



# Fair inconsistency in imposing sanctions on striking employees

by Kgomotso Mokaba

Striking is a fundamental right enshrined in South Africa's Constitution. However, section 36 of the Constitution accepts that a fundamental right can be limited. Sections 64 and 65 of the Labour Relations Act, 1995 (the "LRA") contain these limitations for strikes. Section 64 requires certain procedures to be followed prior to a strike taking place for it to be "protected". Section 65 prohibits a strike in certain circumstances and if a strike takes place in these circumstances, it will be "unprotected". An employee participating in a "protected" strike is "protected" from dismissal for striking. Conversely, there is no such absolute protection if the strike is "unprotected".

Participation in an unprotected strike constitutes misconduct. However, the dismissal of employees who participate in an unprotected strike is not in itself automatically fair; an employer must ensure that the dismissal is procedurally and substantively fair. To determine fairness, regard must be had to Item 6 of the Code of Good Practice: Dismissals. This provides that the substantive fairness of the dismissal of employees who participated in an unprotected strike should be evaluated in the light of the facts of the case including the seriousness of the failure to comply with the provisions of the LRA, attempts made to comply with these provisions and whether the strike was in response to unjustified conduct by an employer. As part of procedural fairness, an employer is required to issue striking employees with ultimatums, which must be communicated in clear and plain language understood by striking employees and state that striking employees are required to report for duty by a certain time on a certain date, failing which they are warned that they may face dismissal.

These principles were considered by the Labour Appeal Court ("LAC") in ***County Fair Foods (Epping), a division of Astral Operations Ltd v Food & Allied Workers Union & Others***. The LAC considered whether the employer acted consistently and fairly when it dismissed some of its employees who participated in an unprotected strike. The decision also provides an interesting example of what factors could be taken into account in determining the substantive fairness of a dismissal of strikers.

The salient facts of this matter are that on 15 December 2010, a majority of the employees of County Fair Foods ("CFF") staged a sit-in on the premises of CFF. They refused to resume work until their demands were met. In response, a CFF representative informed striking employees that their strike was "unlawful" and that their continued conduct could result in their dismissal. Thereafter, another CFF representative issued a first verbal ultimatum to the employees to the effect that, if they did not return to work by 07h30 on 16 December 2010, disciplinary action would follow. This was followed by a written ultimatum. 64 employees returned to work and accepted a final written warning.

On 17 December 2010, the third and final ultimatum was issued by CFF demanding that striking employees return to work by 07h30. This was extended to 08h00. A further 58 employees returned to work and accepted a final written warning. At 08h35, the remaining striking employees were locked-out.

On 20 December 2010, the remaining striking employees indicated that they wanted to return to work. They signed a “comeback document” which included an undertaking that they would refrain from participating in the strike and stated that they accepted a final written warning. When these remaining employees returned to work, they were suspended and subjected to disciplinary hearings after which 120 employees were dismissed. The dismissed employees alleged that their dismissals were unfair and challenged their dismissals in the Labour Court (“LC”). The LC found that the dismissals were unfair because the dismissed employees’ conduct was not so egregious as to warrant dismissal as the strike was peaceful, for a short duration and the dismissed employees requested to return to work after reconsidering their actions.

CFF was given leave to appeal to the LAC. The LAC held that:

- issuing the lock-out notice and partial compliance by dismissed employees with certain lock-out demands did not prevent CFF from taking disciplinary action against employees who breached workplace discipline by embarking on the unprotected strike and who failed to comply with a final ultimatum to return to work;
- engaging in an unprotected strike constitutes serious and unacceptable misconduct by employees and an employer is entitled to take disciplinary action. Dismissal is an appropriate sanction where the unprotected strike was planned to create maximum pressure, undermine the authority of the employer, and where there was no compliance with an ultimatum given to return to work. This would apply even if the strike was of short duration and the ultimatum given was not one in the conventional sense;
- while discipline should be neither capricious nor selective, there may be grounds to distinguish the conduct of one employee from another, even though they engaged in the same or similar conduct, having regard to the applicable facts. In this case, the distinguishing factor was that the employees who received a final warning heeded the final ultimatum while the dismissed employees had not done so; and
- the LC erred in finding that dismissal was not an appropriate sanction. The dismissed employees ignored the final ultimatum without providing a bona fide reason for doing so. They blatantly disregarded the authority of CFF and the consequences of their actions on CFF and the employment relationship. The fact that the dismissed employees had only continued to strike for one and a half days longer than the other employees was not important enough to warrant weighing considerations of fairness in favour of the dismissed employees or to justify a finding that their dismissals were unfair when regard was had to the totality of factors. Accordingly, the dismissals were fair.

Perhaps the most important facet of this decision is its approach to the difficult issue of consistency in the application of disciplinary measures, especially in the context of strike dismissals. The LAC adopted a flexible approach as is evident from the following excerpt:

“[25] Our courts have repeatedly stated that fairness generally requires that like cases should be treated alike and that disciplinary consistency is the hallmark of progressive labour relations. While discipline should be neither capricious nor selective, this applies within reasonable bounds and subject to the proper and diligent exercise of discretion in each individual case with fairness remaining a value judgment. There may exist valid grounds in a particular case to distinguish the conduct of one employee from another, albeit that they have engaged in the similar conduct, having regard to the material facts applicable.”

It is noteworthy that the dismissed employees did not raise the issue that they signed the comeback document in response to the lock-out notice which indicated that they would receive a final written warning. Yet, upon returning to work, they were suspended, invited to disciplinary hearings and dismissed. It is possible that, if the employees had raised this issue, the outcome could have been different.

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