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EMPLOYMENT ALERT

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Investing in your employees doesn't make them yours

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The competency of incitement as a disciplinary charge: An insight into the charge of incitement

In the recent decision of *Economic Freedom Fighters v Minister of Justice and Constitutional Development* (87638/2016) [2019] ZAGPPHC 253, the High Court pronounced on the definition of the crime of incitement and defined it as the intention, by words or conduct, to influence the mind of another in the furtherance of committing a crime. The decisive question being whether the accused intended to influence the mind of another towards the commission of a crime.

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Hiring new staff usually comes at great expense to employers, who place them on intensive training programmes soon after they take up employment. With continuous changes to technology and systems, this then often continues for the duration of the employment relationship.

For years, employers have sought to protect their businesses from the loss of confidential information and client connections, by inserting restraints of trade into their employees' contracts. These will generally protect against such risks. However, the days of employees working their life-long careers for a single employer is something we seldom see these days and a variety of questions arise when those trained up employees resign and leave, together with the substantial investment made in them.

The question that is then often asked, is whether the employer is at liberty to restrain the employee from utilising the skills and training at their new employer. Put differently, are skills and training ever protectable under restraints of trade agreements?

This principle was addressed in the case of *Aranda Textile Mills (Pty) Ltd v Hurn and another* [2000] JOL 7350 (E). In this case, the employer sought to enforce its restraint of trade provisions against its employee who had resigned, and to prevent him from taking up employment with a competitor company. The contention, however, was that enforcement of the restraint would protect the employer's investment, money and training which had been expended on the employee.

Importantly and aside from confidential information and client connections which are generally protectable under restraints of trade, the court commented that an employee's skills and abilities are a part of the employee himself and that the employee cannot ordinarily be precluded from making use of them by a contract in a restraint of trade.

As such, where employers have gone to the trouble and expense of training an employee in a particular field of work (thereby equipping the employee with skills he/she may not have gained elsewhere) the court confirmed that the law does not vest the employer with a proprietary interest in the employee, his know-how or skills. The court went on to record the following important principle:

> *"Such knowhow and skills in the public domain become attributes of the workman himself [and] do not belong in any way to the employer and the use thereof cannot be subjected to restriction by way of a restraint of trade provision"*

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Investing in your employees doesn't make them yours...*continued*

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The court ruled that such a restriction would impinge on the employee's ability to compete freely and fairly in the marketplace and would be unreasonable and contrary to public policy. Furthermore, to enforce a restraint of trade purely on the basis of protecting skills and know-how which is already in the public domain, would offend against these principles.

When considering whether to enforce restraints of trade, employers should be aware that only *confidential information* (including trade secrets) *and client connections* are protectable, not the training and skills that the employer has armed the employee with and at its expense. The latter the employee takes with them when they leave.

In order to ensure that employers are not left out of pocket, training agreements with pay back clauses can be entered into, which provide for instance that the company will fund your short course, but that if you leave within 12 months thereafter, the employee agrees to pay the cost thereof back to the employer either in its entirety, or on a pro-rata basis.

Restraints are thus not the appropriate means to protect against such risks.

Nicholas Preston and Sean Jamieson

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The competency of incitement as a disciplinary charge: An insight into the charge of incitement

Where an employee calls a gathering or meeting with a number of non-striking employees to ascertain whether those employees will engage in unlawful strike action, it cannot be said that the employee has gone far enough to be charged with the crime of incitement.

In the recent decision of *Economic Freedom Fighters v Minister of Justice and Constitutional Development* (87638/2016) [2019] ZAGPPHC 253, the High Court pronounced on the definition of the crime of incitement and defined it as the intention, by words or conduct, to influence the mind of another in the furtherance of committing a crime. The decisive question being whether the accused intended to influence the mind of another towards the commission of a crime.

As per the definition above, for an employee to be charged with incitement, the employer must show that the employee in question sought to influence the mind of another employee to commit a crime. In the case of *Albion Services CC v CCMA* (D 275/10) [2013] ZALCD 12, the Labour Court affirmed that the test for incitement is whether an employee acted in such a manner so that '*he reached and sought to influence the minds*' of his fellow employees.

Incitement is mostly used as a charge in the context of strike action, where one or more employees are found to have incited fellow employees to take part in strike action. When charging an employee for such offences, the employer is required to draw up a charge sheet and decide which charge in the disciplinary code fits the transgression. This is a fundamentally important exercise as the employer's case will stand or fall by these charges.

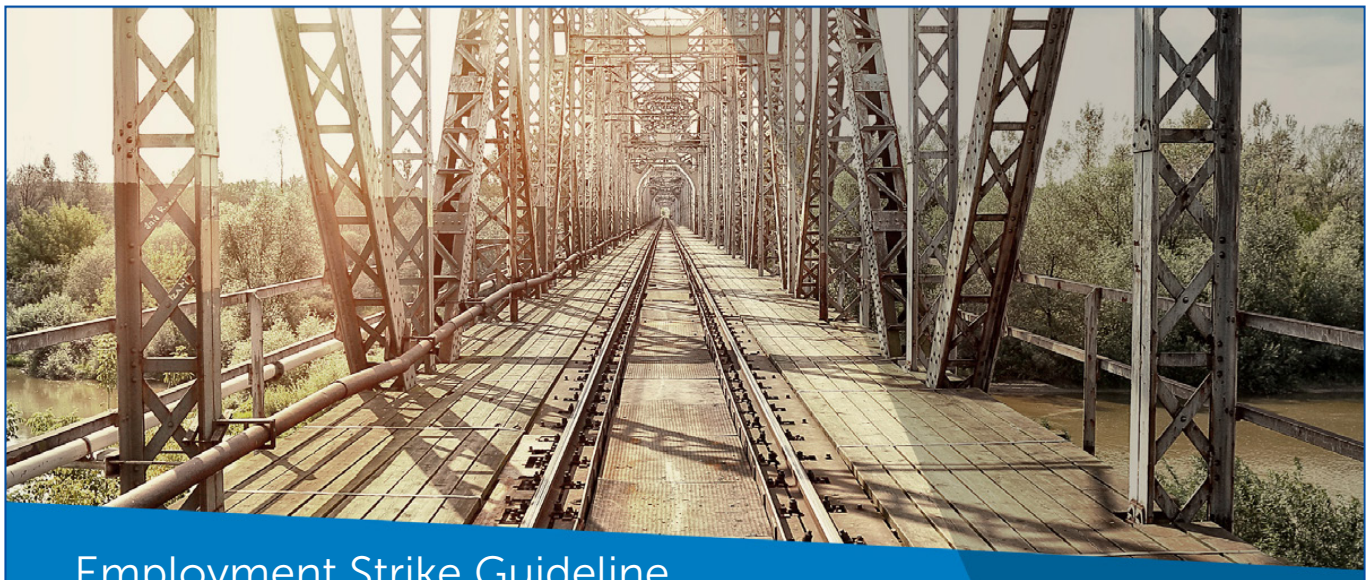
In this context, the definition of incitement as provided by the High Court has the potential to create difficulties for an employer as it is extremely broad and is wholly dependent on the commission of a crime. These difficulties are further reinforced by the fact that section 64 of the Labour Relations Act, No 66 of 1966 (LRA) specifically provides that every employee has the right to strike.

Strike action would only be regarded as being unlawful when it is in violation of the provisions of the LRA. Therefore, if an employee were to influence the minds of fellow employees to institute strike action in accordance with the LRA, that employee would not be guilty of incitement as the strike would not be unlawful. Further, where an employee calls a gathering or meeting with a number of non-striking employees to ascertain whether those employees will engage in unlawful strike action, it cannot be said that the employee has gone far enough to be charged with the crime of incitement.

For an employee to be found guilty of incitement, extensive evidence would need to be led which shows that the employee reached and sought to influence the minds of his/her fellow employees to commit unlawful strike action.

It is clear that a charge of incitement is wholly dependent on the commission of a crime and it is unlikely that employers will have much success in charging employees for this offence at disciplinary enquiries. In the absence of clear evidence, it may be best to avoid charging employees for such an offence.

Aadil Patel, Anli Bezuidenhout and Rowan Bromham



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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

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

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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