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EMPLOYMENT ALERT

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Too scared to come to work: unauthorised absence after a strike

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Strikes are frequently characterised by violence and non-striking employees are often apprehensive to report for duty, but can such employees be dismissed simply for failing to report for duty during such times?

The recent case of *Association of Mineworkers and Construction Union and Another v Metal and Engineering Bargaining Council and Others* (JR729/16) [2018] ZALCJHB 420 has a bearing on this question. The facts are:

- Eskom engaged the services of various independent contractors to complete the construction work at various power stations, such as Medupi, with Murray and Roberts (the employer) being such an example.
- There were two collective agreements concluded by these contractors and Eskom, which included the employer. These agreements dealt with terms and conditions of employment, the rights and obligations of trade unions, employees and contractors and dispute resolution procedures.
- On 25 March 2015 an unprotected strike commenced in support of various demands. A few days later, when employees were due to return to work, a number of striking employees prevented persons from returning to work through acts of violence and intimidation. All vehicles transporting employees were forced to turn back.
- On 9 April 2015, the employer issued short message texts (SMSs) to its employees to update them about the violence and intimidation and that the transport services would no longer be able to operate.
- On 17 April 2015 Eskom's contractors, including the employer, approached the Labour Court to obtain an interdict to declare the strike unprotected. An Order of Court was granted. The employer sent out an SMS to all its employees, including Mr Mashologo, informing them about the terms of the Court Order. However, this had no effect as the employees did not returned to work.
- The employer issued an ultimatum via SMS to all strikers, including Mr Mashologo, instructing them to report for induction between 22 and 28 April 2015. Mr Mashologo did not oblige.

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Too scared to come to work: unauthorised absence after a strike...*continued*

The arbitrator found in favour of the employer and upheld the disciplinary sanction short of dismissal.

- The employer initiated disciplinary action against all employees involved in the unprotected strike as well as those who committed acts of misconduct, intimidation and violence. The employer grouped the employees into two categories. The first group comprised those employees who allegedly reported for duty throughout the duration of the strike and the second group comprised those employees who allegedly committed offences. These employees in the second group were offered the option of signing a Peace Agreement and immediately returning to work. If they did not sign the Peace Agreement, then they were subjected to disciplinary action.
- Mr Mashologo formed part of the second group and was charged for participating in the unprotected strike, failing to comply with the interdict, and ignoring the ultimatum to return to work. Mr Mashologo was found guilty and recieved a final written warning.

AMCU referred an unfair labour practice dispute to the Metal and Engineering Industries Bargaining Council (MEIBC) on behalf of Mr Mashologo. The arbitrator found in favour of the employer and upheld the disciplinary sanction short of dismissal. AMCU bought an application to review the arbitration award in the Labour Court.

The Labour Court found that Mr Mashologo had reported for duty on 25, 27 and 28 March 2015 as well as 8 April 2015, but had not reported for duty in the period 9 to 17 April 2015. Mr Mshalogo contended that there was no transport available for him to report for duty but conceded that other employees had successfully gone to work utilising other means of transport.

Mr Mashologo received the SMS regarding the interdict but did not return to work due to the violence and intimidation associated with the strike. His fear of violence and intimidation was not informed by his own experiences but by the SMS sent out by the employer. He testified that this caused him not to report for duty or attend the induction process.

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Too scared to come to work: unauthorised absence after a strike...*continued*

Employees cannot rely on unsubstantiated excuses for a failure to report for work in an endeavour to avoid discipline in such circumstances.

The Labour Court found inconsistencies in Mr Mashologo's evidence and questioned his inability to report for duty where alternative transportation had been available which he had failed to utilise. The Labour Court upheld the arbitration award and found:

> "It would be an arduous burden to expect employers faced with an unprotected strike to deal with minute details of each employee who did not report for duty. It is incumbent upon an individual employee to dissociate him/herself from the striking employees and communicate that decision to the employer in no uncertain terms."

While the Labour Court did not deal with what might constitute "no uncertain terms" it has placed an onus on non-striking employees to actively distance themselves from the unprotected strike in which they do not wish to participate and advise the employer accordingly. Employees cannot rely on unsubstantiated excuses for a failure to report for work in an endeavour to avoid discipline in such circumstances.

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The Registration of Temporary Employment Services

Although the amendments came into effect on 1 January 2015 there has been slow progress in finalising the regulations for the registration of TES.

The amendments to s198 of the Labour Relations Act, No 66 of 1995 (LRA) have had a profound effect on the manner in which Temporary Employment Services (TES) conduct their business.

Section 198(4F) of the amended Act introduced the requirement that "no person must perform the functions of a temporary employment service unless it is registered in terms of any applicable legislation". Although the amendments came into effect on 1 January 2015 there has been slow progress in finalising the regulations for the registration of TES. The pace does however appear to be picking up.

On 5 December 2018, the Department of Labour published Draft Regulations on the Registration of Private Employment Agencies and Temporary Employment Services (Draft Regulations). The opportunity for public comment on the content of the Draft Regulations closed on 28 February 2019.

The Draft Regulations require that any Private Employment Agencies (PEA) and TES register with the Department of Labour. The Draft Regulations require that PEA and TES must provide the following information and documentation as part of the registration process:

1. Particulars of the PEA or TES, including its name, the type of entity it is and its business address.
2. An institutional registration certification, such as a CIPC certificate.
3. A SARS tax clearance certificate.
4. A Letter of Good Standing from the Compensation Fund proving that the PEA or TES is registered with the fund.
5. A police clearance certificate.
6. An employer registration certificate from the relevant bargaining council, if applicable.
7. Proof of payment of the Department of Labour's registration fee.

The Registrar is required to decide on a registration application within 60 days of receipt of the application. If a registration application is unsuccessful, the Registrar must provide the applicant with reasons for the unsuccessful application.

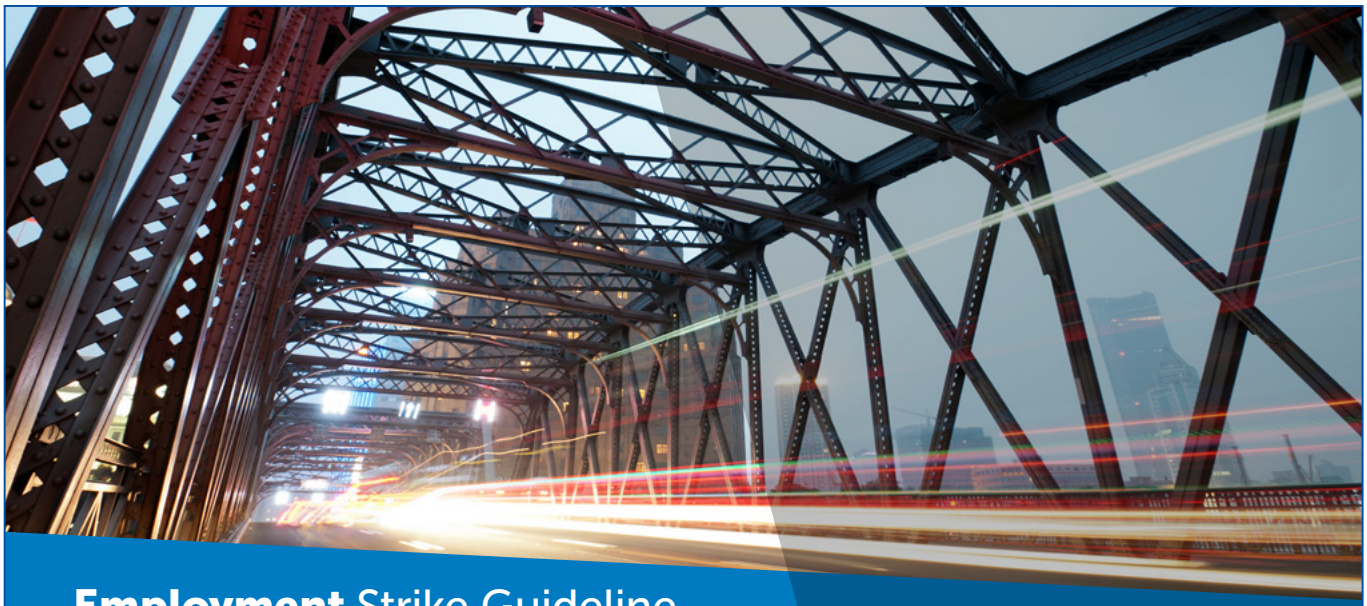
If an application is unsuccessful because of a failure to submit any document, the unsuccessful applicant may resubmit its application within 30 days on receipt of the notice from the Registrar with the omitted information included.

A certificate of registration is valid for three years. If a PEA has already registered as a PEA business with the department of labour in terms of the Skills Development Act 97 of 1998 (SDA), the PEA does not have to re-register itself in terms of the Draft Regulations as the PEA is deemed to be registered.

If a PEA conducts the business of both a PEA and TES, the PEA must apply for registration within two years of the Draft Regulations coming into effect or before the expiry date of its existing certificate, whichever comes first.

If a PEA that is registered under the SDA does not provide temporary employment services, it must apply for registration within three years of the Draft Regulations coming into effect or before the expiry date of its existing certificate, whichever comes first.

Jose Jorge and Steven Adams



Employment Strike Guideline

Find out what steps an employer can take when a strike is unprotected.

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