



Cont@ct Labour
(Pty) Ltd

LABOUR NEWS

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The Grey Zone of Labour Law: Where
Employers Think They're Safe (But aren't):

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INTRODUCTION – THE HIDDEN RISK

Did you know that many CCMA disputes are not lost because employers acted unlawfully, but because they acted informally or too late?

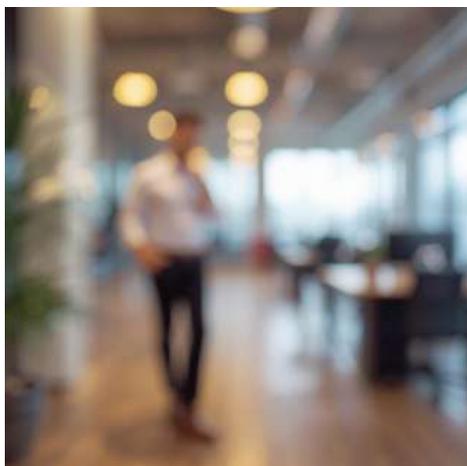
EVERYDAY WORKPLACE DECISIONS OFTEN FEEL HARMLESS AT THE TIME:

- ✓ *A Verbal warning instead of a written one,*
- ✓ *A temporary contract rolled over “just one more time,”*
- ✓ *or A manager making a judgment call without documenting it.*

THESE ARE THE GREY AREAS OF LABOUR LAW.

They aren't always outright illegal, but they quietly expose businesses to serious legal risk.

This month, we explore where these grey zones exist, why they matter, and how employers can protect themselves while still running a fair and efficient workplace.



WHY THE GREY ZONE MATTERS:

Many employers assume that if a decision isn't explicitly unlawful, it must be safe. Under South African labour law, however, fairness, consistency, and proper procedure carry far more weight than intention.

UNDERSTANDING THE GREY ZONE IS ESSENTIAL BECAUSE IT DIRECTLY IMPACTS:

Risk Management: Reduces the likelihood of CCMA disputes and adverse awards.

Employee Trust: Transparent and consistent processes build credibility and morale.

Operational Clarity: Prevents uncertainty about acceptable conduct and consequences.

Legal Compliance: In many cases, how a decision is made matters more than what decision is made.



COMMON GREY-ZONE PITFALLS EMPLOYERS OVERLOOK

1. INFORMAL DISCIPLINE

Managers often address misconduct or performance issues through verbal warnings, WhatsApp messages, or informal discussions. While well-intentioned, this creates significant risk.

Without formal documentation, there is no proof that:
the employee was warned, expectations were clarified, or an opportunity to improve was given.

At the CCMA, informal communication is often viewed as procedurally inadequate. Employers should ensure that all disciplinary steps are properly documented, clearly communicated, and securely stored to demonstrate fairness.

2. INCONSISTENT ENFORCEMENT

When similar misconduct is treated differently by different managers, it creates a perception of unfairness and favouritism.

For example, if one employee receives a warning for absenteeism while another is ignored for the same behaviour, the employer may later be seen as having condoned the misconduct. Inconsistency is a common basis for CCMA findings of unfair labour practice or unfair dismissal.

CONSISTENCY REQUIRES:

- ✓ Trained managers,
- ✓ Reference to precedent,
- ✓ and HR guidance when uncertainty arises.





3. ROLLING TEMPORARY CONTRACTS:

Employees on fixed-term contracts who are treated like permanent staff without clear, lawful justifications may later claim permanent employment rights under the Labour Relations Act (LRA).

As discussed in last month's newsletter, informal extensions or misclassification of fixed-term contracts can result in employees being deemed permanent, with full statutory protections.

4. DELAYED ACTION AND CONDONATION:

Waiting weeks or months to address misconduct can be interpreted as condonation, meaning the employer is seen as having accepted the behaviour.

THE CCMA ASSESSES:

When the employer became aware of the misconduct, how long it took to act, whether similar cases were handled more promptly, and whether the employee continued working as normal. Once condonation is established, it becomes extremely difficult to justify disciplinary action later, especially dismissal.





EXAMPLE 1: CASH HANDLING IRREGULARITIES

An employee is found short of cash in January. Management discusses it informally but takes no action. In April, the employee is disciplined for similar shortages.

➔ The CCMA may find that the January misconduct was condoned.

EXAMPLE 2: ABSENTEEISM.

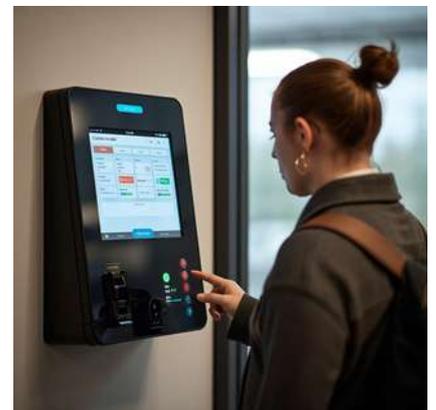
An employee arrives late repeatedly over several months with no written warnings. Six months later, they are dismissed for habitual lateness.

➔ The dismissal is likely to be found procedurally and substantively unfair.

EXAMPLE 3: INVESTIGATION DELAYS.

An investigation drags on for months with no justification, while the employee remains on full duties.

➔ The CCMA may view this as unreasonable delay and implied acceptance.



5. MANAGER DISCRETION WITHOUT TRAINING

Managers act as representatives of the employer. When they lack training in: Company disciplinary policies, the Labour Relations Act, and the Code of Good Practice: Dismissal, their decisions can unintentionally violate employees' rights. At the CCMA, managerial ignorance is not a defence the employer remains liable.

UNTRAINED DISCRETION OFTEN LEADS TO:

- ✓ Inconsistent sanctions,
- ✓ Skipped procedures,
- ✓ Poor documentation,
- ✓ Allegations of bias or discrimination.

INDEPENDENT CONTRACTORS:

- ✓ A Common Grey-Zone Trap
- ✓ Many employers believe that signing a “Contract for Services”
- ✓ Automatically excludes a worker from the LRA. This is incorrect.
- ✓ South African law looks at the reality of the relationship, not the title of the contract.

IF A PERSON:

- ✓ Works under your supervision,
- ✓ Uses your tools or equipment,
- ✓ Or is economically dependent on your business,
- ✓ They are likely to be deemed an employee, regardless of what the contract says.
- ✓ “I Didn’t Know That...”

Many employers don't realise that by failing to act against a rule violation, they may unintentionally create a new implied rule.



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If a practice is allowed to continue for months without objection, the law may interpret silence as acquiescence.

A "dead" rule cannot be enforced without first formally notifying employees that the rule is being reinstated.



DID YOU KNOW?

THE CONSISTENCY TRAP:

You can lose a CCMA case for dismissing an employee if another employee previously received a lighter sanction for the same offence.

The Polygraph Myth: A failed polygraph test alone is not sufficient grounds for dismissal it must be supported by additional evidence.



HOW TO STAY OUT OF THE GREY ZONE

HOW TO STAY OUT OF THE GREY ZONE:

- ✓ Keep Policies Clear and Updated.
- ✓ Apply Rules Consistently Across the Business
- ✓ Document All Disciplinary and Performance Actions
- ✓ Train Managers on Fair Procedure and Labour Law Basics
- ✓ Act Promptly When Issues Arise.

Before taking action, ask:
“Would this decision withstand scrutiny at the CCMA?”

CONCLUSION FROM RISK TO CONFIDENCE

Grey-zone decisions are the silent risks employers most often underestimate. Small missteps can create major legal exposure if left unchecked.

By training managers, documenting decisions, enforcing policies consistently, and acting promptly, employers can confidently navigate these grey areas.

It's not about avoiding difficult decisions.
it's about making difficult decisions the right way.

ACTION ITEM

1. Conduct a Grey-Zone Risk Audit within the next 30 days and review:
 2. Informal disciplinary practices
 3. Fixed term and temporary contracts
 4. Manager discretion and training gaps

Yours Sincerely,
Chanelle Vosloo
Labour Relations & HR Consultant



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Want guidance on drafting compliant contracts? Need help avoiding Labour disputes?

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Our Strategic Partnership



Cont@ct Labour (Pty) Ltd

Superstitions Out Strategy In

- Date: 13 February
- Time: 9:00-13:00
- Venue: Randpark Golf Club, Setperk road, Randpark, Randburg, 2194

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Riana helps CEOs and business owners grow their businesses through peer networking, strategic guidance, and proven leadership frameworks.

TAB equips leaders with the tools and insights they need to build high-performing teams, create aligned strategies, and future-proof their organisations.

Join us for this exclusive opportunity to learn from Riana and connect with other like-minded business leaders- don't miss out!