19 NOVEMBER 2018

EMPLOYMENT ALERT

IN THIS **ISSUE**

LOCK THEM OUT – LOCK-OUT NOTICES

A lock-out is a form of industrial action that may be exercised by an employer. It entails the exclusion of employees from the employer's workplace for the purpose of compelling them to accept a demand in respect of any matter of mutual interest between the employee and employer.

THE RIGHT TO RELIGION IN THE WORKPLACE – A CAREFUL BALANCE BETWEEN THE RIGHT AND THE EMPLOYER'S BUSINESS REQUIREMENTS

South African workplaces are not immune to the winds of change blowing towards the direction of the constitutional project. The essence of this project is to ensure that wherever it is in the country and no matter the circumstance, the rights and freedoms contained in the Bill of Rights are respected or where they are limited, such limitation is justifiable.

CDH
CLIFFE DEKKER HOFMEYR

LOCK THEM OUT – LOCK-OUT NOTICES

The employer can uphold the lock-out until such time that the employees have unconditionally agreed to the employer's demands.

A lock-out is a form of industrial action that may be exercised by an employer. It entails the exclusion of employees from the employer's workplace for the purpose of compelling them to accept a demand in respect of any matter of mutual interest between the employee and employer. A lock-out, if implemented in compliance with the procedural and substantive requirements under the Labour Relations Act, No 66 of 1995 (LRA), may continue until such time as the employer and the employees reach an agreement on the issues in dispute, alternatively, until such time that the employer decides to uplift the lock-out.

The dispute could not be resolved through conciliation.

If the lock-out had been implemented in response to a strike by employees, and the employees subsequently abandon their strike action and tender their services to the employer, the employer is not obliged to accept the tender. The employer can uphold the lock-out until such time that the employees have unconditionally agreed to the employer's demands. This was demonstrated in *National Union of Metalworkers of South Africa and Others v Bumatech Calcium Aluminates* (J 303/16) [2018] ZALCJHB 364 (9 November 2018).

In this case, NUMSA brought an application to the labour court to have a lock-out which was imposed by the employer declared unlawful and illegal. The salient facts were that, the employer issued a notice to NUMSA inviting it to consult in terms of s189 of the LRA. The consultation was however placed in abeyance at NUMSA's request. During this time, the employer informed its employees that it was introducing a change to the employees' shifts as a cost-saving initiative.

As a response to the shift changes, NUMSA referred a dispute to the CCMA alleging that the employer had unilaterally changed the terms and conditions of its members' employment. The dispute could not be resolved through conciliation. The employer then served NUMSA with a lock-out notice. NUMSA subsequently served the employer with a strike notice. NUMSA's members thereafter embarked on a protected strike.

In its application before the court, NUMSA submitted that the employer's lock-out was unlawful because it had addressed a letter to the employer requesting a meeting with the view of resolving the dispute between the parties. In the letter, NUMSA had further conveyed its intention to suspend the strike and for its members to return to work. However, when the NUMSA members attended at the employer's premises to tender their services, the employer denied them access by enforcing the lock-out. The employer responded by demanding that NUMSA and

CDH
CLIFFE DEKKER HOFMEYR

LOCK THEM OUT – LOCK-OUT NOTICES

CONTINUED

The court ultimately dismissed NUMSA's application and held that it failed to prove that the employer's lock-out was unlawful.

its members give an undertaking that they would refrain from acts of violence and intimidatory conduct. NUMSA contended that the employer's condition rendered the lock-out unlawful as it illustrated that the lock-out was based on disciplinary issues, and that it ought not to have continued since the strike, to which it was in response to, had been called off.

The employer's contention was that the lock-out was lawful because NUMSA had not abandoned the strike and had not accepted the demand for shift changes unconditionally, therefore there was still a live dispute between the parties. NUMSA retaliated by challenging the employer's lock-out notice on the basis that it did not disclose what NUMSA and its members had to do in order to resolve the dispute.

The court in its decision held that NUMSA knew that the employer wanted to implement changes to the shifts, and that NUMSA's claim that it did not know what it had to do to resolve the dispute in order for the lock-out to be uplifted was without merit. The court further held that NUMSA's correspondence to the employer did not show an intention by NUMSA to accept the employer's demands unconditionally. The court ultimately dismissed NUMSA's application and held that it failed to prove that the employer's lock-out was unlawful.

From this case, it is important for employers to note that the lock-out notice must not only inform employees of the employer's demand, but must also clearly set out what the employees are required to do in order to end the dispute and have the lock-out uplifted by the employer, in order to avert any challenges to the notice by employees.

Aadil Patel and Prencess Mohlahlo

CDH
CLIFFE DEKKER HOFMEYR

THE RIGHT TO RELIGION IN THE WORKPLACE – A CAREFUL BALANCE BETWEEN THE RIGHT AND THE EMPLOYER'S BUSINESS REQUIREMENTS

Due to the substantial stock in the warehouse, stock taking had to be conducted over weekends on a monthly basis.

South African workplaces are not immune to the winds of change blowing towards the direction of the constitutional project. The essence of this project is to ensure that wherever it is in the country and no matter the circumstance, the rights and freedoms contained in the Bill of Rights are respected or where they are limited, such limitation is justifiable. *The TDF Network Africa (Pty) Ltd v Deidre Beverly Faris* case is an example of balancing business interests and the rights and freedoms that employees enjoy under the South African Constitution.

TDF refused such accommodation on the basis that the stock taking requirements cannot be changed for one person and that there would be a floodgate of similar requests.

The facts of this case are that during the recruitment process, Ms Faris informed TDF Network Africa (Pty) Ltd's (TDF) representatives that she was a Seventh Day Adventist. In terms of this religion, a Saturday is a holy Sabbath and Ms Faris was required to observe it by not working on Saturdays but dedicate herself to spiritual and religious matters.

TDF is involved in logistics and warehousing services. Due to the substantial stock in the warehouse, stock taking had to be conducted over weekends on a monthly basis. A roster was created and Ms Faris was also required to attend to do stock taking on weekends but she never attended as she had to observe the holy Sabbath. During a meeting regarding her failure to attend to work on Saturdays, Ms Faris' explanation was that this was due to religious reasons and requested a special accommodation to be made. Further, Ms Faris made suggestions including working on Sundays. TDF refused such accommodation on the basis that the stock taking requirements cannot be changed for one person and that there would be a floodgate of similar requests.

TDF initiated incapacity proceedings and dismissed Ms Faris due to her unavailability to work on Saturdays. Ms Faris referred an automatically unfair dismissal dispute to the CCMA and upon receiving the certificate of non-resolution, she referred the matter to the Labour Court. The Labour Court found that the dismissal was automatically unfair and ordered 12 months compensation.

On appeal, TDF argued that the dominant reasons for Ms Faris' dismissal was not her religion but her refusal to work on Saturdays. Further, that she failed to prove that her religion forbid work on Saturday. TDF's conclusion was that Ms Faris' religion played no role in her dismissal.

The Labour Appeal Court applied the causation test in deciding the matter and held that Ms Faris' religion was the dominant and proximate reason for her dismissal as had she not been an Adventist, she would have been able to work on Saturdays. The Labour Appeal Court also enquired into whether the discrimination unduly impaired Ms Faris'

CDH
CLIFFE DEKKER HOFMEYR

THE RIGHT TO RELIGION IN THE WORKPLACE – A CAREFUL BALANCE BETWEEN THE RIGHT AND THE EMPLOYER'S BUSINESS REQUIREMENTS

CONTINUED

The Labour Appeal Court found that TDF had a rigid policy which it did not want to depart by making an exception.

dignity. On this issue, the Labour Appeal Court found that TDF had a rigid policy which it did not want to depart by making an exception. Further, it held that TDF would not have suffered undue hardship by accommodating Ms Faris. On this point, a distinction was drawn between this case and the *FAWU and others v Rainbow Chicken Farms* (2000) 21 ILJ 615 (LC) case.

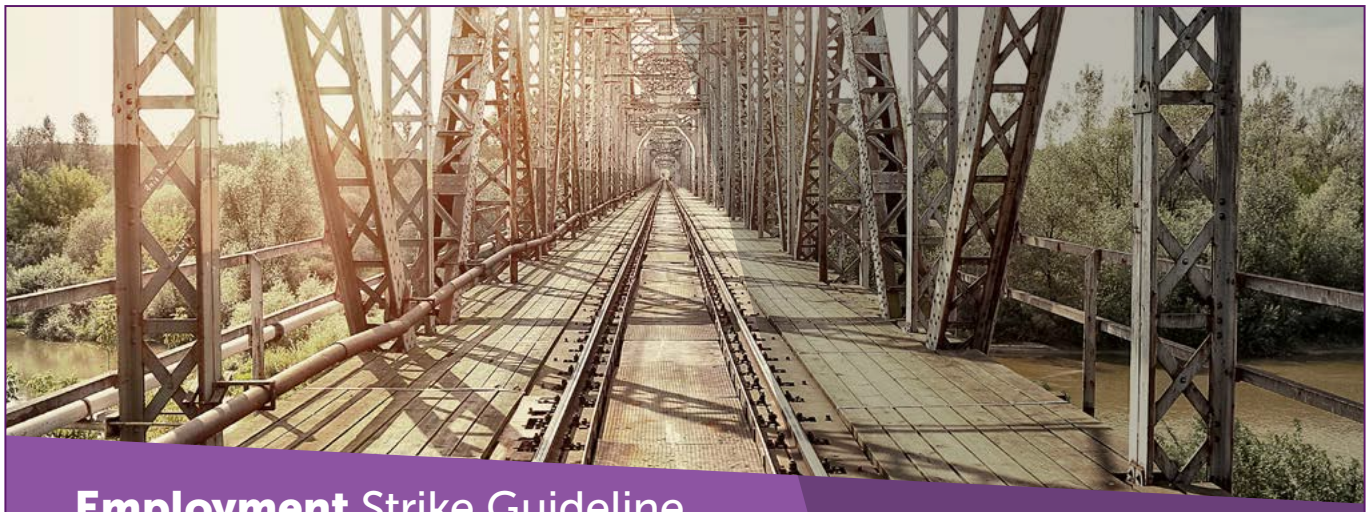
In dealing with the need to balance the right to religion against TDF's business requirements, the Court held that – *"Without question, an employment practice that penalises an employee for practising her religion is a palpable invasion of her dignity in that it supposes that her religion is not worthy of protection or respect. ... The employee is forced to make an unenviable choice between conscience and livelihood."*

The Labour Appeal Court concluded that in such situations, employers must take steps to reasonably accommodate employees.

This case demonstrates that the right to religion can be in conflict with employers' demands and that a level of tolerance is expected from employers in a form of taking steps towards the protection of constitutional rights in the workplace. However, it is not always the case that the right to religion will prevail over the employer's commercial rationale. Each case must be treated and assessed on its own merit.

Ndumiso Zwane and Bheki Nhlapho

CDH
CLIFFE DEKKER HOFMEYR



Employment Strike Guideline

Find out what steps an employer can take when striking employees ignore court orders.

Click here to find out more

Best Lawyers®
LINKING LAWYERS AND CLIENTS WORLDWIDE

Best Lawyers 2018 South Africa Edition

- Included 53 of CDH's Directors across Cape Town and Johannesburg.
- Recognised Chris Charter as Lawyer of the Year for Competition Law (Johannesburg).
- Recognised Faan Coetzee as Lawyer of the Year for Employment Law (Johannesburg).
- Recognised Peter Hesseling as Lawyer of the Year for M&A Law (Cape Town).
- Named Cliffe Dekker Hofmeyr Litigation Law Firm of the Year.
- Named Cliffe Dekker Hofmeyr Real Estate Law Firm of the Year.

CLICK HERE
FOR THE LATEST SOCIAL MEDIA AND THE WORKPLACE GUIDELINE

TOP RANKED GLOBAL CHAMBERS AND PARTNERS 2018

- CHAMBERS GLOBAL 2014 - 2018 ranked our Employment practice in Band 2: Employment.
- Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2018 in Band 2: Employment.
- Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2018 in Band 2: Employment.
- Fiona Leppan ranked by CHAMBERS GLOBAL 2018 in Band 2: Employment.
- Gillian Lumb ranked by CHAMBERS GLOBAL 2017 - 2018 in Band 4: Employment.
- Gavin Stansfield ranked by CHAMBERS GLOBAL 2018 in Band 4: Employment.

CDH
CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Employment practice and services, please contact:

Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

Gillian Lumb
Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com

Kirsten Caddy
Director
T +27 (0)11 562 1412
E kirsten.caddy@cdhlegal.com

Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com

Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com

Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com

Nicholas Preston
Director
T +27 (0)11 562 1788
E nicholas.preston@cdhlegal.com

Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com

Samiksha Singh
Director
T +27 (0)21 481 6314
E samiksha.singh@cdhlegal.com

Gavin Stansfield
Director
T +27 (0)21 481 6313
E gavin.stansfield@cdhlegal.com

Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com

Ndumiso Zwane
Director
T +27 (0)11 562 1231
E ndumiso.zwane@cdhlegal.com

Steven Adams
Senior Associate
T +27 (0)21 481 6341
E steven.adams@cdhlegal.com

Anli Bezuidenhout
Senior Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com

Anelisa Mkeme
Senior Associate
T +27 (0)11 562 1039
E anelisa.mkeme@cdhlegal.com

Sean Jamieson
Associate
T +27 (0)11 562 1296
E sean.jamieson@cdhlegal.com

Devon Jenkins
Associate
T +27 (0)11 562 1326
E devon.jenkins@cdhlegal.com

Zola Mcaciso
Associate
T +27 (0)21 481 6316
E zola.mcaciso@cdhlegal.com

Tamsanqa Mila
Associate
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com

Prencess Mohlahlo
Associate
T +27 (0)11 562 1875
E prencess.mohlahlo@cdhlegal.com

Prinoleen Naidoo
Associate
T +27 (0)11 562 1829
E prinoleen.naidoo@cdhlegal.com

Bheki Nhlapho
Associate
T +27 (0)11 562 1568
E bheki.nhlapho@cdhlegal.com

Siyabonga Tembe
Associate
Employment
T +27 (0)21 481 6323
E siyabonga.tembe@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR
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.

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 1000 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

CDH
CLIFFE DEKKER HOFMEYR