



NEWSLETTER



PART 5: SEVERE MISCONDUCT

MISCONDUCT

Part 5: Severe Misconduct

In this article, we touch on a form of **Severe Misconduct** prevalent in today's labour environment - illegal strikes. Other topics include: Committing illegal conduct on employer premises or with employer property, Gross Negligence and negligence, Gross Dereliction of Duties and Malicious/deliberate or negligent damage to employer or staff property.

[\(View Part 1, 2, 3 & 4 on Misconduct in the Workplace here\)](#)

Committing illegal conduct on employer premises or with employer property:

Utilising employer property to carry out criminal acts (e.g. selling and distributing illegal substances), even outside the employer's premises, would be regarded as a dismissible offence as such an act is regarded as deliberate behaviour and it contradicts the interests of the employer. Other examples include acts such as using a company vehicle as a get-away vehicle in a hijacking or using a company computer to hack into a co-worker's profile.

Gross negligence and negligence:

Dealing with this offense is tricky, as dereliction of duty or failure to obey an instruction is misconstrued as gross negligence.

Negligence in the context of labour law, is when an employee carried out his duties in a manner which the normal employee in his/her circumstances would not have done or otherwise when an employee did not exercise his duties with reasonable care. **Gross negligence** is a conscious and voluntary disregard of the need to use reasonable care, which is likely to cause foreseeable grave injury or harm to persons, property, or both. When coupled with financial or reputational damages to the employer, dismissal might be a justifiable sanction, but all cases must be determined on their own merit.

Gross Dereliction of Duties:

Simple examples of this are when an employee goes to the mall without permission during working hours, or loitering at work to avoid doing any actual work. Dismissal can never be justified after first offence. In severe circumstances a final written warning would in fact be justifiable. Aggravating circumstances occur when dereliction of duty is coupled with dishonest behaviour such as attempting to cover up the fact that he/she is or was not working. In such circumstances, considering the employee's dishonesty, dismissal can be justified. The employee must however then be charged with both dishonesty and gross dereliction of duties and not with simple gross dereliction of duties.

Malicious/deliberate or negligent damage to employer or staff property:

In most circumstances this is viewed as a dismissible offence as it has a direct impact on the employer/employee trust relationship, particularly as the damage was deliberate and therefore not in the best interest of the employer.

When addressing issues of negligent damage, however, the same parameters must be used as demonstrated above when considering gross negligence or simple negligence. Whether dismissal would be fair is highly dependable on the merits.

Participating in an unlawful strike:

Unlawful strikes place an unexpected halt on production or service which could have severe implications for the business.

Before any action is taken, however, it is advisable to engage with the staff on strike and determine their demands. If the demands are reasonable, the employer should attempt to meet their demands, avoiding any future problems. Subsequent to the matter being resolved, a final written warning must be issued due to their participation in an unprotected strike. The employees must be advised how to do address these types of matters in future to avoid any further similar situations.

If the employees' demands are unreasonable and no consensus can be reached, an ultimatum/final written warning must be issued to the employees instructing them to return to work at a specific time (either afternoon shift, night shift (if applicable) or the following day). Failure to do so would result in disciplinary enquiries being held which could lead to dismissal. Some learned opinions indicate that disciplinary enquiries would not be necessary prior to dismissal considering that ultimatums were issued. In some cases an illegal strike can have hundreds of participants, ensuring that conducting individual disciplinary enquiries would be impractical as it can take months to finalise. The law, however, does not provide specific clarity in this regard. In my professional view, any dismissal based on misconduct requires substantive and procedural fairness. Procedural fairness can only be achieved through proper representations and ensuring that the audi alteram partem-rule is abided to. In the matter of Siphon Sigcau & 13 others v Power Construction (LC) Case number C85/2014 the court ruled that the dismissal was procedurally fair, despite no disciplinary enquiries being held. The Respondent however ensured that all employees had an opportunity to issue representations and the Respondent also went the extra mile to ensure that employees are completely aware of the wrongfulness and illegality of their participation in an unprotected strike. One must therefore use this matter as guideline to ensure that the audi alteram partem-rule is in fact abided to. This matter also further defines what would be defined as a "strike". It basically concluded that strikes do not have to be violent to be considered a strike. Although this is common sense, it seems as though this argument might be raised by some.

The employees in all circumstances must be advised how they were incorrect to simply commence with an unprotected strike and must also be advised on the steps on how to commence with a legal strike or recognised protest in future.

Any further unprotected action taken after an ultimatum or final written warning was issued would be regarded as a dismissible offence, however to be on the safe side I would recommend, in line with the above caselaw, to issue at least three ultimatums.

Threatening or Inciting Violence::

A **threat** is a statement of an intention to inflict pain, injury, damage, or other hostile action on someone in retribution for something done or not done. **Incitement** is the action of provoking unlawful behaviour or urging someone to behave unlawfully or in context of labour law to provoke or urge an employee to act in contradiction of the employer's interests.

Both should be considered serious. **Uttering a threat** could be a dismissible offence; however in most circumstances it would warrant a final written warning. If a person however made a very specific and serious threat, and the employer's code of conduct makes provision for this, dismissal should be sanctioned.

Incitement is a dismissible offence as the employee actually took action and steps to incite and therefore had time to deliberate on his behaviour and did not act in the heat of a moment. Such predetermined acts are in direct contravention of the employer's interests therefore in turn has a direct effect on the trust relationship between the employer and the employee.

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For assistance with
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GEO members are advised to subscribe to the CIRIS internet labour law advice site. It provides valuable information on all matters related to Labour Law. Contact Andre Rabe on 0824910708 or email him on andrer@geo.org.za

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Summary



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NOTE:

Strikes can become violent, particularly when they are embarked upon illegally. There are cases where violence is incited by persons using a strike for purposes other than those of the strikers, e.g. for political purposes.

Get expert advice on how to deal with these situations by calling Andre Rabe on 0861 436 436

Severe Misconduct examples:



Loitering at work to avoid doing any actual work



Using a company computer to hack into a co-worker's profile



Deliberate or negligent damage to employer property