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EMPLOYMENT ALERT

IN THIS **ISSUE**

SHAFTED...BUT WAS IT DURING THE COURSE AND SCOPE OF EMPLOYMENT?

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YOU SNOOZE YOU LOSE: DELAYING THE FINALISATION OF DISCIPLINARY ACTION

An inordinate delay in finalising disciplinary action may lead to a dismissal being procedurally unfair. This was the case in the matter before the Constitutional Court in *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and others [2018] ZACC 3*.

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De Gee instituted proceedings in the High Court for damages he allegedly sustained due to his injuries.

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In *De Gee v Transnet SOC Ltd* (30085/2015) [2019] ZAGPJHC 2, the High Court had the opportunity to consider when an occupational injury can be said to have occurred during the course and scope of an employee's employment for purposes of COIDA.

De Gee, an executive support manager, injured his lumbar spine when the lift he was travelling in fell approximately seven floors. He was using the lift to gain access to his office situated on the 48th floor of his employer's building.

De Gee instituted proceedings in the High Court for damages he allegedly sustained due to his injuries. His employer opposed his claim and raised a special plea in terms of which it contended that he could not institute legal proceedings against it as he had suffered the injuries during the course and scope of his employment and, as such, his claim was covered by COIDA.

The court distilled the following guidelines from previous authorities to determine whether an employee was acting in the course and scope of his employment when the injury occurred:

1. an employee is acting in the course of his employment when he is doing something he was employed to do;
2. where an employee is travelling to or from work, the journey is dissociated from the employee's employment unless the employee is fulfilling an obligation imposed by the contract of employment;
3. an employee does not start working until he has reached his work, unless at the time the injury occurred the employee was doing something in discharge of his duty towards his employer;

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The important question is whether the injury arose out of and in the course of the employee's employment.

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4. after an employee has finished his work for the day and started his way home, his employment continues while navigating the premises. Once an employee reaches a place of public access, his status as a worker is removed and he becomes a member of the general public;
5. an employee may be deemed to be working while travelling to work if he is required to follow a prescribed route or is required to use a prescribed means of conveyance; and
6. in all cases where an employee on going to or on leaving work suffers an accident on the way, the first question to be determined is whether the employee was at the place where the accident occurred by virtue of his employment or as a member of the public.

The court emphasised that there is no bright-line test. Each case must be decided on its own merits. It held that the place where the accident happened was not decisive for the purposes of an inquiry in terms of s35(1) of COIDA. Even if the accident happened at a place not owned by the employer it could still give rise to an occupational injury. The important question is whether the injury arose out of and in the course of the employee's employment. The court concluded that based on the evidence before it, there was insufficient evidence to determine whether at the time of the incident the employee was acting in the course and scope of his employment. On this basis, the court found that the employee's claim was not covered by COIDA and dismissed the employer's special plea.

Jose Jorge and Steven Adams

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YOU SNOOZE YOU LOSE: DELAYING THE FINALISATION OF DISCIPLINARY ACTION

In terms of the Employment of Educators Act, a sanction may not be implemented pending the outcome of an appeal. Accordingly, she was retained and continued working for the Department.

An inordinate delay in finalising disciplinary action may lead to a dismissal being procedurally unfair. This was the case in the matter before the Constitutional Court in *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and others [2018] ZACC 3*.

In August 2009, Ms Stokwe, the then Deputy Chief Education Specialist in the Department of Education, Eastern Cape, awarded a temporary transport services contract to her husband's unregistered company. Although she reported the temporary awarding of the contract, she did not obtain the approval and consent of the Head of the Department as required. On 22 July 2010, the department brought four counts of misconduct against her. Her disciplinary hearing was initially scheduled for 12 August 2010, but only held the following year on 30 March 2011. She was found guilty of two of the allegations and dismissed on 22 June 2011.

Ms Stokwe appealed against the dismissal. In terms of the Employment of Educators Act, a sanction may not be implemented pending the outcome of an appeal. Accordingly, she was retained and continued working for the Department. On several occasions she and her attorneys enquired about the outcome of the appeal, even recording that in the absence of a response from the department they were of the view that it had abandoned the disciplinary action. They received no quick response from the department. Finally, on 14 February 2014, Ms Stokwe was informed that her appeal had been dismissed.

Unhappy with that she then challenged her dismissal, before the Education Labour Relations Council. She contended firstly, that the Department has abandoned the disciplinary process after her appeal and secondly, that the dismissal was substantively and procedurally unfair. The arbitrator found that her conduct seriously and negatively impacted upon the trust relationship and that the dismissal was substantively fair. *Inter alia*, she had admitted that her decision to appoint her spouse was to alleviate his dire financial situation. The arbitrator found that the abandonment argument had to fail as the Act did not allow for the implementation of a sanction pending an appeal.

The finding fell within the "band of reasonableness" at which a reasonable decision-maker could arrive.

Ms Sokwe then applied for a review of the arbitrator's decision to the Labour Court. She contended that the arbitrator misunderstood the employer's policy and overlooked the delay in finalising the disciplinary process. The Labour Court dismissed her application. Her subsequent applications for leave to appeal were denied by the Labour Court and Labour Appeal Court.

Undaunted, Ms Sokwe appealed to the Constitutional Court. The Constitutional Court agreed that the arbitrator's finding that her dismissal was substantively fair was beyond criticism. The finding fell within the "band of reasonableness" at which a reasonable decision-maker could arrive.

The Constitutional Court did, however, find that this was not the case with the procedural fairness of the dismissal. It held that the principle that discipline should be prompt and fair and that disciplinary processes should be concluded in the

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The court found that the department had no explanation for the delay and that Ms Stokwe's dismissal was procedurally unfair.

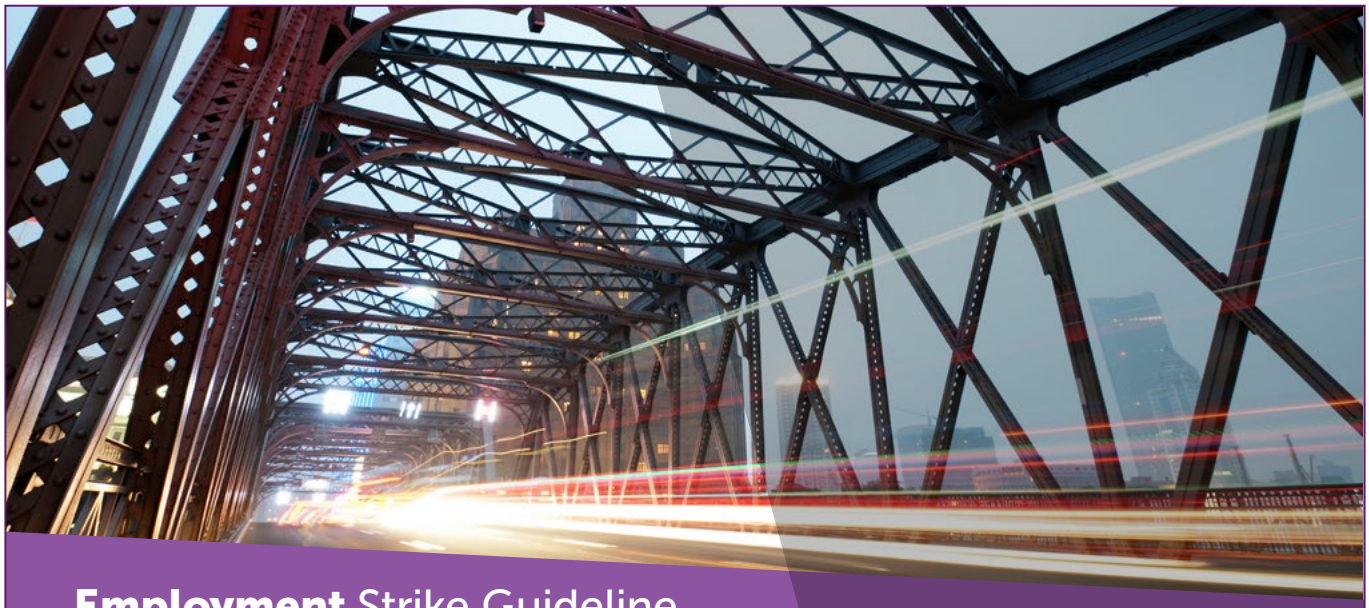
shortest possible timeframe, applied to both the Labour Relations Act and the Employment of Educators Act. The court held that the question of whether there was an unacceptable delay should be considered on a case-by-case basis. The court in assessing the reasonableness of the delay considered the following factors:

- The delay has to be unreasonable. The longer the delay, the more likely it is that it would be unreasonable.
- There must be an explanation that can reasonably serve to excuse the delay. A delay that is inexcusable would normally lead to a conclusion of unreasonableness.
- Did the employee has taken steps to assert his or her right to a speedy process?
- Did the delay cause material prejudice to the employee? Establishing this includes an assessment as to what impact the delay has on the ability of the employee to conduct a proper case.
- The nature of the alleged offence must be considered. The nature of the offence could, in itself, justify a longer period of investigation, or in collating and preparing proper evidence, thus causing a delay that is understandable.
- All these considerations must be applied holistically.

The court found that the Department had no explanation for the delay and that Ms Stokwe's dismissal was procedurally unfair. As a measure of its disapproval of the Department's conduct the court made an adverse costs order against it. It remitted the matter back to the Labour Court, as a specialist court to decide on the appropriate remedy, as a matter of priority.

This case serves to reiterate a core principle of our labour law: employment disputes should be conducted and concluded in a speedy and efficient manner.

Jose Jorge and Siyabonga Tembe



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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

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

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

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

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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

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CLIFFE DEKKER HOFMEYR