

EMPLOYMENT

CARRYING WEAPONS DURING STRIKE ACTION: POTENTIAL GROUND FOR DISMISSAL

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ISSUE

Whether an employer is justified in dismissing employees carrying weapons during a protected strike.

SUMMARY

Employees engaged in strike action who carry dangerous weapons during a strike run the risk of dismissal. The act of carrying weapons exposes others to the risk of injury and also serves to threaten and intimidate others. This kind of conduct is not protected by the right to strike.

FACTS

In the matter of *Pailprint (Pty) Ltd v Lyster NO and Others* (2019) 28 LAC 1.11.47 the Labour Appeal Court ("**LAC**") had to consider the above issue. The facts of the matter are set out briefly below.

On 1 July 2014 a number of Pailprint (Pty) Ltd ("**employer**") employees participated in a national strike called by their union, the National Union of Metalworkers of South Africa ("**NUMSA**"). The employees were employed in various positions at the employer's factory. The employer's disciplinary code provided, among others, that the "[b]randishing or wielding of dangerous weapons" was a dismissible offence.

Furthermore, the employer's picketing policy stated that:

- picketers may not "engage in unlawful or violent actions";
- "no weapons of any kind are to be carried or wielded by the picketers"; and
- the employer may take disciplinary action "where an employee's actions during a picket are in breach of the organisation's disciplinary Code".

The employer's 2012 strike policy also stated that it had zero tolerance for "any violent acts, intimidation or vandalism" during strikes and that "any employee caught behaving in a violent manner (which included verbal abuse), vandalising property, preventing anyone from entering or participating in work or intimidating any other person in any form or manner" would be disciplined.

During the strike, the employees were seen carrying sticks, a sjambok and lengths of piping. They were also in the presence of employees who carried a golf club and an axe. These acts were regarded by the employer as being in contravention of the employer's picketing rules and the employees were called to disciplinary hearings. Following disciplinary hearings, the employees were dismissed for the "brandishing or wielding of dangerous weapons during [the] strike".

COMMISSION FOR CONCILIATION, ARBITRATION AND MEDIATION ("**CCMA**")

Aggrieved by their dismissals, NUMSA, acting on behalf of the employees, referred an unfair dismissal dispute to the CCMA. At the arbitration, the employer presented graphic photographs of severe injuries sustained by two individuals during the course of the strike. This evidence was not challenged or rebutted by the employees.

The arbitrator had regard to the fact that during the disciplinary hearings, more than one of the employees "disingenuously testified that neither a stick nor a sjambok could inflict any harm". However, the arbitrator also found that it was not shown that the employees had brandished or wielded weapons but that they were "just carrying sticks in their hands". The arbitrator found further that there was no evidence that they intended to threaten or intimidate anyone. He held further that the employees were in partial breach of a valid and reasonable rule of the employer. Given that the picketing policy was placed on the company's notice boards, the arbitrator found that the employees were aware of the rule or could reasonably have been aware of it. The employees' state of mind when they decided to picket with sticks in their hands and the fact that they had "voluntarily associated" with others who carried a golf club and an axe was also taken into account by the arbitrator. The arbitrator rejected the claim by the employees that they were exercising their traditional and customary right to carry sticks as a "grossly improbable scenario".

With regard to the sanction imposed, the arbitrator held that the employees "did not brandish or wield the weapons" but instead carried them. He held that neither the picketing policy nor disciplinary code indicated what the consequences of their breach would be. It was held that the disciplinary code was intended to regulate the behaviour of employees while "on-duty" and not when they were on strike and effectively off-duty. The arbitrator found that the sanction of dismissal was inappropriate and substantively unfair. The employees were reinstated from the date of the arbitration with a final written warning valid for 12 months.

The arbitrator noted in conclusion that the award should not be interpreted to validate the carrying of weapons during a strike however if the employer wished to outlaw this practice, it should amend its disciplinary code to inform employees that the mere holding of any object that could intimidate others or inflict harm could result in dismissal.

LABOUR COURT'S DECISION

The employer was dissatisfied with this award and brought a review application before the LC.

On review, the employer argued that the arbitrator had committed a gross irregularity in the conduct of the proceedings and had arrived at a decision which a reasonable arbitrator would not have arrived at with the evidence before him. In particular that the arbitrator had agreed that dangerous weapons had been carried, that the employees were part of a crowd carrying a golf club and an axe, that the evidence showed the severe assaults on certain individuals during the course of the strike and that the disciplinary code was applicable to the misconduct.

The LC did not find the award unreasonable and dismissed the review application. The employer appealed to the LAC.

LABOUR APPEAL COURT'S EVALUATION

The LAC held that it was common cause that the employees carried the sticks and piping and were in the presence of individuals carrying a golf club and an axe. This conduct was clearly in breach of the employer's policy and disciplinary code. There was no dispute that this rule was valid and reasonable and its purpose was clear. The LAC thus found it difficult to comprehend how the arbitrator could conclude on the evidence before him that the rule had only been partially breached when the employees' conduct was expressly prohibited.

The LAC held that it was clear that the arbitrator did not have regard to the importance of the rule breached or the reason the employer imposed the sanction of dismissal. The seriousness of the breach had been overlooked by the arbitrator.

The Labour Court erred in finding that the arbitrator's award fell within the bounds of reasonableness. The LAC set aside the arbitrator's award and found that the employees' dismissal had been substantively fair.

IMPORTANCE OF THE CASE

The right to strike, like most rights, is not absolute and it does not allow for the encroachment of another's right to safety. The LAC held that carrying dangerous weapons on a picket line, by its very nature, exposes others to the risk of injury and also serves to threaten and intimidate. This was not the intention of the legislature when it provided for the right to picket.

It is worth noting that the over formalistic phrasing of the charge against the employees as "brandishing or wielding" weapons was to the detriment of the employer. Employers are advised that charges against employees need not resemble formal criminal charges and it is permissible for an employer to state and describe the employee's offence in plain language. It is nonetheless important to have policies and procedures in place (as was the case in the present instance) that make it clear such conduct will not be tolerated.

The facts of this dispute arose before the new Code of Good Practice: Collective bargaining, industrial action and picketing ("**Code**") came into force on 19 December 2018. The Code regulates, among others, the use of dangerous weapons.

The Code makes express reference to the Dangerous Weapons Act 15 of 2013 which defines a 'dangerous weapon' as "any object, other than a firearm, designed as a weapon and capable of producing death or serious bodily harm, if it were used for an unlawful purpose". The Code provides that the police may intervene if a person is carrying or believed to be carrying a dangerous weapon and that in the context of a picket and/or industrial action, there is no justifiable reason for the possession or display of such an object.



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