

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

SUSPENSION WITHOUT PAY: DELAYS CAUSED BY EMPLOYEES WILL COST THEM

Drawn-out, expensive suspensions are a creeping phenomenon. Whilst there is an onus on the employer to deal with labour disputes "expeditiously", many employees charged with misconduct deliberately delay the process or attempt to postpone their fate by producing sick notes, claiming unavailability of their representative or changing representatives at the last minute.

SUSPENSION WITHOUT PAY: DELAYS CAUSED BY EMPLOYEES WILL COST THEM

Generally, a suspension pending a disciplinary enquiry is effected at the instance of an employer.

A suspension may amount to an unfair labour practice if not executed in accordance with the principles of fairness and in terms of the employer's codes and procedures.



Drawn-out, expensive suspensions are a creeping phenomenon. Whilst there is an onus on the employer to deal with labour disputes "expeditiously", many employees charged with misconduct deliberately delay the process or attempt to postpone their fate by producing sick notes, claiming unavailability of their representative or changing representatives at the last minute.

Generally, a suspension pending a disciplinary enquiry is effected at the instance of an employer. As a consequence, the employer remains liable to pay a suspended employee at the normal rate. Delays in the process can end up bleeding the employer dry.

The question that then arises is in what circumstances an employee pending a disciplinary hearing may be suspended without pay. The answer to this question is important, because suspension must also be fair and the employee is entitled to challenge a suspension that he/she feels is unfair.

A suspension may amount to an unfair labour practice if not executed in accordance with the principles of fairness and in terms of the employer's codes and procedures.

In the case of *Msipho and Plasma Cut* (2005) 26 ILJ 2276 (BCA), an employee was suspended on full pay pending a disciplinary enquiry into alleged misconduct. He was entitled to be represented by a union official. At the hearing his union official was not present. The employee requested and was granted a postponement to enable him to secure the attendance of a representative. The postponed hearing was held six weeks later. The employer failed to pay the employee during this period.

The employee referred an unfair labour practice dispute to the Centre for Dispute Resolution claiming that he was entitled to be paid whilst on suspension pending an enquiry.

The arbitrator noted that the employee was aware of the original date of the hearing and it was his responsibility to secure the attendance of his representative. He failed to discharge this responsibility and it was unfair to blame the employer for his failure. If a scheduled hearing was postponed at the instance of an employee, the employer might not be liable for remuneration from the date of postponement to the date of hearing. Otherwise, employees would find reason to delay disciplinary proceedings as this would always be at the employer's cost.

The arbitrator therefore, ruled that the failure to pay the employee during the period of postponement was not an unfair labour practice.

Two years later, these sentiments were echoed by an arbitrator of the MEIBC in the matter of *SAEWA obo Members and Aberdare Cables* [2007] 2 BALR 106 (MEIBC).

In this case, the employee was suspended on full pay pending a disciplinary enquiry. The hearing was postponed at the request of the union and was ultimately held about

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CONTINUED

It is important that the employers amend their disciplinary code or policies and procedures to allow for the remedy of suspension without pay in the case of undue delays in the disciplinary enquiry caused by an employee.



two weeks after the scheduled date. The company agreed to the postponement with the proviso that the further period of suspension would be unpaid. The employee claimed that he was entitled to his pay during the full period of suspension.

The arbitrator noted that employees suspended pending disciplinary action are normally entitled to their full pay. However, to apply this principle to situations where suspension is extended at the request of the employee would be unfair to employers. The employee was accordingly not entitled to be paid for the additional period of suspension.

It appears that arbitrators have come to realise that delaying tactics by employees on full pay can result in an abuse of the disciplinary process and have sought to close the gap on this phenomenon. In the public service for example, government spends millions on salaries of suspended employees and there are increasing measures identified to address this problem.

It is quite clear that employers have failed to implement proper procedures to ensure the completion of disciplinary processes within reasonable timeframes, and therefore tacitly allow employees to be on suspension endlessly, with full pay.

It is important that the employers amend their disciplinary code or policies and procedures to allow for the remedy of suspension without pay in the case of undue delays in the disciplinary enquiry caused by an employee.

Medical certificates ought not to be accepted on face value. The employer should be guided by the Ethical and Professional Rules of the Medical and Dental Professions Board of the Health Professions Council of South Africa with respect to medical certificates and be guided by their own codes and practices in this regard.

Hugo Pienaar and Prinoleen Naidoo

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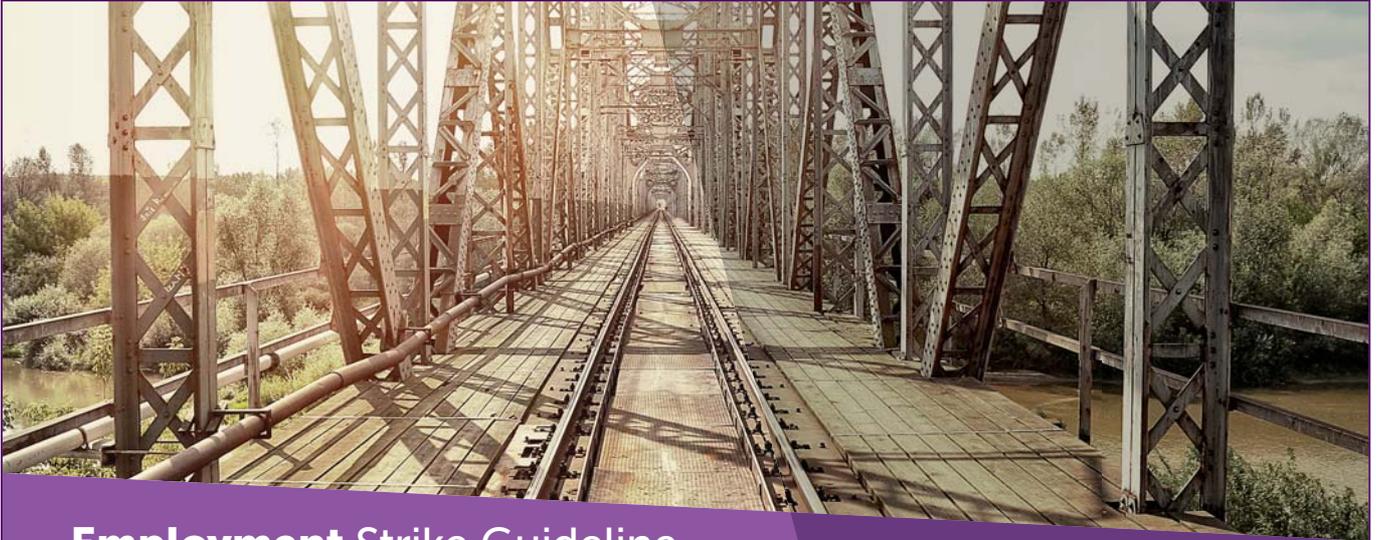
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Employment Strike Guideline

Find out what steps an employer can take when striking employees ignore court orders.

 [Click here to find out more](#)

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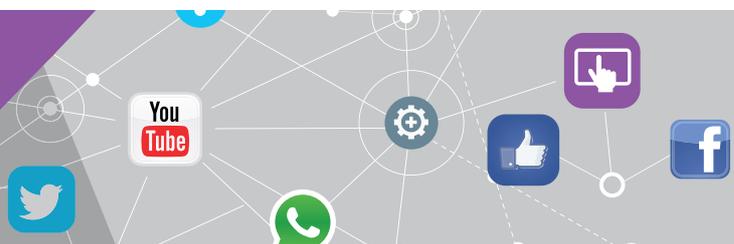
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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving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

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