CDH
CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

An employer's guide to dealing with employees during civil unrest

Scan the QR code to view our team OR

Click here to view

CDH
CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

An employer's guide to dealing with employees during civil unrest

The civil unrest that South Africa faced during July 2021 has left many employers asking questions such as: What may an employer do if its employee is seen on social media participating in the civil unrest? What if the employee is found to have stolen property and is correctly identified? May an employer dismiss an employee for participating in the civil unrest? May an employer dismiss an employee for having been arrested during the civil unrest?

This guideline seeks to unpack some of these questions.

WHAT IS CIVIL UNREST OR CIVIL DISTURBANCE?

Civil unrest or disturbance refers to activities arising from mass acts of civil disobedience in which the participants become hostile towards authority/ies, and authorities incur difficulties in maintaining public safety and order over the crowd.

Civil unrest or civil disturbance refers to acts such as:

- acts of violence;
- insurrections;
- demonstrations; and
- gatherings that become disruptive.

WHAT IS THE REASON FOR THE CURRENT CIVIL UNREST?

Following the incarceration of former President Jacob Zuma, citizens took to the streets and began pillaging, vandalising and setting alight businesses and petrol stations in KwaZulu-Natal (KZN) and Gauteng, in what appears to have been anger over inequality that remains 27 years after apartheid. It has further been reported that Zuma's incarceration was politically motivated.

WHAT HAS GOVERNMENT'S RESPONSE TO THE CIVIL UNREST BEEN?

President Cyril Ramaphosa, in his address to the nation on 11 July 2021 on government's response to COVID-19 and its vaccination program, called for calm and order. He addressed the nation again on 12 July 2021, following further civil unrest. Two thousand five hundred soldiers were deployed to KZN and Gauteng by the South African National Defence Force. Additionally twenty five thousand soldiers were deployed to quell the unrest and violence in both provinces.

HAVE PRIORITY COURTS BEEN ESTABLISHED TO DEAL WITH THE ARRESTS DUE TO CIVIL UNREST?

Yes. New Directions in terms of Regulation 4(2) of the Disaster Management Act 57 of 2002 (Directions) have been gazetted. These provide for special measures for the processing of cases and accused persons through the magistrate's courts during the adjusted Alert Level 4 Regulations that are in place to address the COVID-19 pandemic.

The Directions provide for:

- the use of technology in courtrooms;
- the postponement of cases through audio-visual links; and
- the compilation of a priority roll at each court which will enable the courts to prioritise the hearing of importance cases which include: gender-based violence and sexual offences, corruption cases, cases involving children and contravention of COVID-19 regulations.

The Directions also include special measures that will apply in respect of cases that arise from public violence, public disorder and widespread acts of theft that have been witnessed in KZN and Gauteng. These measures include the compilation of a separate roll and designation of courts to expeditiously deal with these cases. Furthermore, additional dedicated staff, including experienced retired magistrates and prosecutors, will be called upon in order to fast-track these cases where hundreds of arrests have already been effected.

MAY AN EMPLOYER DISMISS AN EMPLOYEE FOR PARTICIPATING IN THE CIVIL UNREST?

Generally, what an employee does outside of working hours is of no significance to the employment relationship. However, *"off-duty misconduct"* can, in certain circumstances, constitute a valid reason for disciplinary action as serious as dismissal. Even more so, where the employee's misconduct constitutes: a criminal offence, where the employee's behaviour involves gross dishonesty and/or corruption, and where the nature of the conduct results in the destruction of the trust relationship between the employer and the employee.

THE CODE OF GOOD PRACTICE: DISMISSAL

Item 7(a) of Schedule 8 of the Code of Good Practice: Dismissal (Dismissal Code) provides that the contravention of a rule regulating conduct in the workplace, or of relevance to the workplace, is capable of being the subject of disciplinary action. Therefore, *"off-duty misconduct"* may result in disciplinary action as it may be deemed of relevance to the workplace.

MAY AN EMPLOYER DISMISS AN EMPLOYEE BY VIRTUE OF SEEING THE EMPLOYEE PARTICIPATING IN THE CIVIL UNREST ON TELEVISION FOOTAGE?

The mere fact that an employer has identified an employee in television footage does not necessarily mean that the employer automatically has a right to discipline or dismiss an identified employee. The employer must evaluate each situation with circumspect, ensuring that a nexus exists between the employee's conduct and the employer's business.

WHAT IS THE TEST FOR DETERMINING RELEVANCE TO THE WORKPLACE?

The test for determining relevance to the workplace is that a link or nexus between the conduct complained of and the employee's duties, the employer's business or the workplace must exist; and the employer must have a sufficient and legitimate interest in the conduct or the activities undertaken by the employee outside of working hours or the workplace.

Therefore, if the nexus and interest exist, an employer will be entitled to take disciplinary action against an employee for their *"off-duty misconduct"*.

WHEN DOES THE NEXUS EXIST?

The nexus between an employee's off-duty misconduct and the employer's business exists where the employee's conduct has a detrimental effect on the efficiency, profitability, continuity or good name and reputation of the employer's business.

EXAMPLES WHERE A CONNECTION MAY BE ESTABLISHED

These are:

- the employee was wearing their workplace uniform while participating in the theft and is therefore identifiable as an employee of the employer;
- the employee, whilst not wearing their uniform, is identifiable as being associated with the business. In this regard, it would include employees who are thought to be *"the face"* of the business such as management, sales staff and staff used in marketing campaigns;
- the employee stole from a client of the employer and was identified by the client; and
- the nature of the offence impacts on the employee's duties or on the operation of the business. For instance, where the identified employee works in a retail store and is entrusted with the employer's stock or is engaged in a position of trust in the financial section.

CASE STUDY: THE CONTRAVENTION OF THE RULE MUST BE OF RELEVANCE TO THE WORKPLACE

In *Dolo v Commission for Conciliation, Mediation and Arbitration and Others [2011] 32 ILJ 905 (LC)* the Labour Court (LC) upheld the principle that actions outside of the workplace could be subjected to discipline in certain circumstances. The LC referred to item 7(a) of the Dismissal Code and noted that the first stage of the enquiry was *"whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace"* and as such, conduct outside of the workplace was covered by the Labour Relations Act 66 of 1995 (LRA).

The LC relied on the principles explained in *Hoechst (Pty) Ltd v Chemical Workers Industrial Union and Another [1993] 14 ILJ 1449 (LAC)* and confirmed that the determination of whether conduct outside the workplace could be subjected to disciplinary action was a multifaceted factual enquiry, but the central issue was its impact on the employment relationship.

CASE STUDY: CONDUCT OUTSIDE OF THE WORKPLACE

In *Visser vs Woolworths [2005] 11 BALR 1216* the employee was arrested on a charge of theft from a department store owned by a competitor of the employer. Before she was convicted the employer dismissed her due to her arrest on the grounds that she had a number of subordinates who were expected to look up to her and that she could no longer be trusted.

The commissioner held that an employer is entitled to take disciplinary action against an employee for conduct off the premises and outside working hours, provided that there is some nexus between that conduct and the employer's business. The test is whether the employee's conduct destroys or seriously damages the trust relationship between the employer and the employee. The employee was in charge of a number of subordinates, and her arrest for theft would have serious repercussions for the staff.

The commissioner further held that the employer was not obliged to wait for the conclusion of criminal proceedings against the employee before taking disciplinary action against her. However, the employee had not been charged with misconduct and, in this case, the allegation against her was that she had destroyed the trust relationship by being arrested. The employer made no attempt at the disciplinary hearing or the arbitration to prove that she was indeed guilty of theft. Being arrested cannot *per se* constitute an offence and in this case the dismissal was found to be unfair.

CAN INCARCERATION CONSTITUTE INCAPACITY?

Incapacity is a "*no-fault*" dismissal caused by an impossibility to perform the work the employee was employed to perform, the fault of which cannot be attributed to either the employee or the employer.

Incapacity is not limited to poor work performance, ill health or injury and accordingly, incarceration may constitute incapacity.

This question was also dealt with by the Labour Appeal Court (LAC) in the case of *Samancor Tubatse Ferrochrome v MEIBC (Maloma & Stemmett NO) [2010] JOL 257 48 (LAC)* (Samancor). In this case the employee was arrested and incarcerated on suspicion of having committed an armed robbery. Ten days after his arrest, he received a letter informing him that he had been dismissed for incapacity. The employee remained in custody for approximately five months and, after being found not guilty and being released, he referred an unfair dismissal dispute to the relevant bargaining council.

The commissioner ruled that his dismissal was procedurally and substantively unfair as the dismissal did not relate to incapacity and ordered his reinstatement. The LC on review agreed with the commissioner that incapacity is confined to ill health, injury or poor performance.

In the LC's view, the true reason for the employee's dismissal was misconduct for unauthorised absenteeism and not incapacity. As the employee was not the cause of his incarceration, it was a factor beyond his control and it could not be said that he was absent without authorisation.

On appeal, the LAC found in favour of the employer, holding that the definition of incapacity was wider than that asserted by the LC as:

> *"Incapacity may be permanent or temporary and may have either a partial or complete impact on the employee's ability to perform their job. The Code of Good Conduct: Dismissal conceives of incapacity as ill health or injury but it can take other forms. Imprisonment and military call up for instance incapacitate the employee from performing his obligations under the contract ... [sic]"*

The LAC's findings on incapacity were subsequently confirmed by the Supreme Court of Appeal.

CASE STUDY: DISMISSAL FOR BEING INCARCERATED

In *Eskom Limited v Commission for Conciliation, Mediation and Arbitration and Others (JR2025/06) [2008] ZALC 92* (Eskom), the employee was employed as a sales representative. In February 2004 he was arrested by the South African Police Services (SAPS) and was unable to work. The employer became aware of his arrest in March 2004 and subsequently, terminated his contract of employment as well as his salary and benefits. The employer appointed someone to replace him. The employee was denied bail and remained in custody for approximately 15 months and released from prison on 8 June 2005. On 24 June 2005 the employer convened a confrontation meeting where he was given an opportunity to make representations. He contended that he was incarcerated which barred him from communicating his whereabouts to his employer within the stipulated period or within a reasonable time.

WHAT WERE THE COURT'S FINDINGS?

The LC found that the arbitrator's decision was one that a reasonable decision-maker would have arrived at.

Essential to an employment contract is that the employee tendered his services for remuneration at the employer's business. If the employer fails to pay the employee this is considered a breach of the contract. If the employee fails to tender his services, the contract is breached. A supervening impossibility occurs. The question, therefore, is whether because of the supervening impossibility of performance a breach in the employment relationship occurred?

The commissioner found that if either party was unable to perform their obligations under the contract or was unable to perform their obligations for an unreasonable period, as far as the employer was concerned, the other party was entitled to terminate the contract on the ground of such non-performance. Where an employee was sentenced to a long period of imprisonment the employer could cancel the contract provided that the employee was afforded an opportunity to explain his incarceration.

WHAT WAS DISTINGUISHABLE, IN THIS CASE, IN LIGHT OF THE ABOVE?

In this instance, however, the employee's conditions of employment stated that a contract of employment would terminate if the employee failed to report for seven calendar days *"unless physically prevented from doing so ..."* The interpretation of which, suggested that if the employee was unable to report for duty because he was ill or in jail, this section would not apply. Therefore, the employee did not abscond or terminate his services. It was apparent that he was physically prevented from reporting for work due to his incarceration. This was a reasonable explanation for his absence considering that he was denied bail and it was impossible for him to perform his duties.

The commissioner said that 15 months was an unreasonable length of time for the employer to hold the position open. She accepted that the operational requirements of the employer necessitated that this position be filled. Although the employer was entitled to fill the position, this did not have to result in the termination of the employee's employment. The employer was at liberty to employ someone on a fixed-term contract until the situation was resolved, especially as they were aware of the employee's whereabouts.

WHAT ARE SOME OF THE REASONS AN EMPLOYER MAY DISMISS AN EMPLOYEE WHO HAS BEEN INCARCERATED?

Reasons may include:

- the employer is concerned about having a convicted employee at its workplace;
- the employer or other employees could be at risk if the incarcerated employee returns to work and has not been rehabilitated;
- employers do not seek to have the names of their businesses or organisations associated with criminals (as it may tarnish their reputation);
- the person who replaced the employee while they were in prison may be seen as an honest and more effective employee; and
- the employer's disciplinary code may state that a criminal conviction can result in dismissal.

ON WHAT DOES THE FAIRNESS OF A DISMISSAL FOR INCAPACITY DEPEND?

In the Samancor case, the LAC stated that the fairness of a dismissal, depends on:

- the facts of the case before the court;
- an employer should consider the reasons for the incapacity;
- the length of the incapacity (the period of the incarceration);
- the position held by the employee;
- the possibility of keeping the position vacant for an indefinite period - whether a temporary employee may be employed; and
- whether there are any alternatives to dismissal available.

WHEN SHOULD AN EMPLOYER CONSIDER AN INCAPACITY ENQUIRY?

An employer should first consider alternatives to dismissal, such as the recruitment of temporary personnel. If the recruitment of temporary personnel is not possible, or the position is such that it requires permanent employment, an employer may seek dismissal on the basis of incapacity. When relying on dismissal on this basis the employer must also ensure that procedural fairness is maintained. This entails affording the employee the opportunity to be heard.

HOW MAY THE EMPLOYER AFFORD THE EMPLOYEE AN OPPORTUNITY TO BE HEARD?

An incapacity hearing prior to incarceration may be held by means of a hearing at the place of incarceration or by inviting the employee's legal representative or shop steward to make written submissions on the employee's behalf.

IS AN EMPLOYER REQUIRED TO PAY AN EMPLOYEE THEIR SALARY WHILE THE EMPLOYEE IS ARRESTED?

No. An employer's obligation to pay an employee's salary is suspended upon arrest. The principle of no work, no pay should be maintained.

WHAT IS ABSENCE FROM WORK?

Employees have a fundamental duty to render services and their employers have a reciprocal right to expect them to do so. Essential to this is that employees are expected to be at their workplaces during working hours (unless an adequate reason is present for their absence).

The onus rests on the employee to provide an explanation for their absence. Where the employee is charged with absenteeism, an explanation for the absence may suffice if the employee can prove that the absence was beyond their control. In addition, absence from work will fall under the misconduct category.

CASE STUDY: DISMISSAL BASED ON ABSENTEEISM FROM WORK

In *Trident Steel (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others [2005] 26 ILJ 1519 (LC)* (Trident Steel), the LC, found that the dismissal for absenteeism of an employee who had been incarcerated (for an offence unrelated to the workplace) was unfair. The LC held that if the employee's absence from work was unacceptable, there were alternatives open to the employer such as the employer employing a temporary employee. Alternatively, if it had no alternative but to employ a permanent employee, the employer could have retrenched the employee in accordance with its operational requirements. The employer could thus not dismiss the employee for misconduct.

CASE STUDY: ABSENCE WITHOUT LEAVE

In *Langa v CBC Laser Fab Engineering [2007] 6 BALR 526* the employee was given a prison sentence. He returned to work sometime after his release. He was sent home and told that a job no longer existed for him. He referred a dispute to the bargaining council, after which his employer reinstated him and held a disciplinary enquiry at which he was dismissed for *"absence without leave"*. The employer argued that, although the employee had been unable to attend work while incarcerated, he could have returned to work immediately upon his release. His failure to do so constituted absence without leave. The arbitrator found as follows:

- the employee should have been forgiven for failing to return to work because being incarcerated *"could be disruptive"* to him;
- the employee's absence had not caused any inconvenience to the employer;
- the employment relationship had not been seriously harmed by the employee's conduct;
- the disciplinary enquiry had been a mockery and had been held in an attempt to justify the original dismissal; and
- the dismissal was unfair.

The employer was required to reinstate the employee with retrospective effect.

CASE STUDY: ABSCONDMENT

In *Mofokeng v KSB Pumps [2003] 12 BALR 1342* the employee was imprisoned and thereafter returned to work, but the employer did not seek to maintain the employment relationship and instead gave him a cheque *"in full and final settlement"* on the grounds that he had absconded. The commissioner found that abscondment occurs when the employee leaves his employ without the intention to return. As the employee had returned to work immediately upon his release from prison, he had not done anything to give the impression that he had absconded. The arbitrator also ruled that the fact that the employer had already replaced the absent employee was of no consequence. The employer could have employed a temporary replacement. The dismissal was, therefore, unfair and the employer was ordered to pay the employee compensation equivalent to five months' remuneration.

WHAT SHOULD AN EMPLOYER CONSIDER WHEN DECIDING TO DISMISS AN EMPLOYEE FOR INCARCERATION?

Having regard to the decisions in the Trident Steel and Samancor cases, an employer who is confronted with the dilemma of having one of its employees incarcerated for a considerable period, may consider whether there are grounds to either dismiss the employee for operational requirements or incapacity (provided that the necessary procedural requirements of each ground are met).

A dismissal for misconduct merely based on the employee's absenteeism from work (and where the incarceration is based on an offence outside of the workplace) may be found to be unfair.

WHAT ASPECTS SHOULD AN EMPLOYER CONSIDER INCLUDING IN ITS POLICY WHEN DEALING WITH INCARCERATION?

Aspects to be contained within the policy may include:

- reporting the arrest to the employer as soon as practicably possible;
- submitting a police report or other documentation concerning the arrest and charges; and
- complying with the requirements within a certain time frame.

The policy should further specify that:

- non-compliance with the requirements constitutes grounds for dismissal;
- misrepresentation of the circumstances of the arrest can serve as grounds for dismissal;
- an employee who is unavailable for work due to incarceration may be suspended or dismissed as the case may be; and
- the option of offering the employee work upon release is apparent, if such work is available.

TERS RELIEF

On 11 August 2021, the Minister of Employment and Labour Gazetted the Temporary Financial Relief Scheme known as the: *"Destroyed, Affected or Looted Workplaces: Temporary Financial Relief Scheme, 2021"*. The Scheme is created under the Unemployment Insurance Act, 2001 and will be reviewed bi-weekly by the Minister on the advice of the Unemployment Insurance Commissioner in respect of its continued operation. The Scheme is not linked to the normal Unemployment Insurance benefits.

Building upon the lessons of 2020, the Scheme applies not only to employees but to workers. Where a worker who is receiving part or no remuneration because of the civil unrest (experienced between 9 to 18 July 2021), such worker is entitled to an income replacement, calculated on a sliding scale of 38% to 60% based on remuneration.

The remuneration that would be taken into account in calculating the relief cannot exceed R17,712.00 per month. However, if the income replacement is below R3 500.00 then the worker must be paid a replacement income equal to such amount. Accordingly, the payment will not exceed R6,700.00 and shall not be less than R3,500.00 per month. A flat rate may also be deteremined by the Minister if financial considerations dictate.

Payments under the Scheme will be made directly into the workers bank account unless the Commissioner allows payment directly to the employer. However, an employer is required to apply for the temporary financial relief on behalf of the affected employees and must satisfy the following conditions (an application cannot be made by the employee):

1. It must register and be registered with the Unemployment Insurance Fund;
2. The closure of the employer's business must be directly linked to the destruction, damage or looting of its workplace;
3. The employer must confirm in writing or electronically that the terms of the Scheme and/or the procedure document issued by the UIF is accepted;
4. Details of the destruction or damage or looting or closure of the workplace must be provided. Additionally, documentary proof of a report to the SAPS (case number issued) and if the business is insured proof of submission and acknowledgement of receipt of the insurance claim must be submitted; and
5. Any other information the Commissioner may require.

BBBEE STATUS: LEVEL ONE CONTRIBUTOR
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.

PLEASE NOTE
This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 100 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CDH
CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA