

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.

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EMPLOYEES BEHIND BARS AND THE CONSTRAINTS ON EMPLOYERS

In recent times, employers frequently encounter situations where an employee cannot report for duty due to circumstances beyond their control. One such example would be where an employee is incarcerated. The question that then arises is whether the employee's incarceration may serve as a fair reason for the termination of their employment.

EMPLOYEES BEHIND BARS AND THE CONSTRAINTS ON EMPLOYERS

The case concerned an employee who was arrested on suspicion of having committed an armed robbery and incarcerated.

The matter was subsequently taken on review to the Labour Court (LC) by the employer.

In recent times, employers frequently encounter situations where an employee cannot report for duty due to circumstances beyond their control. One such example would be where an employee is incarcerated. The question that then arises is whether the employee's incarceration may serve as a fair reason for the termination of their employment.

The Labour Appeal Court (LAC) dealt with this question in the case of *Samancor Tubatse Ferrochrome v MEIBC (Maloma & Stemmet NO) [2010] JOL 257 48 LAC*. The case concerned an employee who was arrested on suspicion of having committed an armed robbery and incarcerated. 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 upon his release, referred an unfair dismissal dispute to the Bargaining Council.

The Commissioner ruled that his dismissal was procedurally and substantively unfair and ordered his reinstatement. The matter was taken on review to the Labour Court (LC) by the employer. The LC 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..."

The LAC therefore concluded that the LC had erred in classifying the matter as misconduct instead of incapacity. The LAC noted further that the fairness of a dismissal, depends on the facts of the case before it. An employer should consider the reasons for the incapacity, the length of the incapacity (the period of incarceration) and whether there are any alternatives to dismissal available.

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.



EMPLOYEES BEHIND BARS AND THE CONSTRAINTS ON EMPLOYERS

CONTINUED

When relying on dismissal on the basis of incapacity, the employer must also ensure that procedural fairness is maintained.



Having regard to the facts of this case, it was not reasonable to expect the employer to hold a position (of furnace operator in the mining sector) vacant for an indefinite period, especially where in this case, the position was integral to the organisation.

Regarding procedural fairness, the LAC noted that merely sending a dismissal letter to the employee containing the reasons for his dismissal, whilst he was in prison, was procedurally unfair on the basis that the employee was not afforded an opportunity to be heard. The employee's dismissal was thus found to substantively fair but procedurally unfair and he was awarded six months' remuneration as compensation.

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

Given the above, an employer who is faced with employees who are incarcerated for a substantial or indefinite period, 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 the basis of incapacity, the employer must also ensure that procedural fairness is maintained. This entails affording the employee the opportunity to be heard. This could be done either at an incapacity hearing prior to incarceration, by means of a hearing held at the place of incarceration or by inviting the employee's legal representative or shop steward to make written submissions on their behalf.

Hugo Pienaar and Reza Ahmed



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.



Employment Strike Guideline

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

 [Click here to find out more](#)

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Included 53 of CDH's Directors across Cape Town and Johannesburg.

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Recognised Peter Hesseling as Lawyer of the Year for M&A Law (Cape Town).

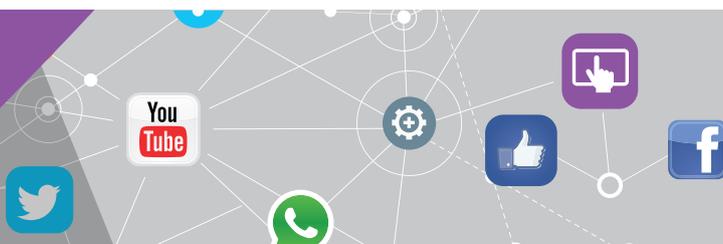
Recognised Terry Winstanley as Lawyer of the Year for Environmental Law (Cape Town).

Named Cliffe Dekker Hofmeyr Litigation Law Firm of the Year.

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 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.

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.

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