25 MAY 2020

EMPLOYMENT ALERT

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Stay in your lane: Lessons on the duty to contact trade unions before dismissing employees involved in a strike

The collective bargaining landscape is defined by the membership numbers that trade unions have within a particular workplace. Item 6(2) of the Schedule 8 of the Labour Relations Act (LRA) requires an employer to contact a trade union official prior to dismissing employees involved in an industrial action. Item 6(2) does not specify whether the employer's duty to contact a trade union official applies to all trade unions in the workplace, recognised trade unions or only the majority or sufficiently representative trade unions.

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Stay in your lane: Lessons on the duty to contact trade unions before dismissing employees involved in a strike

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This question was recently considered by the Labour Appeal Court in *Roberts Brothers Construction (Pty) Ltd and Mpumalanga Construction (Pty) Ltd v the National Union of Mineworkers & Others* PA08/18. The judgment was delivered on 18 May 2020. In this case, the employees embarked on an unprotected strike action for a two days demanding electricity for heating, lighting and cooking. The strike was unprotected on the basis that the employees did not issue the employer with a strike notice and the demand did not fall within the employer's control.

The employees were issued with three ultimatums which demanded that they return to work failing which they would be dismissed. The employees did not comply with the ultimatums and were thereafter dismissed. For the first time in the matter, the NUM was involved and referred an unfair dismissal dispute to the CCMA on behalf of the employees which dispute was unresolved and was then referred to the Labour Court. The Labour Court found that the dismissal was substantively fair because the strike was not in response to management's conduct.

In respect procedural fairness, the Labour Court found that the dismissal was procedurally unfair on the basis that the employer failed to contact the trade union to try and end the strike. On this point, the employer argued that it did not contact the NUM because it did have a recognition agreement with the NUM. It was established that the NUM represented about 7% of the workforce.

The employer appealed the procedural fairness finding to the Labour Appeal Court and the issue to be considered was whether Item 6(2) obliged the employer to contact a trade union official regardless of the trade union's representative status. The Labour Appeal Court held that although Item 6(2) is a guideline, it should be followed and interpreted to promote orderly collective bargaining.

Stay in your lane: Lessons on the duty to contact trade unions before dismissing employees involved in a strike...*continued*

It is our view that more than the NUM's representative status in this matter, the fact that it was absent prior to the dismissal was a major factor.

The LRA favours majoritarianism in collective bargaining. It held that although trade unions with minimal membership may act on behalf of their members in other capacities, they do not enjoy organisational rights and presence or role as a bargaining agent. Such rights are reserved for majority or sufficiently representative trade unions.

In dealing with whether the representative status matters, the Labour Appeal Court held that the employer's duty in Item 6(2) is restricted to trade unions that have been granted organisational rights or enjoy contractual rights under a recognition agreement with the employer. Such duty obliges the employer to contact an appropriately recognised bargaining agent. In this case, the NUM did not enjoy any organisational rights in the LRA and was not a party to a recognition agreement with the employer. On this basis, the Labour Appeal Court concluded that the employer did not have a duty to contact the NUM's trade union official prior to dismissing the employees.

It is our view that more than the NUM's representative status in this matter, the fact that it was absent prior to the dismissal was a major factor. Had the NUM been involved in the strike action and assisted the employees with their demands despite its representative status and not being party to a recognition agreement with the employer, it is possible that the Labour Appeal Court may have found differently. Therefore, it may be wise to apply the Labour Appeal Court's findings on a case by case basis.

Fiona Leppan, Bheki Nhlapho and Arnold Saungweme

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EMPLOYMENT

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The LEGAL 500 EMEA

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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.

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