



NTEU at NMMU

**Can union shop stewards be disciplined for misconduct they committed while performing their duties as workers' representatives?**

Written By Magate Phala

Section 14 (4) of the Labour Relations Act, 66 of 1995, provides that a trade union representative has the right to perform the following functions at the request of an employee in the workplace:

- a) to assist and represent the employee in grievance and disciplinary proceedings,
- b) to monitor the employer's compliance with the workplace-related provisions of this Act, any law regulating the terms and conditions of employment and any collective agreement binding on the employer,
- c) to report any alleged contravention of the workplace-related provisions of this Act, any law regulating to the terms and conditions of employment and any collective agreement binding on the employer to the employer, the representative trade union and any responsible authority or agency.

The trade union representative may also perform any other function agreed to between the representative trade union and the employer.

Item 4(2) of Schedule 8 of the Labour Relations Act, 66 of 1995, as amended also provides that discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union.

In **National Union of Mineworkers and Others v Black Mountain Mining (Pty) Ltd [2010] 3 BLLR 281 (LC)** at Para 36 ..., the court held that:

*"When shop stewards are dismissed for alleged misconduct committed while performing their duties as shop stewards, the first issue that must be established is whether or not they were, in fact, committing misconduct as employees or whether the alleged misconduct was merely an action ancillary to the duties of a shop steward. Furthermore, where it is established that the shop steward was indeed committing misconduct in relation to his duties as a shop steward, the limits of the immunity from disciplinary action that should be extended to shop stewards must be determined."*

In **BIFAWU & Another v Mutual & Federal Insurance Co Ltd (2006) 27 ILJ 600 (LAC)**, the LAC held as follows... (At paragraphs [19] and [21]):

*"That an employee, even when he or she is representing a fellow employee at a disciplinary enquiry or arbitration hearing, owes certain duties to an employer cannot be doubted. Among these is the duty to act honestly. ... After all, when an employee represents a fellow employee at a disciplinary enquiry or arbitration hearing, he or she does so precisely in that capacity of being a fellow employee. The fellowship does not transubstantiate the continuing employment relationship between the employer and the representing employee."*

*... the right and duty to represent a fellow employee to the best of one's ability is not an unbridled licence; it is constrained by the duty to do so honestly. Without honesty on the part of the representatives of the parties, the system would be unviable."*

In **Mondi Paper Co Ltd v PPWAWU & Another (1994) 15 ILJ 778 (LAC)**, the Court acknowledged that a shop steward has a particular role to play. The LAC also acknowledged that this is not a license for unruly behaviour. In this particular case, the shop steward was dismissed for deliberately disrupting a meeting with management. The Court held as follows: *"No doubt a shop steward should fearlessly pursue the interests of the members he represents, and he ought to be protected against being victimized for doing so. However, this is no license to resort to defiance and needless confrontation. I do not agree with the view of the court a quo that the fact that he is acting in his capacity as a shop steward serves to 'mitigate' conduct which objectively is unacceptable. Notwithstanding the position to which he has been elected, a shop steward remains an employee, from whom his employer is entitled to expect conduct that is appropriate to that relationship."*

In **SACTWU & Another v Ninian & Lester (Pty) Ltd (1995) 16 ILJ 1041(LAC)**, the LAC, for example, rejected a shop steward's plea that she had been unfairly selected for dismissal after she had led a walk out of the workstation. The LAC held that her conduct was not "collective" as she claimed and also took into account that her employment record demonstrated "an attitude of militancy, open defiance and non-co-operation".



**STAFF SAFETY ON CAMPUS  
NMMU EMERGENCY PLAN**

Many of our members have expressed their concern for their safety when on campus. The recent rogue strike by newly insourced staff members, added to these fears and left many of our members with trust issues.

NTEU consulted with legal counsel regarding the issue of staff safety and upon guidance wrote to the Acting VC to voice our concerns. The Acting VC in turn invited NTEU to a meeting where we could place these issues and others on the table. At the meeting of 15 August, NTEU highlighted that the NMMU requires a clear and concise Emergency Action Plan that would guide all stakeholders in case of emergency, protests and strike action.

We have since received a draft document from Management for input. Chairperson will be drafting the union's input and response in this regard and will welcome any suggestions from our members. Members who wish to forward suggestions, can do so on [nteu@nmmu.ac.za](mailto:nteu@nmmu.ac.za) before 6 September 2016.

**CHALLENGES IDENTIFIED IN TERMS OF  
INSOURCING OF SECURITY STAFF**

NTEU has written a letter to the Chair of Council to alert him to the challenges that have been identified during recent meetings between HR and aggrieved security staff in relations to their salaries and benefits.

An expectation was created that security staff would be insourced as permanent staff members with all benefits that are linked to their salary grade. However, the offer made to them on 29 June 2016 was not with full benefits, and the salary was at an hourly rate, similar to their remuneration from their previous employer. According to security staff, they signed permanent offers of employment under duress on 29 June 2016 with the understanding that they would be permanent staff members and that their pay rate and job grading would be in place by 25 July 2016.

Following the 25 July and 25 August 2016 pay runs, several challenges came to light:

- There is no clarity regarding normal hours of work. Security staff are unsure of how many hours they work before they start accumulating overtime. It is important to bear in mind that the Basic Conditions of Employment Act does not permit or require an employee to work more than 45 hours in any week. It appears that security staff are expected to accumulate 208 hours as normal hours of work per month before accumulating overtime.
- During four separate meetings in the week of 8 – 12 August 2016, three different rates of pay per level were provided [ranging from R21 (grade C) and R24 (grade B) per hour to R17 (grade C) and R19 (grade B) per hour]. Overtime is paid at R17 (grade C) and R19 (grade B) per hour – which is similar to the previously outsourced rates.



## Can union shop stewards be disciplined for misconduct they committed while performing their duties as workers' representatives? [continued]

The Court concluded as follows:

*"Sound and healthy labour relations are built up by reasonableness, understanding, fairness and the ability to negotiate – not by militancy, belligerence, obstinacy and the refusal to consider a point of view other than yours."*

In **Banking Insurance Finance & Allied Workers Union & Another v Mutual & Federal Insurance Co Ltd (2006) 27 ILJ 600 (LAC)**, the Court was required to consider whether the dismissal of a shop steward was automatically unfair. The shop steward who had represented a fellow employee in disciplinary proceedings and before the CCMA had dishonestly alleged in documents and evidence before the CCMA that the chairperson of the disciplinary proceedings had unreasonably refused the employee's request for a postponement of his hearing. As a result of this dishonesty the shop steward was dismissed for misconduct.

The Court in dismissing the appeal held that *"a shop steward who represents a fellow employee at a disciplinary enquiry or arbitration hearing does so in the capacity of a fellow employee as well and as such owes the employer the duty to act honestly. An employee representing a fellow employee has the right to do so to the best of his or her ability without fear of recrimination or reprisal and this right is not an unbridled licence but is constrained by the duty to do so honestly. The record of the arbitration hearing and the disciplinary enquiry showed clearly that the shop steward did not merely have a momentary lapse of candour but that he was downright devious, unscrupulous and deceitful and the dismissal was upheld"*.

**Written by Magate Phala, who specialises in Labour Law, and writes in his own private capacity.**

SOURCE:

<https://www.cliffedekkerhofmeyr.com/en/news/publications/2016/employment/employment-alert-1-august-constitutional-court-clarifies-employment-equity-measures.html>



## harassment

(either harris-meant or huh-rass-meant) n. the act of systematic and/or continued unwanted and annoying actions of one party or a group, including threats and demands. The purposes may vary, including racial prejudice, personal malice, an attempt to force someone to quit a job or grant sexual favors, apply illegal pressure to collect a bill, or merely gain sadistic pleasure from making someone fearful or anxious. Such activities may be the basis for a lawsuit if due to discrimination based on race or sex, a violation on the statutory limitations on collection agencies, involve revenge by an ex-spouse, or be shown to be a form of blackmail ("I'll stop bothering you, if you'll go to bed with me"). The victim may file a petition for a "stay away" (restraining) order, intended to prevent contact by the offensive party. A systematic pattern of harassment by an employee against another worker may subject the employer to a lawsuit for failure to protect the worker.

## CHALLENGES IDENTIFIED IN TERMS OF INSOURCING OF SECURITY STAFF - continued

- Security staff is justifiably insisting on the full set of benefits that current permanent staff members receive, such as medical aid, pension fund and full annual leave. These benefits are not provided to insourced security staff. On what justifiable basis is the University treating these employees "less favourably" than other permanent employees?
- Furthermore, they wish to be placed at the very least on a Peromnes grade 17 with an entry level salary of R62 000 per annum (R5200 per month).
- At an urgent meeting held on 15 August 2016 between management and organised labour, management informed the unions that it would not move on the "basket available" at present for security staff, as it would affect the future financial sustainability of the NMMU.

Management confirmed that if they were forced to insource using salary grades with immediate effect, the cost would have to be offset with retrenchments. The unions then requested access to financial information, as the emphasis should be on an open, transparent and financially sustainable insourcing programme.

The end result of staff insourcing should always be the reintegration of the new staff complement into the existing one according to the same policies and procedures that apply to existing staff. Specifically, the Remuneration Policy of the NMMU should also be applied, or at the very least a clear, transparent process outlined for how the security staff's benefits will be harmonised over an agreed upon timeline.

By failing to implement a fair process regarding the reintegration of security staff, the University is at risk of further dispute, legal or strike action by security staff. Considering that Fedics Catering staff were insourced with full benefits and placed on Peromnes job grades, the inconsistency with regard to the insourcing of security staff is morally wrong and betrays the values of Ubuntu and Integrity that the university claims to uphold. Additionally, the NMMU is in breach of its own Remuneration policy which outlines the grade levels at which staff may be employed. By employing security staff outside of any defined grade within this policy, is, in our view, an automatic unfair labour practice.

NTEU is concerned by the threat of imminent retrenchments to offset costs should the University be forced to remunerate security staff in terms of existing policies, without having had the opportunity to access the financial status of NMMU. The Labour Relations Act, section 189 unambiguously states that *"when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult..."*. By already raising the possibility of retrenchments means that the university has started contemplating this need and yet has not issued any notice thereof to representative trade unions. We can therefore only assume that this is strong-arm tactics by management and we do not appreciate this sort of engagements. If there is insufficient funding for security insourcing, what about cleaning services?

NTEU is asking that if Council intervenes to ensure the fair and proper reintegration of security staff into the University. NTEU commends the decision to insource for social justice reasons and our national structures have given support for this, however the implementation process seems to suggest that NMMU is now looking for a way out and still save face at the same time.

NTEU as the majority union at NMMU has always taken a responsible and conciliatory approach and wishes to be part of the solution, but we cannot play this part if NMMU is not willing to stand by its values and with integrity show us all the financial and other information requested.

It is time for the university to play open cards.

We await the Chair of Council's response.