

May 25, 2018

How do courts view an unprotected strike and issuing of an ultimatum?



In the recent Labour Appeal Court (LAC) case of **County Fair Foods v FAWU & others (CA02/2017)**, pertaining to an **unprotected strike and the issuing of repeated ultimatums**, the brief facts were that County Fair had informed its employees that annual discretionary bonuses would not be paid due to its financial position.

In response, more than 200 employees had embarked on an *unprotected strike*. Three subsequent ultimatums were issued to the employees.

An initial group of 67 employees had returned to work and a further (second) group of 58 employees had returned to work shortly thereafter. The remaining (third) group of employees had continued the unprotected strike for a further 1½ days after the second group had returned to work. When the third group of employees attempted to return to work they were suspended, subjected to a disciplinary hearing and subsequently dismissed.

The LAC relied on **Section 68(5)** of the Labour Relations Act (LRA) which states as follows:

- *Participation in a strike that **does not comply** with the provisions of this Chapter or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the **Code of Good Practice: Dismissal in Schedule 8 must be taken into account.***
- **Item 6** of the said Code recognises that participation in an unprotected strike constitutes misconduct but that:

*‘...like any other act of misconduct, **it does not always deserve dismissal.** The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including –*

- *The seriousness of the contravention of this LRA;*
- *Attempts made to comply with this LRA; and*
- *Whether or not the strike was in response to unjustified conduct by the employer.’*

The LAC considered the abovementioned provisions and held that our courts had repeatedly stated that **engaging in an illegal strike constitutes serious and unacceptable misconduct** by workers in respect of which an employer is entitled to take disciplinary action. Dismissal has been found to be an appropriate sanction where an unprotected strike was planned to create maximum pressure and undermine the authority of the employer and, where there had not been compliance with an ultimatum given, the employees refused to return to work.

The LAC further held that, *‘the facts showed that the Union and the employees displayed a **blatant disregard for the authority** of County Fair Foods without regard to the consequences of their actions on either the business of the employer or the employment relationship’*. The fact that the strike had continued for a further one and a half days was not a significantly material fact to warrant weighing considerations of fairness in favour of the Union. The sanction of dismissal imposed on the employees by the employer was fair given their decision to embark on an unprotected strike action at a critical business period and their persistent refusal, without bona fide reason provided, to comply with the ultimatum.

SERR Synergy assists employers when faced with unprotected strike action that may occur in sporadic and unforeseen instances. We assist with the issuing of correctly worded ultimatums in clear and concise language to the employees and the trade unions to cease the said unprotected strike action. We also *chair the hearings* that may lead to the disciplining of employees who participate in an unprotected strike. Should the employees thereafter refer the said disciplinary outcome to the CCMA, we provide employers with the necessary representation in such circumstances.

About the Author: Jared Francis joined SERR Synergy in October 2016, and currently holds the title of KZN Labour Manager. He is an admitted attorney who has practised in KZN and Gauteng. He holds an LLB degree, a Post-Graduate Diploma in Industrial Relations and a Post-Graduate Certificate in Forensic Investigation from the University of KwaZulu-Natal. He also holds Post-Graduate Certificates in Advanced Labour Law, Corporate Law, Advanced Human Resource Management and Health and Safety from UNISA and has more than 10 years' experience in the legal and industrial relations fields respectively.

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