

Incitement to strike

3 July 2013 3 min read

Inciting employees to commit misconduct

When does the conduct of an employee amount to ‘incitement’ justifying disciplinary action?

In order to discipline an employee for inciting employees to commit misconduct, of any form, an employer must be able to show that the employee in question sought to reach and influence the minds of other employees in order to commit a crime or misconduct. In the context of a strike, a shop steward who calls a meeting with a group of non-striking employees in order to query whether they will join the remaining employees in their unlawful strike action cannot be said to have gone far enough to justify dismissal on the basis of incitement.

Engaging in the unlawful strike

In *Albion Services CC v CCMA and others (D 275/10) [2013] ZALCD 12 (12 May 2013)* the employer’s workforce had divided into two groups, the first group (“group A”) had engaged in an unlawful strike action while the second group (“group B”) had elected to continue working.

Upon engaging in the unlawful strike, management warned the strikers of the unlawfulness of their actions. Subsequent to such warning, a shop steward for a trade union held a meeting with group B. During the meeting the shop steward asked what group B’s intentions were when group A continued with their strike. As a result of his action, the shop steward was charged with incitement to strike and insolence. He was dismissed after an internal disciplinary hearing after being found guilty of the first charge. At arbitration, his dismissal was found to be unfair as the employer had failed to prove incitement.

Upon review, the Labour Court confirmed the finding of the arbitrator finding that there was no evidence suggesting the shop steward did more than merely trying to ascertain the view of the non-striking employees. In order for conduct to constitute incitement, an employee must act in such a manner so that he ‘reached and sought to influence the minds’ of his fellow employees. Calling a meeting merely presented an opportunity to incite which the employee did not exploit.

An employee can be guilty of inciting other employees

An employee can be guilty of inciting other employees to commit misconduct such as participating in an unlawful strike. However, the employer must prove that the employee ‘reached and sought to influence the minds’ of his fellow employees to commit such misconduct. Whether an employee has done so will have to be determined based on the facts of the matter. Merely asking whether employees intended to join an unlawful strike would not be enough. There will clearly have to be an element of persuasion or cajoling on the part of the employee.

