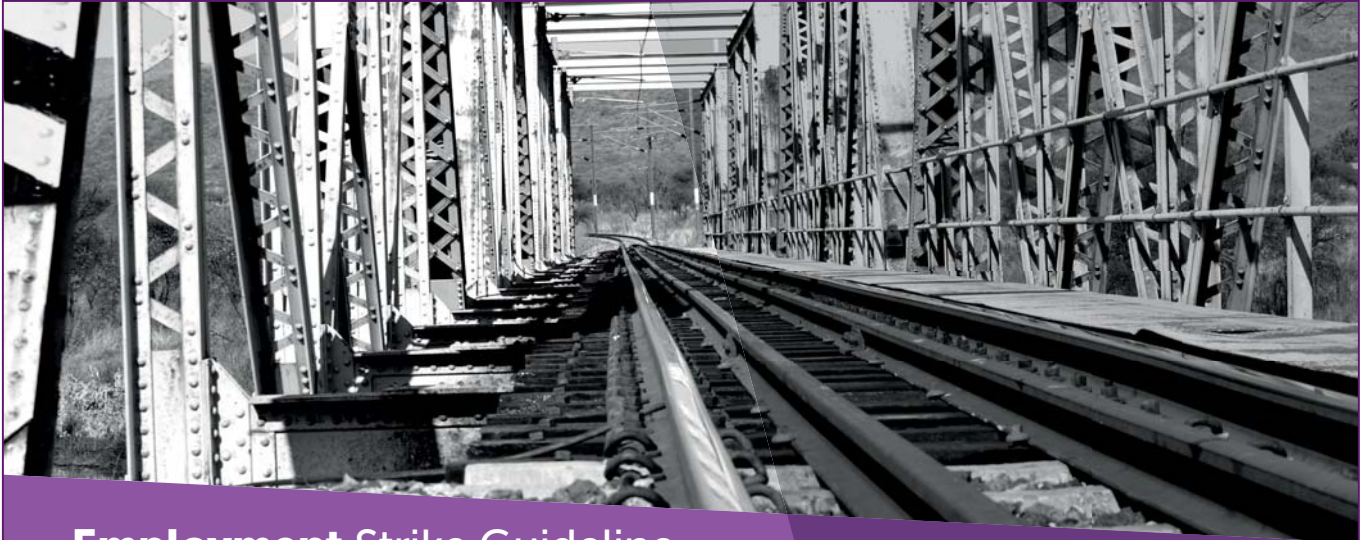
a failure to apply his or her mind to the issues"

The LAC agreed with the LC, albeit for different reasons, that the arbitrator's award was to be set aside and remitted to the bargaining council for rehearing.

Two lessons can be learned from this decision. Firstly, employers must carefully consider who they appoint as disciplinary enquiry chairpersons when outsourcing this function and secondly, an arbitrating commissioner is obliged by law to consider whether reinstatement is an appropriate remedy in the circumstances.

Jose Jorge and Steven Adams





Employment Strike Guideline

Find out when a lock-out will be protected.

 [Click here to find out more](#)

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OUR TEAM

For more information about our Employment practice and services, please contact:



Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



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



Kirsten Caddy
Director
T +27 (0)11 562 1412
E kirsten.caddy@cdhlegal.com



Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Nicholas Preston
Director
T +27 (0)11 562 1788
E nicholas.preston@cdhlegal.com



Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com



Samiksha Singh
Director
T +27 (0)21 481 6314
E samiksha.singh@cdhlegal.com



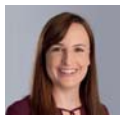
Gavin Stansfield
Director
T +27 (0)21 481 6313
E gavin.stansfield@cdhlegal.com



Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com



Ndumiso Zwane
Director
T +27 (0)11 562 1231
E ndumiso.zwane@cdhlegal.com



Anli Bezuidenhout
Senior Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Steven Adams
Associate
T +27 (0) 21 481 6341
E steven.adams@cdhlegal.com



Samantha Bonato
Associate
T +27 (0)11 562 1134
E samantha.bonato@cdhlegal.com



Sean Jamieson
Associate
T +27 (0)11 562 1296
E sean.jamieson@cdhlegal.com



Zola Mcaciso
Associate
T +27 (0)21 481 6316
E zola.mcaciso@cdhlegal.com



Anelisa Mkeme
Associate
T +27 (0)11 562 1039
E anelisa.mkeme@cdhlegal.com



Prinoleen Naidoo
Associate
T +27 (0)11 562 1829
E prinoleen.naidoo@cdhlegal.com



Bheki Nhlapho
Associate
T +27 (0)11 562 1568
E bheki.nhlapho@cdhlegal.com

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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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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.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@cdhlegal.com

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