

**EMPLOYMENT
LAW**

WORKPLACE DISCIPLINE AND DISMISSAL

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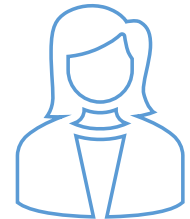
PRECISION IN DRAFTING DISCIPLINARY CHARGES

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Sol Plaatje Municipality v SA Local Government Bargaining Council and others (PA12/19) [2021] ZALAC 24

FACTS:

1. Botha & Fritz – Carpenters for Municipality
2. Dismissed: three charges of misconduct – dismantling of an air conditioner for the *purpose of selling it*
3. Referred an unfair dismissal dispute to the SALGBC
4. SALGBC found Botha not guilty on Charge 1 and 3; Fritz not guilty on all 3 Charges
5. Labour Court dismissed review



LABOUR APPEAL COURT

Disagrees with Labour Court...

1. Wording in charges in Criminal v Disciplinary Proceedings: **DISTINGUISHED**
2. Main charge of misconduct NOT proved – attempt to commit misconduct – may be found *guilty of an attempt on same charge*
3. Commissioner: overly technical approach → overlooked crucial facts and evidence
4. Taking all evidence into account = reasonable inference



STRIKE RELATED DISCIPLINE AND DISMISSAL

Sasol Mine Ltd v Nhlapo & others
(2021) 42 ILJ 2589 (LAC)

FACTS:

1. 950 employees = unprotected strike action
2. Non-payment of “Bonanza” payments...
3. Strike = Significant economic harm
4. Disciplinary hearing: charged with assault, intimidation and causing damage to property → **DISMISSED**
5. CCMA → Labour Court: Sanction = too severe?
6. Substantively Unfair ∴ Reinstatement + 12 months compensation



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LABOUR APPEAL COURT

Disagreed with Labour Court...

Substantive Fairness: Item 6(2) of Schedule 8:

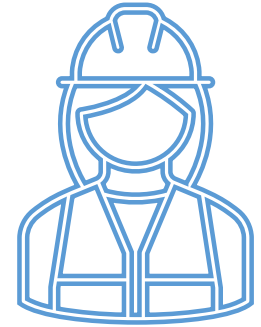
1. Employer = constant contact with Council
2. Council aware strike = commenced
3. Ultimatum = ignored

Historical Inconsistency: Strike 2006 vs 2009

1. Seriousness of Consequences
2. Compromised mine safety
3. Serious personal risk

SERIOUSNESS OF LRA CONTRAVENTION + LACK OF COMPLIANCE
= **DISMISSAL: APPROPRIATE SANCTION**

APPEAL UPHELD!



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Avoiding Reinstatement


3 February 2022

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§193(1), LRA

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3 remedies for unfair dismissal:

- ✓ Reinstatement
- ✓ Re-employment to same position or other suitable position
- ✓ Compensation

S193(2), LRA

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If dismissal unfair arbitrator or the court MUST require the employer to Reinstatement or Re-employ the employee unless –

- Employee does not want to be reinstated/re-employed
- Circumstances surrounding dismissal are such that continued employment would be intolerable
- It is not reasonably practicable to reinstate/re-employ



SETTLED LAW



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- Reinstatement is primary remedy – Booi v Amathole Municipality, CC, 19 October 2021
- And, high threshold of intolerability is required to avoid reinstatement
 - It is “unbearability”
 - It is not: “the relationship is difficult, or sour”
- Intolerability is NOT incompatibility

- NB, Reinstatement comes with back pay. This can be in excess of 12 months!



WHAT IF MISCONDUCT NOT PROVEN

Groot probleem!!!!

- Arbitrator is not required to have regard to conduct at arbitration: *Glencor v Sibeko* (2018) 39 ILJ 138 (LAC)



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To consider

- ✓ Prep of witnesses for arbitration – high risk when reinstatement is sought
- ✓ What if a new incumbent in position?
- ✓ Where position no longer exists
- ✓ Conduct of employee during the disciplinary proceedings?
- ✓ Reinstatement after a lengthy period of time? 7 years later reinstatement ordered



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Final Thoughts – to think about???

- One bite at cherry at arbitration – on certainty
- Can employee seek reinstatement and alternatively, reemployment, alternatively, compensation
- If post is filled should the new incumbent be party to the arbitration?

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RESTRUCTURING AND RETRENCHMENTS

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DEVELOPMENTS IN 2020 - 2021

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SA Airways (SOC) Ltd (In Business Rescue) & others v National Union of Metalworkers of SA on behalf of members & others (2020) 41 ILJ 2113 (LAC)

- In business rescue
- When to issue a s189(3) notice
- When to offer voluntary severance packages

National Union of Metalworkers of SA & others & Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) & another (2021) 42 ILJ 67 (CC)

- Proximate cause of dismissal – refusal to accept mutual interest demand or the employer’s operational requirements?
- Employer entitled to alter terms and conditions of employment as an alternative to retrenchment

When to discuss VSP's

South African Communications Union v Telkom SOC Ltd & Others
(2020) JOL 46876 (LC)

- No rigid sequence prescribed in s189(3) on the subject-matters for consultation
- Offering VSP's can happen upfront



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No absolute right to severance

Lemley v CCMA & Others (2020) 41 ILJ 1339 (LAC)

- Employee who unreasonably refuses offer of alternative employment
- Not entitled to severance



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RETIRED, EMPLOYED, RETRENCHED – CALCULATING SEVERANCE

Barrier v Paramount Advanced Technologies (Pty) Ltd (2021) 42 ILJ 1177 (LAC)

- Employee reached retirement age
- Employment continued
- Severance calculated over *pre-* and *post-*retirement period
- Employee not disentitled to severance due to receipt of other payments they are entitled to in law



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