

## Dirty hands will be caned at CCMA



In common law employers and employees have the obligation to treat each other fairly and within the law.

For its part, the employer is required to pay the employee the agreed remuneration by the normal pay date. The employer is also required to employ the employee in reasonable working conditions and to avoid rendering the employment circumstances intolerable. Failing this, the employee is entitled to seek legal remedy.

The employee has the obligation towards the employer to refrain from misrepresenting his/her qualifications and to carry out his/her work to the best of his/her ability. The employee is also obliged to behave in an honest and reasonable manner, to serve the interests of the employer and to refrain from rendering the employment relationship intolerable. Failing this, the employer has a right to legal remedies including discipline, dismissal and even court action.

While both parties have legal recourse against the infractions of the other they must beware of the dangers of taking such action. That is:

Legal action can be extremely expensive. Many lawyers charge high fees for representing parties at the CCMA, bargaining councils or at Labour Court.

Sometimes, legal fees are paid to attorneys or advocates for representation services at the CCMA but the arbitrator, on the day of the case, evicts the lawyer from the hearing because the case in question does not, in the discretion of the arbitrator, require a legal mind. As such arbitrator discretion does not apply to union representation more and more employers are joining employers' organisations (unions for employers) in order that they can be represented at arbitration by an employers' organisation official. The judge or arbitrator sometimes orders the losing party to pay the legal costs of the winner even if the

loser's case was a reasonable one. It appears that this practice may be carried out as a means of deterring parties from taking cases to court.

Should it be found in court, at the CCMA or at bargaining council that a party has referred a frivolous or vexatious case, that party is likely to be required to pay the legal costs of the winner. In this context, a frivolous case is one that is devoid of seriousness, sense or worth. A vexatious case is one that is brought more to cause annoyance than because it has valid grounds.

A party may also be punished for bringing a case to the CCMA with 'dirty hands'. This means that the party bringing the complaint has broken a rule or transgressed the law. For example, an employer may be accused by the employee at the CCMA of retrenching him unfairly. However, the employer may be able to show that the employee's disloyal or malicious behaviour was the cause of the financial backslide and the need to cut back on staff. This misbehaviour of the employee would then mean that he has come to the CCMA with dirty hands. This is likely to count against him/her at the arbitration.

Alternatively, where the employee claims unfair dismissal at CCMA, but is proved to have committed the misconduct for which he/she was dismissed, his/her 'dirty hands' are likely to disqualify him/her from the right to relief from the CCMA even if the employer was partly at fault. For example, in the case of SACCAWU obo Nzonza vs Balalaika Hotel (1998, 8 BALR 1030) the employee was dismissed for violence committed during a strike but the employer acted unfairly by failing to dismiss other employees who had been guilty of the same offence. However, the employee was proved to have been involved in the strike violence. The arbitrator therefore only awarded the employee partial reinstatement as the employee had come to the CCMA with "unclean hands"

In the case of Simani vs Coca Cola Furtune (2006, 10 BALR 1044) the employee was dismissed for dishonesty. The arbitrator found that the employee, well aware of his guilt, nevertheless approached the CCMA. This was unacceptable as it was not a genuine dispute. The employee came to the CCMA with dirty hands and, in addition to having his case dismissed, was ordered to pay the respondent's costs resulting from the losses that he had caused.

In the light of all the dangers discussed above employers and employees should:

Think carefully before taking legal action

Avoid making the decision to go to CCMA or court merely because they are angry

Avoid misusing the CCMA as a means of extorting money out of the other party

Ensure that they have valid reasons for the legal action they take

Gather solid proof of their allegations

Check that their own hands are clean before pointing a finger at the other party.

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**BY** *Ivan Israelstam, Chief Executive of Labour Law Management Consulting. He may be contacted on (011) 888-7944 or 0828522973 or on e-mail address: [ivan@labourlawadvice.co.za](mailto:ivan@labourlawadvice.co.za). Web Address: [www.labourlawadvice.co.za](http://www.labourlawadvice.co.za).*