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WHAT'S UP!

NTEU at NMMU

WE HEAR IT A LOT LATELY, BUT WHERE DID IT ORIGINATE?

New Normal is a term in business and economics that refers to financial conditions following the financial crisis of 2007-2008 and the aftermath of the 2008–2012 global recession. The term has since been used in a variety of other contexts to imply that something which was previously abnormal has become commonplace.

The term arose from the context of cautioning the belief of economists and policy makers that industrial economies would revert to their most recent means post the 2007-2008 financial crisis. The 2010 Per Jacobsson lecture delivered by the head of PIMCO, Mohamed A. El-Erian, was titled "Navigating the New Normal in Industrial Countries". In the lecture El-Erian stated that "Our use of the term was an attempt to move the discussion beyond the notion that the crisis was a mere flesh wound...instead the crisis cut to the bone. It was the inevitable result of an extraordinary, multiyear period which was anything but normal".up feeling stuck. Write out your to-do list the night before. Identify the three most important things that you must accomplish the next day and start with those first.

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Driving the audi principle through an unprotected strike: are employees partaking in an unprotected strike entitled to a hearing before dismissal?

The audi alteram partem principle has long since formed an integral part of South African law. There is an argument to be made that it goes as far back as the realms of natural justice.

However, it is not until relatively recently that the audi principle has found traction in South African employment law. Prior to this incorporation, the audi principle was utilised almost exclusively in the sphere of administrative law and was rarely found in private contracts of any nature.

In essence, the audi principle advocates the notion that a person whose rights, interests or property are to be prejudiced by a particular decision, should be given the opportunity to make representations before such a decision is finalised.

South African employment law regarding misconduct, strikes, dismissal as well as fair procedure, somewhat mirrors the standards delimited by the International Labour Organisation (ILO). Article 7, Convention 158 of the ILO sets out that unless reasonably impossible, an employer must provide an employee with an opportunity to make representations prior to a dismissal.

Section 188(1)(b) of the Labour Relations Act, No 66 of 1995 (LRA) states that a dismissal is unfair if an employer fails to adhere to fair procedure. In an attempt to provide a statutory framework for employers to follow, the South African Legislature fashioned the Code of Good Practice (Codes) which is integrated into the LRA in Schedule 8.

Item 6 of the Codes specifically deals with the correct procedure to follow when dismissing employees during an unprotected strike. Essentially, item 6 adopts a two-stage process to dismiss an employee during an unprotected strike:

It places an obligation on an employer to first contact the relevant trade unions and inform them of the action that they intend taking.

Subsequently, the employer is required to issue the unlawful strikers with a "clear and unambiguous" ultimatum, outlining the sanction that will be imposed if the ultimatum is not complied with. In addition, employees should be given reasonable time to consider the ultimatum before either accepting or rejecting it.

On the face of it, this two-stage approach seems to overlook the audi principle, which in turn would allow an employer to dismiss an employee without a hearing during an unprotected or unlawful strike.

The earliest and arguably the most prominent case to deal with this issue is Modise v Steve's Spar Blackheath 2000 ILJ 519 (LAC). Here the court drew a distinction between an ultimatum and the opportunity to be heard, holding that an opportunity to make representations should precede an ultimatum. The case thus confirms that even during an unprotected or unlawful strike, the audi principle must be adhered to.

The implication of this is there are now more hurdles to jump and boxes to tick before a company can move to dismantle an unprotected strike and sanction those who persist with the action.

However, it may be possible to take advantage of the oversight of the audi principle in the Codes which is only subsequently supplemented by the Steve's Spar judgment, by blurring the lines between an ultimatum and an opportunity to be heard.

After consulting with the relevant trade unions, a company may be able to provide for the opportunity to be heard in conjunction with an ultimatum. This may be done by building in a specific invitation for the striking employees to air their grievances with the company, in addition to the prescribed content of a normal ultimatum.

This amalgamated ultimatum should specifically invite the striking employees to make representations to demonstrate why their strike is in fact protected and why they should not be dismissed. By doing so, the company would have followed the requisite guidelines of the Codes as well as adhered to the precedent set out in Steve's Spar without losing valuable time.

In summation, while employees partaking in an unprotected strike are still entitled to a hearing, this entitlement should not over burden the employer.

SOURCE: http://www.labourguide.co.za/most-recent/2314-driving-the-audi-principle-through-an-unprotected-strike-are-employees-partaking-in-an-unprotected-strike-entitled-to-a-hearing-before-dismissal