

EMPLOYMENT LAW ALERT

19 MAY 2022



INCORPORATING
KIETI LAW LLP, KENYA

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As clear as night and day: An employer has to distinguish between dayshift and nightshift employees when considering dismissal due to unprotected industrial action

The case of *Trellicor (Pty) Ltd t/a Trelldor v National Union of Metalworkers of South Africa obo Ndwalane and others* [2022] 5 BLLR 442 (LAC) highlights the importance of distinguishing between employees who are on different shifts, and the manner in which they are charged, in respect of unprotected strike action.



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As clear as night and day: An employer has to distinguish between dayshift and nightshift employees when considering dismissal due to unprotected industrial action

The case of *Trellicor (Pty) Ltd t/a Trellidor v National Union of Metalworkers of South Africa obo Ndwalane and others* [2022] 5 BLLR 442 (LAC) highlights the importance of distinguishing between employees who are on different shifts, and the manner in which they are charged, in respect of unprotected strike action.

The facts of the case are as follows:

Individual employees embarked on an unprotected strike during June 2013 pursuant to a grading dispute.

On 9 July 2013, individual employees again embarked on an unprotected strike, after which the employer obtained a court order, on 12 July, interdicting the unprotected industrial action.

On 17 July, certain individual employees once again embarked on an unprotected strike, which continued the next day.

On 17 and 18 July 2013, the nightshift employees congregated with the dayshift employees. The nightshift employees, however, worked their shift on 17 July. Their night shift on 18 July was cancelled by the employer.

In response, the employer sought an order holding those employees in contempt of the court order that was granted on 12 July 2013. An interim order was granted.

On 19 July 2013, the employer charged 123 day and nightshift employees with:

- acting in contempt of the interdict of 12 July 2013;
- refusing to obey a reasonable instruction to work and to vacate the employer's premises; and
- gross insubordination.

The employees were found guilty and dismissed by the employer.

UNFAIR DISMISSAL CLAIM

The National Union of Metalworkers of South Africa approached the Labour Court, claiming that the dismissal of its members was unfair.

The Labour Court held that the nightshift employees "*never withdrew their labour in demand for anything*".

The court also stated that the charge sheet should have been more specific about what these employees were alleged to have done wrong, for example, that they had acted "*in common purpose with the day shift,*

or words to that effect". However, the court held that it was not proved that these employees had committed the misconduct they were charged with, and they were accordingly found not guilty. As relief, the court ordered their retrospective reinstatement with full back pay.

The Labour Court thus distinguished between those employees who were on the day shift and those who were on the night shift. In respect of the dayshift employees, the court found that they were on an unprotected strike and were in contempt of the interdict. Their dismissal was held to be fair.

When the matter was taken on appeal, the union supported the reasoning of the court *a quo* in respect of the nightshift employees and submitted that the employer's case did not relate to those who had been on the night shift. Those employees had,

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according to the union, been wrongly charged as also having been on the day shift. The union further argued that it distinguished between the dayshift and nightshift employees, and that the employer's case was defective because it did not make such a distinction.

The Labour Appeal Court held, among other things, that the employer did not specifically implicate the nightshift employees in the misconduct as charged – the employer simply pleaded that everyone on the day shift had refused to comply with its instruction to resume work. Clearly, that could not apply to nightshift employees, who did, in fact, work their shift on the night of 17 July to the morning of 18 July 2013.

Accordingly, no proper case in respect of the fairness of the dismissal of the nightshift employees was made out. The Labour Appeal Court thus dismissed the appeal.

With regard to the cross-appeal by the union against the dismissal of the dayshift employees, the court found that the court *a quo* considered all the relevant facts and correctly held that the dismissal of the dayshift employees for participating in the unprotected strike was justified on the evidence that was before it.

This judgment highlights the fact that employers should:

- carefully word charges in respect of employees who participate in an unprotected strike;
- specifically address common purpose and/or association if it is to be relied upon;
- distinguish between shifts, when it is necessary to do so; and
- always simplify charges.

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