

# 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

### RIOTOUS BEHAVIOUR IN A DISCIPLINARY ENQUIRY

What happens in a situation where an employee is called to a disciplinary enquiry to answer to allegations of misconduct, however commits further misconduct by being disruptive or even acting violently during the enquiry? Is the employer entitled to dismiss the employee on the spot and do away with the enquiry? This is the question that the arbitrator in the matter of *Ekurhuleni Metropolitan Municipality v South African Municipal Workers Union and Others* (JA56/2015, JR1676/2012) [2017] ZALAC 80 (18 December 2017) was faced with.

# RIOTOUS BEHAVIOUR IN A DISCIPLINARY ENQUIRY

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*The arbitrator found that the employer had proven that there was a fair reason to dismiss the employee.*

What happens in a situation where an employee is called to a disciplinary enquiry to answer to allegations of misconduct, however commits further misconduct by being disruptive or even acting violently during the enquiry? Is the employer entitled to dismiss the employee on the spot and do away with the enquiry? This is the question that the arbitrator in the matter of *Ekurhuleni Metropolitan Municipality v South African Municipal Workers Union and Others* (JA56/2015, JR1676/2012) [2017] ZALAC 80 (18 December 2017) was faced with.

In this matter, seven employees had been subjected to a disciplinary enquiry into allegations of misconduct. The enquiry was chaired by an independent chairperson. During the eighth session of the enquiry, the employees assaulted the chairperson of the enquiry, damaged the recording device and damaged the chairperson's phone which the chairperson was using to record the incident, by throwing it against a wall.

As a result of the employees' violent and disruptive behaviour, the employer abandoned the enquiry. The employer then proceeded to summarily dismiss all seven of the employees. In this matter, the union acted on behalf of one of the employees who had been dismissed and referred an unfair dismissal dispute to the South African Local Government Bargaining Council (SALGBC) on behalf of the employee. It was alleged that the employee's dismissal was substantively and procedurally unfair. At the arbitration, evidence was adduced by the employer that although the employee did not

physically engage in the physical assault of the chairperson, she did however block the doorway and shouted "mshaye" which translates to "hit him" as the other employees assaulted the chairperson.

The arbitrator found that the employer had proven that there was a fair reason to dismiss the employee.

On the issue of procedural fairness, the arbitrator held that the employer had presented no sound reason for failing to hold a new enquiry into the alleged misconduct that took place at the disciplinary enquiry. The arbitrator criticised the employer's approach and held that the employer could have convened an enquiry prior to dismissing the employee. The arbitrator found that the employee's dismissal was procedurally unfair.

In deciding the relief, the arbitrator exercised his discretion under s194 of the Labour Relations Act, No 66 of 1995 (as amended) and decided not to award the employee any compensation for the procedural unfairness.

Michael Yeates was named the exclusive South African winner of the **ILO Client Choice Awards 2015 – 2016** in the category Employment and Benefits as well as in **2018** in the Immigration category.



# RIOTOUS BEHAVIOUR IN A DISCIPLINARY ENQUIRY

CONTINUED

*The LAC held that s194(1) requires compensation to be “just and equitable” and that the arbitrator properly exercised his discretion not to award compensation in light of the employee’s “riotous behaviour”.*



The union launched a review against the arbitrator’s finding on the basis that, amongst other things, it was unfair that, although the arbitrator held that the employee’s dismissal was procedurally unfair he denied the employee compensation and that the dismissal was in breach of a collective agreement. The Labour Court reviewed and set aside the award on the basis that the arbitrator failed to take into account the provisions of a collective agreement that required a disciplinary enquiry be held prior to a dismissal.

The employer took the Labour Court order on appeal. The Labour Appeal Court (LAC) held that the cause of action that had been referred to the SALGBC was an unfair dismissal dispute and not an alleged breach of a collective agreement and that the Labour Court had misdirected itself by making a finding based on the provisions of a collective agreement.

The LAC found that the arbitrator’s finding that the dismissal was substantively fair was unassailable. On the finding on procedure, the LAC held that in the absence of a cross-review by the employer it was “unnecessary to consider whether it might indeed have been excusable to convene another enquiry when the very misconduct was the rendering of an enquiry impossible” and therefore the finding of the arbitrator on this point was not interfered with.

The LAC held that s194(1) requires compensation to be “just and equitable” and that the arbitrator properly exercised his discretion not to award compensation in light of the employee’s “riotous behaviour” in the enquiry, as the behaviour was serious enough to warrant a deviation from the usual response to procedural unfairness.

Although the LAC could not make a determination on the arbitrator’s finding that the employee’s dismissal was procedurally unfair, because the employer in this case did not cross-review the findings, it did remark that “there was no consideration given to whether the circumstances that prevailed were such as to excuse the employer from holding an enquiry as contemplated in paragraph 4 of the code of good practice on dismissal in schedule 8 to the Labour Relations Act, No 66 of 1995” at the arbitration proceedings.

Paragraph four of the code of good practice on dismissal, states that “in exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures”.

It will depend on the circumstances of each case whether it can be said that it is unreasonable to expect an employer to hold a disciplinary enquiry prior to dismissing an employee.



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# RIOTOUS BEHAVIOUR IN A DISCIPLINARY ENQUIRY

CONTINUED

*This case confirms the importance of a disciplinary enquiry prior to the dismissal of an employee.*



In this case, the arbitrator was of the view that the assault of the chairperson during an enquiry did not qualify as an "exceptional circumstance" which warranted the dismissal of the employee without holding a new disciplinary enquiry into the misconduct.

This case confirms the importance of a disciplinary enquiry prior to the dismissal of an employee, even in circumstances where the employer is of the view that the severity of the employee's misconduct does not justify an enquiry. The courts

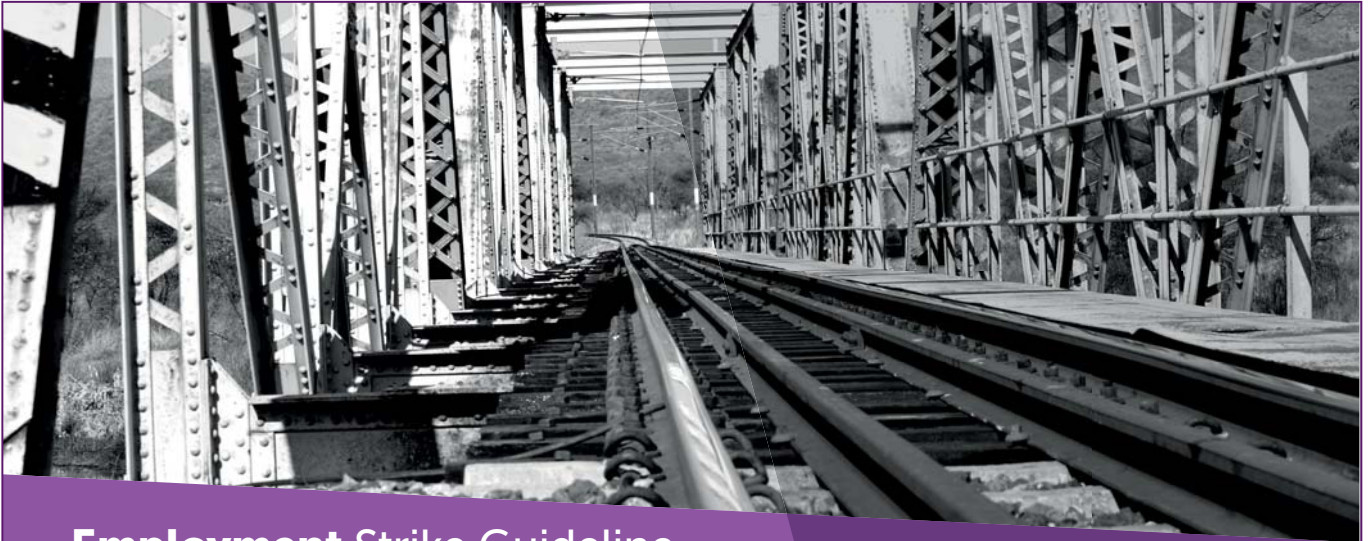
may hold a different view to the employer and the employer may end up with an award for compensation. The case also demonstrated that a finding of procedural unfairness will not always result in a compensation order.

However, it is clear from this case that it is safer to hold a disciplinary enquiry rather than not to.

*Thabang Rapuleng and  
Prencess Mohlahlo*







## Employment Strike Guideline

**Find out when a lock-out will be protected.**

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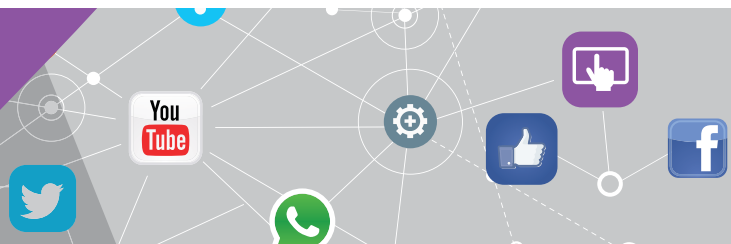
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