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EMPLOYMENT ALERT

IN THIS **ISSUE**

CDH
CLIFFE DEKKER HOFMEYR

DO EMPLOYERS HAVE FREE REIN TO TERMINATE FIXED-TERM EMPLOYMENT?

Clause 10 of the contract provided for termination, prior to the expiration of the term of the contract.

The High Court in *Joni v Kei fresh Produce Market (936/2012) [2018] ZAECMHC 39* (14 August 2018) (the Joni judgment), confirmed the right of an employer to prematurely terminate a fixed-term employment contract on any grounds. According to the court, it is sufficient for a fixed-term employment contract between the employer and the employee to simply contain a clause permitting either party to terminate the contract on written notice, prior to the expiration of the contract term. This is independent of whether such termination may be fair in terms of the Labour Relations Act.

The High Court in the Joni judgment held that if no termination clause was present, the right of termination would be restricted in terms of the common law.

The employee instituted action against her employer, Kei Fresh Produce Market (KFPM), claiming damages arising out of the alleged unlawful termination of her contract of employment with KFPM. The employment contract was for a fixed-term and commenced on 1 July 2010, to end on 30 June 2015. Clause 10 of the contract provided for termination, prior to the expiration of the term of the contract. Particularly, clause 10.2 stipulated that either party would be entitled to terminate the contract on one month's written notice to the other party, while clause 10.3 provided that notwithstanding anything to the contrary, the contract could also be summarily terminated on any grounds recognized in law.

In 2011, KFPM wrote to the employee, giving her one month's notice of the termination of the employment contract, citing operational requirements as the reason.

The High Court relied on the Labour Appeal Court decision of *Buthelezi v Municipal Demarcation Board* [2005] 2 BLLR 115 (LAC) (Buthelezi), which highlighted that the common law does not recognise the right to terminate a fixed-term contract of employment prematurely in the absence of a repudiation or material breach, which was interpreted to mean that where the terms of the employment contract specifically make provision for premature termination, such termination is lawful.

In light of its interpretation of Buthelezi, the High Court in the Joni judgment held that if no termination clause was present, the right of termination would be restricted in terms of the common law. It, however, highlighted that under these circumstances, there was a termination clause present, and it set out the terms of termination in clear and unambiguous language. The High Court then concluded that because clause 10.2 placed no restriction on the grounds upon which the contract could be terminated and because the employee was served with a notice of termination which cited the reasons for termination, the contract was terminated lawfully. Furthermore, the Court made it clear that clause 10.3

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of the contract was not applicable to this situation as it referred to "summary termination", which would deal only with instances of gross misconduct or material breaches that warrant immediate termination.

The High Court held that the contract of employment was therefore lawfully terminated in accordance with the provisions of the contract.

Accordingly, if an employer terminates a contract in accordance with its termination clause, but without complying with labour legislation, the employee may not have a claim under the contract, but the employer may still be exposed to a claim under the Labour Relations Act.

Where the fixed-term contract does not include a termination clause, the employee may have both a contractual and employment claim.

In light of the Joni judgment, it would be prudent for employers to ensure that their fixed-term contracts with employees contain a provision permitting the early termination of the contract. This, however, does not detract from the fact that in terminating the contract in accordance with its termination clauses, employers must still comply with the Labour Relations Act.

Aadil Patel and Anelisa Mkeme

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DRAFTING CHARGE SHEETS – SUPER SIMPLE!

Notwithstanding this decision, many employers opt instead to continue with technically worded charge sheets so as to meet the perceived test of compliance in the forums that all too often follow.

There are countless examples of workplace misconduct which may also amount to criminal offences, such as theft, fraud, corruption and bribery ... the list goes on.

Given this overlap, employers often draft charge sheets to categorise the misconduct as "theft" or "fraud" and in doing so, utilise phrases such as "unlawful conduct", in an attempt to amplify and/or highlight the seriousness of the misconduct or to justify dismissal as an appropriate sanction.

The landmark decision in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration and Others* [2006] 9 BLLR 833 (LC) affirmed the approach that for purposes of disciplinary enquiries, there is no place for legalistic procedures that incorporate all of the accoutrements of a criminal trial, including technical and complex "charge sheets".

Notwithstanding this decision, many employers opt instead to continue with technically worded charge sheets so as to meet the perceived test of compliance in the forums that all too often follow.

This approach, however, ushers in a mechanical test of legal interpretation, which involves a painstaking dissection of each element of the charge and its legal label, hoping to reveal the absence of an essential element thereof.

For example, 'Fraud' as a legal concept, involves an intentional misrepresentation, that has the effect of prejudicing another or has the potential to prejudice another. It therefore follows that the absence of 'intention' for example, will result in the charge not being sustained.

In the recent decision of *Kidrogen (Pty) Ltd v CCMA & others* (Case no: C 814/2016, 31 July 2018), three newly appointed executives received payments that were not due to them and for which there was no Board approval. They were as such each charged with gross dishonesty and dismissed.

At the CCMA, the Commissioner found that by receiving monies to which they were not entitled and failing to ensure board approval for the payments, the executives had demonstrated incompetence and negligence.

The Commissioner went on to conclude, however, that because the Executives had not made the calculations or prepared the payments, which they had later received, they could not have been dishonest because dishonesty (in his view) involved deceitful intent. As such, their dismissals were found to be substantively unfair.

On review, the Labour Court rejected the Commissioner's view that "dishonest" conduct (and, by implication, other forms of misconduct) for purposes of employment law, requires proof of the same elements as in criminal law – that is, deceitful intent.

Dishonesty in employment law is an aspect of the breach of the employee's duty of good faith towards the employer and is measured against the standard of conduct that could reasonably have been expected of an employee acting in good faith.

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DRAFTING CHARGE SHEETS – SUPER SIMPLE!

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To avoid complicated disciplinary proceedings and unnecessary litigation, employers should avoid using criminal law terminology when drafting charge sheets.

In the present case, the Labour Court found that the executives should have foreseen the possibility that accepting the payments in question would be contrary to their contracts of employment and that they could have avoided those consequences simply by seeking clarification from the Board.

The Commissioners decision was therefore set aside and this is consistent with the view that employment law merely requires proof on a balance of probabilities and that there will be no room for technical or legalistic approaches.

To avoid complicated disciplinary proceedings and unnecessary litigation, employers should avoid using criminal law terminology (unless this had been checked by a legal professional) when drafting charge sheets.

Focus should ideally be placed instead on the employee's contractual obligations as contained in either their contract of employment, disciplinary code and procedure or a work policy. To this end, such contracts, codes and policies must also be plainly drafted.

Nicholas Preston and Prinoleen Naidoo

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PLANNED UNPROTECTED STRIKES AIMED AT CAUSING FINANCIAL HARM TO THE EMPLOYER MAY GET YOU DISMISSED NO MATTER HOW SHORT ITS DURATION!

The employees raised dissatisfaction with the company's decision and demanded that the managing director address them on the issue. After the company denied this request, 242 employees downed tools.

This is what happened at County Fair Foods when 246 employees engaged in an unprotected strike. The company operates a chicken processing plant. In August 2010, the company advised employees that it may not pay out discretionary bonuses at the end of the financial year. On 12 October the company confirmed in a second communique that it had made a decision not to pay the bonuses due to its non-profitability caused by, among other factors, downward pressure on poultry prices. On 19 November, the company shared its financial indicators with the employees to justify its reason for not paying the bonuses.

The company alleged that the strike was in bad faith and strategically during a critical business production cycle of the company.

On 15 December, the employees raised dissatisfaction with the company's decision and demanded that the managing director address them on the issue. After the company denied this request, 246 employees downed tools. The production manager later addressed the employees and gave a verbal ultimatum, advising them that they were engaged in an unprotected strike which could result in dismissal. A written ultimatum followed, requiring the employees to return to work the following day. 68 employees listened and returned to work. Following a final ultimatum , another 58 employees returned. All employees who complied with the ultimatums received written warnings. 120 employees remained on strike and, following a hearing, the company ultimately dismissed them on 3 January 2011.

Assisted by the Food and Allied Workers' Union, the employees referred a class action dispute to the Labour Court challenging the substantive fairness of their dismissal. They submitted that the strike was for a short duration, peaceful and for a justifiable reason. They also placed weight on their length of service and argued that the employer could have used a less severe sanction to discipline them. In response, the company referred to, among other things, its economic suffering caused by the strike, the fact that it had to employ replacement labour and that the employees had deliberately refused to comply with three ultimatums. In consideration of these submissions, Steenkamp J found that the strike was peaceful and for a short duration. He drew no distinction between the employees who received written warnings after returning to work and those who were dismissed for striking for an extra 1,5 days longer. The court found the dismissal unfair, reinstating the employees and awarding 6 months' compensation.

Disgruntled by this decision, the company referred the matter to the Labour Appeal Court (LAC). In its submissions, the company alleged that the strike was in bad faith and strategically during a critical business production cycle of the company. This timing indicated a deliberate attempt, according to the company, of economic sabotage aimed at frustrating its ability to meet festive orders. The employees had received two months' notice of the company's decision but only chose to strike in December: the peak production season. There was also no reason as to why they had not complied with requirements of a protected strike in the Labour Relations Act, No 66 of 1995 (LRA) which could have protected them from dismissal. The employees had also been untruthful at the disciplinary hearings, denying knowledge that the strike was

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The court found the strike to have been deliberately embarked upon during end-of-year peak production with the employees making no attempts to comply with the LRA.

unprotected. This dishonesty impacted the trust necessary for a continued relationship. The employees opposed the appeal, arguing that the company suffered no irreparable harm during the strike as it had employed replacement labour.

In evaluating these submissions, Savage AJA relied on the Code of Good Practice to consider whether dismissal for participating in an unprotected strike was fair. She specifically relied on item 6 and 7 of the Code for guidance. In having regard to the above, the LAC found that the company issued three ultimatums written in clear language which the employees had ignored for no good reason. Other employees had opted to adhere to the ultimatum. Participating in an unprotected strike is serious misconduct entitling the employer to impose discipline.

The LAC found dismissal appropriate in circumstances where the employees planned the strike to create maximum pressure and undermine the employer's authority, and where ultimatums were ignored, even where a strike had been for a short duration.

The court found the strike to have been deliberately embarked upon during end-of-year peak production with the employees making no attempts to comply with the LRA. The strike was not in response to unjustified conduct of the employer and less disruptive methods were available to the employees. The LAC agreed with the company and the appeal succeeded.

Gavin Stansfield and Zola Mcaciso

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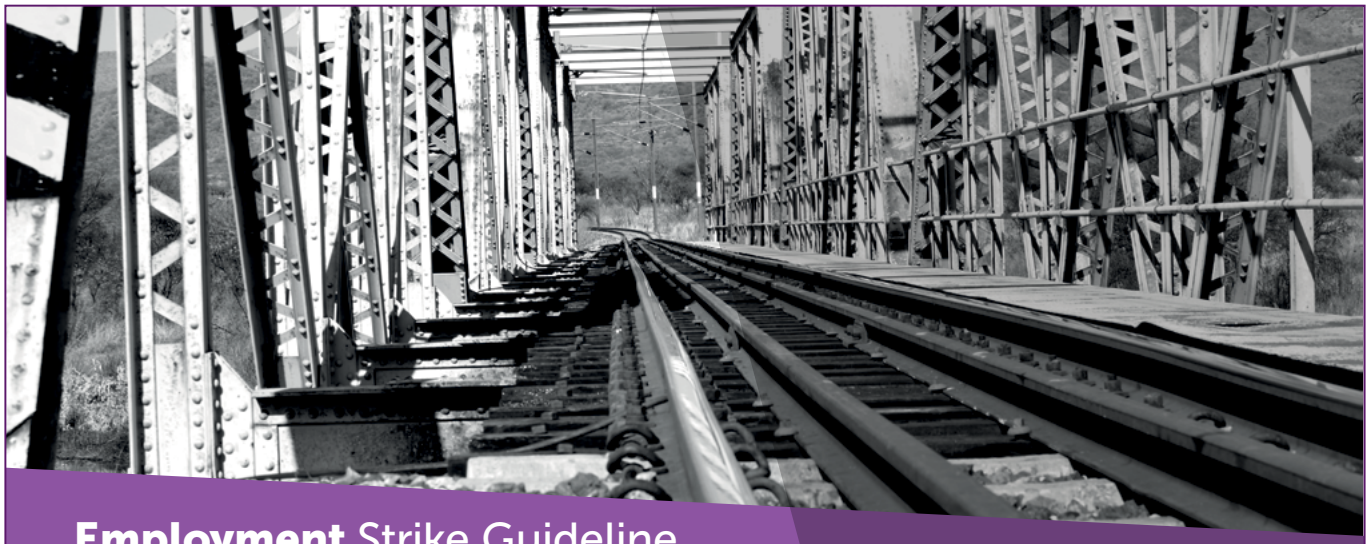

Employment Strike Guideline

Find out when a lock-out will be protected.

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 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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