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EMPLOYMENT ALERT

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Is an employer restricted to the categorisation of the charges during the disciplinary proceedings?

Procedural fairness in disciplinary proceedings requires an employee to be made aware and understand the charges against him. This is not only to assist the employee in deciding how to plead but also to ensure that the employee understands the case he has to answer. Is an employer restricted to the manner in which the charges are categorised or can it find the employee guilty of competent verdicts? This question was dealt with by the Labour Appeal Court in *EOH Abantu (Pty) Ltd v CCMA & Others* (JA4/18) [2019] ZALAC 57.

Update: Ladies and gentlemen, it's time to place your (secret) ballots

The requirement to hold a secret ballot before embarking on strike action has been a hot topic of late.

Here's a recap: S19 of the Labour Relations Amendment Act, No 8 of 2018 (Amendment Act) requires trade unions (and employers' organisations) to amend their constitutions to provide for secret strike ballots prior to embarking on strike action, in the event that their constitutions do not already provide for this.

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Is an employer restricted to the categorisation of the charges during the disciplinary proceedings?

The CCMA commissioner found that the dismissal was procedurally fair but substantively unfair as the employee was dismissed for gross negligence, for which he had not been charged.

Procedural fairness in disciplinary proceedings requires an employee to be made aware and understand the charges against him. This is not only to assist the employee in deciding how to plead but also to ensure that the employee understands the case he has to answer. Is an employer restricted to the manner in which the charges are categorised or can it find the employee guilty of competent verdicts? This question was dealt with by the Labour Appeal Court in *EOH Abantu (Pty) Ltd v CCMA & Others* (JA4/18) [2019] ZALAC 57.

The employee was charged with theft, fraud, dishonesty alternatively unauthorised removal of material, breach of the confidentiality agreements and disregard of the code of ethics. He was found to have committed the misconduct but was found guilty and dismissed for gross negligence because the employer could not prove that the employee had acted with intention.

The CCMA commissioner found that the dismissal was procedurally fair but substantively unfair as the employee was dismissed for gross negligence, for which he had not been charged. The Labour Court dismissed the employer's review application on the basis that gross negligence was not a competent verdict on the charges the employee was called upon to meet and dismissal was an inappropriate sanction where the employer had failed to prove dishonesty.

In dealing with the employer's appeal, the Labour Appeal Court held that charges must be precisely formulated and specific enough for the employee to answer them. However, the approach adopted by courts and arbitrators must not be formalistic or technical. This is because lay persons often craft the charges too narrowly or incorrectly. It was the Labour Appeal Court's view that the categorisation of misconduct in the charge sheet is of less importance.

On the issue of competent verdicts, the Labour Appeal Court found that it is common for an employee to be charged with theft and for the evidence to establish the offence of unauthorised possession. The Labour Appeal Court held that the correct approach is that it must be established that a workplace standard has been contravened, that the employee knew (or reasonably should have known) the workplace rule and that no significant

Is an employer restricted to the categorisation of the charges during the disciplinary proceedings?

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The Labour Appeal Court concluded that there is no requirement that competent verdicts be mentioned in the charge sheet, subject always to the principle that the employee should not be prejudiced.

prejudice flowed from the incorrect categorisation of the offence. The Labour Appeal Court concluded that there is no requirement that competent verdicts be mentioned in the charge sheet, subject always to the principle that the employee should not be prejudiced.

The essence of this judgment is that an employer is not restricted to the manner in which the charges are formulated in the charge sheet. An employer may find the employee guilty of a lesser charge or competent verdict if it arises from the evidence led. However, this is subject to the employee not being prejudiced by the incorrect categorisation. It is our view that this judgment clarifies the position where charges are challenged on a technicality concerning categorisation. It suffices that the employee must be made aware of the essential details of the alleged misconduct and in what respect a workplace rule has been infringed.

Fiona Leppan, Bheki Nhlapho and Kgodisho Phashe

CDH
CLIFFE DEKKER HOFMEYR

Update: Ladies and gentlemen, it's time to place your (secret) ballots

Section 19 provides that those trade unions who have not yet amended their constitutions to cater for secret ballots, are legally required to first conduct a secret ballot before embarking on any strike action.

The requirement to hold a secret ballot before embarking on strike action has been a hot topic of late.

Here's a recap: S19 of the Labour Relations Amendment Act, No 8 of 2018 (Amendment Act) requires trade unions (and employers' organisations) to amend their constitutions to provide for secret strike ballots prior to embarking on strike action, in the event that their constitutions do not already provide for this.

Section 19 further provides that those trade unions who have not yet amended their constitutions to cater for secret ballots, are legally required to first conduct a secret ballot before embarking on any strike action.

The interpretation of s19 of the Amendment Act was recently tested in the case of *Johannesburg Metropolitan Bus Services (SOC) Ltd and Democratic Municipal and Allied Workers Union* (J1799/19). In this case, the employer brought an urgent application to the Labour Court to interdict the intended strike action based on, amongst others, the union failing to hold a secret ballot before engaging in the strike. The employer contended that the union was legally required to do so, given that it had not amended its constitution to provide for a ballot as per s19.

It was the trade union's position that the requirement to conduct a secret ballot in these circumstances constituted a limitation on the right to strike.

The Labour Court held that a failure to comply with the requirements of s19 of the Amendment Act amounts to a breach of the Labour Relations Act, No 66 of 1995 (LRA). Furthermore, unlike an order declaring a strike to be unprotected, an order requiring the trade union to first conduct a secret ballot in accordance with s19 was a temporary limitation on the right to strike. The court held:

> *"I am inclined to concur that an obligation on a registered union to conduct a secret ballot of its members before engaging in strike action in conformity with a provision which it ought to have included in its constitution in any event does not impose a limitation on the right to strike. It remains entirely within the union's power to remedy the situation."*

The Labour Court accordingly interdicted the strike pending compliance with s19 of the Amendment Act.

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Update: Ladies and gentlemen, it's time to place your (secret) ballots

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Section 67 prescribes that a failure of a trade union to comply with a provision in its constitution regarding a ballot may not constitute a ground for litigation affecting the legality or protected nature of the strike.

The position therefore appears to be as follows:

- Section 19 of the Amendment Act requires trade unions to amend their constitutions to provide for a secret ballot where their constitutions do not already cater for this;
- Those trade unions who have not amended their constitutions accordingly, are required to first conduct a secret ballot before embarking on strike action, in terms of s19(2) of the Amendment Act, failing which employers may approach the Labour Court on an urgent basis to interdict the strike pending compliance with s19 of the Amendment Act; and
- The legal requirement to conduct a secret ballot only exists where trade unions have not amended their constitutions to provide for a secret ballot.

The question then becomes: what happens if a trade union has complied with the requirement to amend its constitution by including the secret ballot provision, but still goes out on strike without first conducting the secret ballot (ie contrary to the requirements of its own constitution)?

Section 67 of the LRA is relevant. Section 67 prescribes that a failure of a trade union to comply with a provision in its constitution regarding a ballot may not constitute a ground for litigation affecting the legality or protected nature of the strike.

It therefore appears that where trade unions comply with s19 of the Amendment Act (by amending their constitutions) but nevertheless embark on strike action without complying with their constitutional prerequisite to first hold a secret ballot, an employer is prohibited from interdicting the strike on account of s67(7) of the LRA.

The apparent conflict between s19 of the Amendment Act and s67(7) of the LRA has not yet been tested before the Labour Court. CDH will provide an update in this regard when and if this conflict is resolved.

Hugo Pienaar, Sean Jamieson and Lerato Malope

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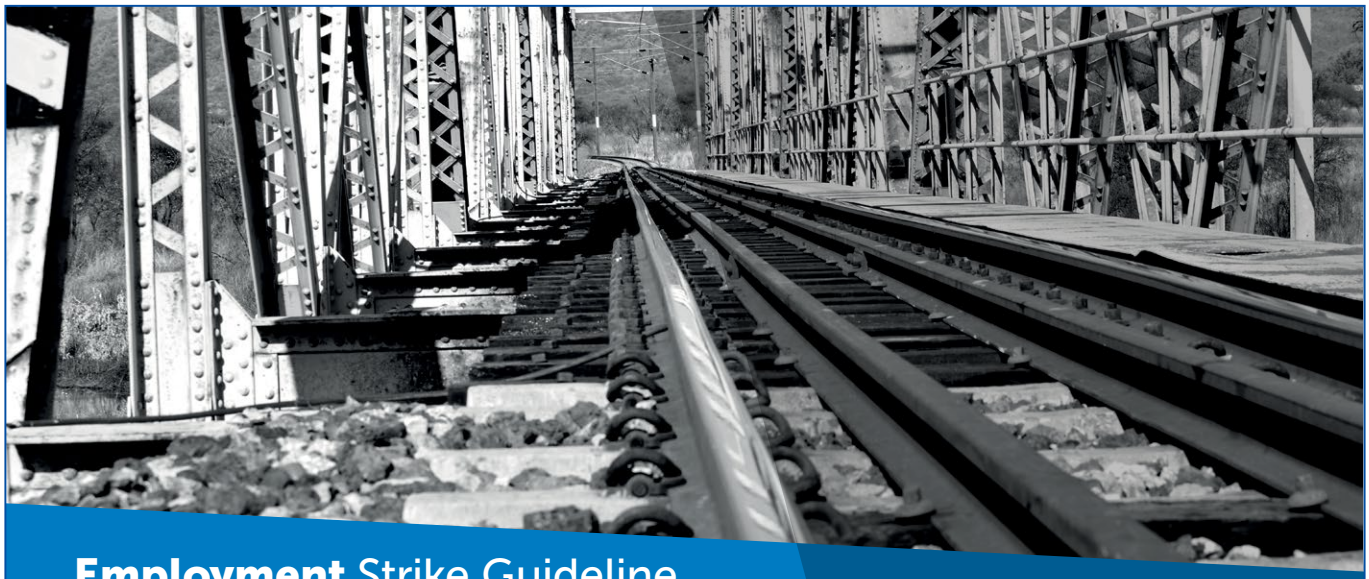

Employment Strike Guideline

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Gillian Lumb ranked by CHAMBERS GLOBAL 2017 - 2019 in Band 4: Employment.

Gavin Stansfield ranked by CHAMBERS GLOBAL 2018 - 2019 in Band 4: Employment.

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

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

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

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

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 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

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

CDH
CLIFFE DEKKER HOFMEYR