

Using picketing rules and the Code on Harassment to mitigate strike-related violence

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Employers trying to tackle violence related to industrial action have traditionally reacted with court proceedings and disciplinary action once such action has taken place. Employers should consider taking more proactive steps, including agreeing picketing rules incorporating the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace.



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Violence and unlawful conduct in the context of industrial action is a reality in South Africa. Increasingly, there appears to be nowhere for employers to turn as they seek to manage violent industrial action.

As South Africa reels from the economic and human cost of the protracted Transnet strike that ended in mid-October 2022, we discuss whether employers can rely on the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (Code) in managing strike-related misconduct and, in particular, engagements with trade unions in seeking to quell such conduct.

Various trade unions have welcomed the introduction of the Code and have expressed their commitment to its objectives. Industrial action in South Africa, however, continues to be characterised by intimidation and violence by union members. It is often instigated by trade union leadership or, at least, not actively discouraged. Support for, or apathy towards, violent and unlawful conduct by trade union members is irreconcilable with the stated objective of the Code to eliminate all forms of harassment in the workplace and in any activity linked to, or arising out, of work.

The Code, issued in terms of the Employment Equity Act (EEA), requires employers to take steps to prevent and eliminate harassment. It describes harassment as unwanted conduct which impairs dignity and creates a hostile or intimidating work environment for one or more employees or is calculated to, or has the effect of, inducing submission by actual or threatened adverse consequences and is related to one or more of the grounds in respect of which discrimination is prohibited.

Throwing stones, carrying dangerous weapons, blocking workplace entrances, making death threats to management or members of rival trade union members and any threats to or intimidation of non-striking employees from attending to normal business operations could all fall into this category, which is wider than the Code's predecessor (that only dealt with sexual harassment). Even strike-related conduct that does not amount to 'physical harassment' as described in the Code could still be regarded as bullying, mobbing or 'intimidation', which is described as "intentional behaviour that would cause a person of ordinary sensibilities to fear injury or harm".

The Code does not place obligations on trade unions that are enforceable under the Code or the EEA but it does accept that trade union representatives could be the perpetrators (or victims) of harassment. It tries to encourage trade union involvement by acknowledging that:

- trade unions are obligated to refrain from committing harassment;
- trade unions have a role to play in contributing to a working environment in which harassment is unacceptable, by ensuring that standards of conduct do not cause offence and by discouraging unacceptable behaviour;
- trade unions should, with employers if appropriate, implement awareness training initiatives to educate employees and shop stewards at all levels about harassment. Compliance should be reinforced and maintained through ongoing awareness programmes.

Employers will typically react to strike-related unlawful conduct using legal mechanisms such as interdicts and contempt of court proceedings. These only become available once strike-related violence (or the conduct that amounts to harassment) is an imminent threat or has already erupted. Employers will also take disciplinary action against employees identified as perpetrators of strike-related misconduct, in compliance with the obligations under the Labour Relations Act (LRA).

When the violent conduct is or could amount to harassment, such reactive steps may not, however, go far enough, given the Code's emphasis on preventing and eliminating harassment in the workplace. It could now be necessary for employers to consider what further and proactive steps they may take to comply with this obligation.

The most obvious is to place more stringent obligations on trade unions in anticipation of protected strike action. No picket in support of a protected strike (or in opposition to a protected lockout) may take place without picketing rules:

- containing a collective agreement binding on the trade union; or
- agreed between the employer and trade union as parties to the dispute; or
- determined by the commissioner conciliating the dispute.

If picketing rules cannot be agreed, and must be established, the Commissioner must take account of any relevant code of practice. Consequently, the Code cannot be avoided.

Employers should, when seeking to agree picketing rules or at the time they are established, seek to impose obligations on the trade union (and/or picketers):

- not to commit any conduct that would amount to harassment under the Code;
- acknowledging that any harassment is unacceptable;
- to supply convenors or marshals trained in accordance with the Code and any policy of the employer implemented in compliance with the Code;
- to disseminate with the picketing rules any policy of the employer in compliance of the Code and assist any picketer to understand their obligations under that policy;
- requiring convenors or marshals to immediately report any consultation process or subsequent steps taken to address a complaint and eliminate harassment in compliance with the Code and the EEA;
- accepting that any conduct contravening these obligations constitutes a material breach of the picketing rules, justifying a complete suspension of the picket.

The inclusion of such obligations will never stop harassment from taking place in the context of a strike. Including such obligations will, however, demonstrate an employer's commitment to compliance with the Code and hold trade unions (at least in writing) to their commitments towards eliminating harassment. Apart from potentially helping to obtain an order suspending the picket, such rules may also act as a greater deterrent to trade union-led or supported harassment and, hopefully, a greater culture of accountability by union officials leading or facilitating pickets.

Of course, while accepting that strike-related violence may amount to harassment under the Code, employers also need to accept that (together with managing the aftermath of work stoppages) there will also be a requirement to comply fully with the obligations under the Code in respect of any complaint of harassment. A failure to take adequate steps if a complaint of harassment is brought to its attention may still result in an employer being held vicariously liable for such harassment under the EEA.

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