

EMPLOYMENT ALERT

IN THIS ISSUE

BAD BEHAVIOUR AT ARBITRATION PROCEEDINGS WILL NOT BAR REINSTATEMENT

Arbitration proceedings frequently become acrimonious and hostile. The manner in which the proceedings progress, however, will not affect the relief granted by a commissioner. In *Glencore Holdings (Pty) Ltd and Another v Sibeko and Others* (2018) 39 ILJ 138 (LAC) (1 November 2017), an arbitrator held that the dismissal of the employee was substantively unfair but refused to order reinstatement as a result of his behaviour at the unfair dismissal arbitration.

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The employee in this case was employed as a dozer driver which is a hazardous occupation and was required to wear protective safety gear, including protective ear muffs. Prior to his dismissal, the employee refused to wear the usual ear muffs. He was charged with misconduct for his refusal to comply with a reasonable instruction and subsequently dismissed. The dispute was referred to arbitration.

During the arbitration proceedings, it was concluded that the dismissal of the employee had been procedurally fair but substantively unfair, as the employer had failed to prove that the employee was guilty of the misconduct levelled against him. The employee then requested reinstatement, however, this relief was refused.

The arbitrator's reasons for refusal included reference to the employee's behaviour during the arbitration proceedings. The employee had alleged *inter alia* that the

employer's representatives were giving one another and the arbitrator cues during the hearing. The arbitrator was of the view that the employee had "behaved badly" and was "habitually disruptive". This demonstrated a breakdown in the employment relationship to such a degree that reinstatement was an inappropriate remedy. On review, this decision was set aside and substituted with an order of reinstatement. In the Labour Appeal Court (LAC), the substitution of the order was appealed.

Section 193(2)(b) of the Labour Relations Act, No 66 of 1995 (LRA) requires an employer to reinstate or re-employ an employee unless the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable. Further, s193(2)(c) requires an employer to reinstate or re-employ an employee, unless it is not reasonably practicable to do so.

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The employee's reinstatement was therefore not impracticable, nor could the employment relationship be deemed intolerable.



The LAC concluded that the entire rationale for the arbitrator's decision to deviate from the primary remedy in these circumstances was based on the factual happenings during the arbitration proceedings. It was on this basis that the arbitrator believed that six months' compensation would be an appropriate remedy as opposed to reinstatement.

With reference to the review decision; the LAC confirmed that the ambit of s193(2)(b) was limited to events up to the point of dismissal and not events thereafter, such as arbitration proceedings. Further, s193(2)(c) was relevant to the core operational requirements of an employer. The employee's reinstatement was therefore not impracticable, nor could the employment relationship be deemed intolerable.

The role performed by the employee as a dozer driver did not embrace a dimension whereby a display of bad manners in the arbitration proceedings would render reinstatement inappropriate. The functional role performed by the employee within the employer's organisation, including the functional rapport or lack thereof with his superiors, was not adversely impacted by his conduct at arbitration. Section 193(2)(b) - (c) was therefore not applicable and the appeal was accordingly dismissed.

In principle, arbitration proceedings are litigious and adversarial in nature. It is not uncommon for employees to behave irrationally, make unsubstantiated allegations and experience paranoia or defensiveness. This is a largely irrelevant consideration in determining the relief granted by a commissioner.

*Gavin Stansfield
and Lee-Andrea Arenz*



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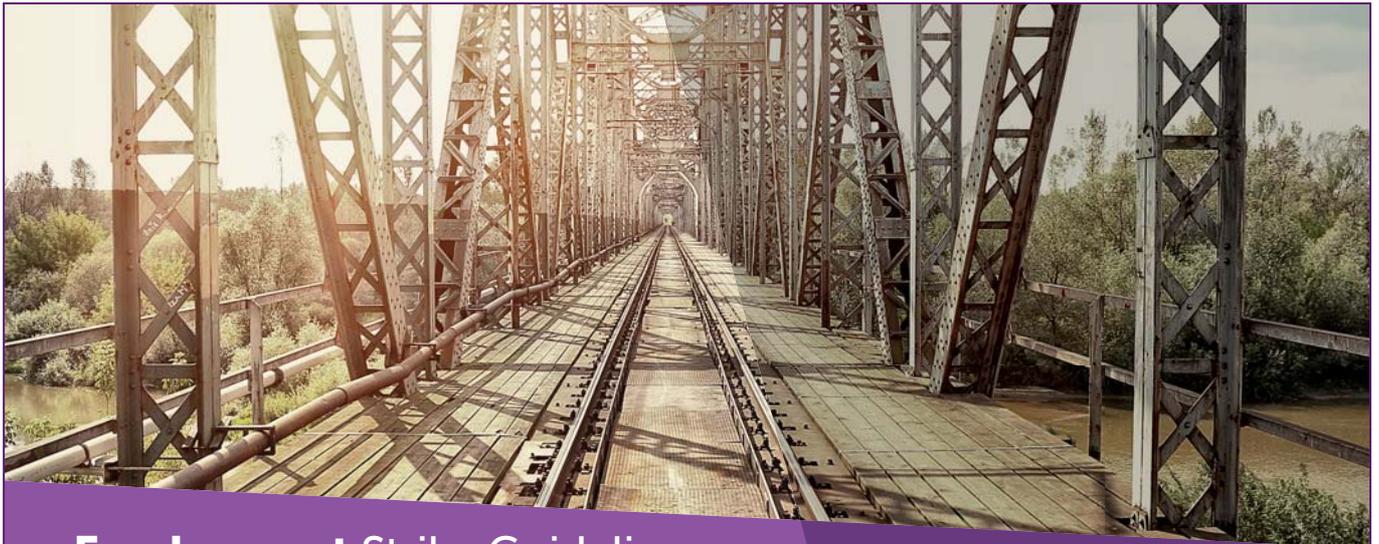
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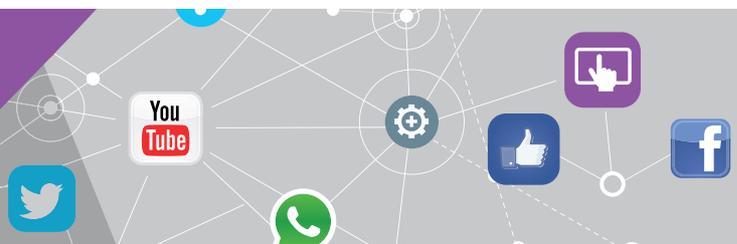
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