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Should you need any further information on these topics please contact us at info@hrtorque.co.za.

1. Understanding derivative misconduct

Author: Lungile Mkhize

In the modern workplace, ethics and legal responsibilities are paramount, yet derivative misconduct remains a concept that is often misunderstood. Effectively addressing derivative misconduct is essential for both employers and employees to maintain a fair and compliant work environment.

What is derivative misconduct?

Derivative misconduct refers to a situation in which an employee becomes aware of wrongdoing or misconduct directed towards their employer but fails to report it. This concept is commonly discussed in the context of labour law, particularly during strikes or protests, where violations of picketing rules occur. In such cases, an employer may seek to take action against employees who, despite having knowledge of the rule breaches, failed to disclose the misconduct or take appropriate action.

To better understand derivative misconduct, consider the following examples:

1. **Strikes and picketing violations:** During a labour strike, employees may observe colleagues violating picketing rules (such as blocking entrances or harassing non-striking employees). If an employee sees these violations and fails to report them, they could be considered guilty of derivative misconduct, as they did not take appropriate steps to address or report the wrongdoing.
2. **Workplace safety violations:** If an employee is aware of unsafe practices in the workplace – such as failure to follow safety protocols or the use of hazardous equipment – but doesn't report the issue, this inaction could be considered derivative misconduct. In this case, the employee is complicit in failing to address the hazard, even if they did not directly cause it.

3. **Harassment and discrimination:** Employees who witness instances of harassment or discrimination but do not report these issues to management or human resources are engaging in derivative misconduct. Their failure to act or disclose the misconduct could contribute to the continuation of the inappropriate behaviour.

Derivative misconduct and strikes: A case study

To better understand how derivative misconduct operates in a strike context, consider a recent case where employees participated in a strike organised by the union AMITU. Although there was no direct evidence linking the striking employees to violent acts, such as firebombing trucks or attacking vehicles, there was a pervasive atmosphere of intimidation and threats associated with the strike. This included the use of weapons like sjamboks, golf clubs, and sticks, as well as threatening social media posts by some of the strikers.

Even though the employees did not directly commit these violent acts, the broader context of violence tied to the strike could be seen as derivative misconduct. For example, strikers, including key figures, encouraged violence against non-strikers and replacement workers. One of the employees posted a message on social media threatening further harm to non-strikers and their families. These actions, while not directly linked to the employees participating in the strike, created a hostile and unsafe environment. In this context, derivative misconduct refers to the employees' failure to dissociate themselves from the unlawful and intimidating actions of others involved in the strike. If they were aware of the violence and threats occurring during the strike and did not take action to stop or report it, they could be considered complicit in these actions. This situation highlights the complexities of derivative misconduct, where an employee's failure to report or oppose misconduct can result in accountability, even when they did not directly commit the wrongful act.

Legal framework for derivative misconduct

Derivative misconduct is rooted in the principle that employees may be held accountable for their failure to act in situations where they know or reasonably should know about misconduct. In the case of *Chauke and Others v Lee Service Centre CC*, the Labour Appeal Court introduced the concept of derivative misconduct, emphasising that employees could be found guilty if they failed to assist in identifying the perpetrators of misconduct. This failure to act breaches the trust and confidence inherent in the employer-employee relationship, even if the employees were not directly involved in the original misconduct.

Furthermore, the *Western Platinum Refinery Ltd v Hlebel* case emphasised that an employer must prove actual knowledge of the misconduct, not simply the possibility that employees could have known about it. The Constitutional Court in *NUMSA obo Nganezi v Dunlop Mixing Technical Services (Pty) Ltd* further clarified that employees do not have a fiduciary duty to report the misconduct of others unless there is a clear reciprocal obligation from the employer, such as guarantees for the safety of the reporting employee.

Application to strikes and picketing

In the case involving the AMITU strike, while the employer attempted to charge employees with derivative misconduct, the court found that there was insufficient evidence to establish that the employees had actual knowledge of the perpetrators of the violence and misconduct. The employer had not proven that the employees were complicit in the violent acts, nor did it show that the employees could have helped identify the perpetrators. The court also noted that the employer had the means to obtain information without relying on the employees' cooperation.

The employer's failure to provide safety guarantees for employees who might have been willing to report misconduct further weakened the case. This highlights the importance of employers fulfilling their

reciprocal duty of good faith, which includes providing safeguards for employees who report wrongdoing.

Mitigating risks of derivative misconduct

To mitigate the risks of derivative misconduct, employers should implement several strategies:

- **Clear reporting channels:** Ensure that employees have clear, confidential, and accessible ways to report misconduct. An anonymous reporting system can also help employees feel more comfortable coming forward with information.
- **Training and education:** Provide regular training on ethical behaviour, legal responsibilities, and the importance of reporting misconduct. Employees should be made aware of the consequences of failing to report known violations.
- **Zero tolerance policies:** Establish and enforce a zero tolerance policy for any form of misconduct, including derivative misconduct. Clearly define what constitutes derivative misconduct and ensure employees understand their obligation to act.
- **Supportive environment:** Cultivate a supportive environment where employees feel safe to report issues without fear of retaliation. Employers should be transparent about how reported information will be handled and the steps taken to investigate and resolve concerns.

By incorporating these strategies, employers can promote a culture of transparency and ethical behaviour, reducing the risk of derivative misconduct and fostering a safer and more compliant workplace.

Should you need assistance in establishing derivative misconduct policies for your employees, we are here to help. Contact us on info@hrtorque.co.za for more information.

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2. Dating in the workplace: An HR conversation worth having

Author: Candice Zulu

As work environments become more collaborative and time-intensive, it is natural for personal relationships to develop, including romantic ones. But when workplace dating isn't handled thoughtfully, it can lead to uncomfortable dynamics, team disruption, or even legal concerns.

This presents an ideal opportunity for organisations to reflect on their HR policies and support structures.

Why it matters

Workplace relationships can influence more than just the individuals involved – they impact team cohesion, productivity, and workplace morale. Without proper boundaries or guidance, things can quickly become complicated.

Here are a few considerations every employer and employee should keep in mind:

1. **Professional boundaries:** Even when a relationship begins with good intentions, it is important to keep things professional during work hours. Avoid public displays of affection or sharing personal disputes in the office.

2. **Power dynamics:** If one person is in a supervisory or leadership position, the relationship may lead to perceptions of favouritism or pressure, whether real or assumed. These scenarios can create HR and compliance risks if not addressed early.
3. **Impact on teams:** Romantic relationships can sometimes lead to divisions, discomfort, or gossip in the workplace. Team members may take sides or feel excluded, which affects collaboration and trust.
4. **The 'what-ifs':** If the relationship ends, both individuals still need to work professionally alongside one another. Without a clear plan or support, this can create long-term tension and productivity issues.

A chance to get ahead

Rather than waiting for issues to arise, employers should take a proactive stance by:

- Reviewing or creating a **workplace relationship policy**
- Outlining **disclosure processes** when reporting lines or potential conflicts exist
- Reaffirming expected standards of **professional conduct**
- Providing access to **confidential HR support** when needed

Do you need assistance setting boundaries and updating your HR policies? At HRTorQue, we guide organisations through sensitive people matters, by offering practical policy development, manager training, and hands-on HR support.

[Reach out to our team today](#) to ensure your workplace is both legally compliant and emotionally intelligent.

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3. The tax treatment of tips for recipients and employers

Author: Dave Beattie

The tax treatment of tips paid by patrons to waitrons was clarified in the SARS Interpretation Note 76 (26 February 2014). This Interpretation Note is incredibly comprehensive – for your convenience, here are the pertinent points that you need to know.

It is imperative that the facts and circumstances of the tipping arrangement be considered before deciding what the tax position is for the employer and the waitron. The reason for this is because the arrangement will determine who is beneficially entitled to the tips and whether the employer is acting as a conduit for the tips or a receiver in their own right. In the conduit approach, the employer collects tips from patrons and then distributes them to the waitrons. This can take the form of tip payments that are specifically due to them as individuals, or according to a pre-agreed formula where the gross tips are divided between waitrons and other restaurant staff. Alternatively, the employer may not act as a conduit. The tips may be received by the employer personally, with full authority to decide on the portion of the tipping pool which will be distributed to employees and the amount that a particular employee will receive. The employer may also agree in advance that employees will receive a higher hourly wage rate and that all tips will accrue to the employer.

In the case where the employer acts as a conduit they have no controlling authority in relation to the payment of or the amount of the tip, and there is no responsibility or obligation on the employer to manage the tip in the best interests of the recipients. The owner is merely holding the funds for the recipient and performing a distribution role for the patron. Accordingly, in these circumstances the

employer would not constitute an 'employer' as defined for the purposes of Employees Tax. PAYE would therefore not be deducted.

In the situation where the owner receives the tip for his own benefit and subsequently decides to pay the recipient a tip in his own capacity as employer, the position is different. When paying the recipient the tip, the employer is acting as a principle because he is acting in his own capacity and has exercised his own controlling authority in deciding firstly, to pay the recipient a tip, and secondly, in deciding on the amount of the tip. Accordingly in these circumstances the employer would constitute an 'employer' as defined for Employees Tax purposes and PAYE would need to be deducted.

It is important to note that in cases where the waitron receives a tip directly from a patron or from the employer where they are acting as a conduit for the distribution of the tips, these tips must be included in the recipient's gross income. This means that the onus is on waitrons and other restaurant employees to declare the total amount of tips received to SARS when completing their annual tax returns.

Should you have any questions in this regard please contact Dave Beattie on 031-5827410 or dave@hrforque.co.za.

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4. Fair vs unfair suspension

Author: Lungile Mkhize

The Labour Relations Act (LRA) establishes a detailed legal framework for managing the relationship between employers and employees in South Africa. A crucial provision within Item 4 of Schedule 8 mandates employers to conduct a fair and comprehensive investigation before taking disciplinary action against an employee. To support this process, employers may suspend employees while awaiting the outcome of a hearing. However, the LRA also highlights the risk of this power being abused. According to Section 186(2), an employee's suspension may be regarded as unfair if not executed appropriately, which could lead to an unfair labour practice. Here, we examine the legal intricacies of employee suspension, the obligations of employers, the protection of employee rights under the LRA, and the factors that determine whether suspension should be with or without pay.

Understanding employee suspension: Legal considerations

Employee suspension is a significant decision and must be approached carefully to avoid potential legal complications. Below are key legal considerations regarding employee suspension:

1. **Suspension must be justified:** Suspension should only occur when there are valid concerns about an employee's conduct, often involving serious allegations that warrant an investigation. Employers must have clear, reasonable grounds for suspending. For example, if an employee is suspected of theft or fraud, suspension could be warranted to maintain workplace integrity during the investigation.
2. **Written notification and clarity:** The employee must receive a written notice detailing the suspension. This ensures that the reasons for the suspension are clearly communicated and properly documented. A verbal suspension is insufficient from a legal standpoint. The written notice should specify the cause of suspension, its duration, and whether or not the suspension is paid.
3. **Minimise suspension duration:** Suspensions should be as brief as possible. Employers should aim to avoid causing unnecessary disruption to the employee's career or livelihood. Extended suspensions without valid reasons may be deemed unreasonable. Employers should seek to

resolve the matter swiftly to lessen the negative impact on the employee's work life and mental well-being.

4. **Challenging suspension at the CCMA:** If an employee believes the suspension is unjustified, they have the right to challenge it. The Commission for Conciliation, Mediation, and Arbitration (CCMA) serves as the platform where employees can contest unfair suspensions. Employees may argue that the suspension was unfounded or that proper procedures were not followed (for example lack of written notice, absence of clear reasons for suspension, or the suspension being overly long).

Employer obligations in suspension cases

Suspending an employee is a serious matter and must be approached with care. Employers have several responsibilities to ensure the process is fair and transparent, respecting the employee's rights. Failing to adhere to proper procedures can result in legal challenges, claims of unfair treatment, and negative effects on workplace morale. The following outlines the steps employers must take when suspending an employee:

1. **Clear and transparent communication:** Employers must give clear, written notice of the suspension to the employee, specifying the reasons, including the exact allegations. Transparent communication reduces the risk of misunderstandings and protects both parties.
2. **Fair investigation:** Before suspending an employee, employers must conduct an unbiased and thorough investigation. This includes gathering relevant facts and interviewing witnesses. A fair investigation ensures that decisions are based on evidence rather than assumptions.
3. **Clarifying pay status:** Employers should inform the employee whether they will receive pay during the suspension. If the suspension is unpaid, employers should explain why and under what circumstances this could change.
4. **Specify suspension length:** The employer must clearly state how long the suspension will last. The duration should be as brief as possible, allowing enough time for a fair investigation without unnecessary delays.
5. **Provide opportunity for employee response:** Employers should give employees a chance to respond to the allegations before finalising the suspension. This ensures that the employee has the opportunity to present their side, supporting a just and fair process.
6. **Maintain confidentiality:** Employers must maintain confidentiality throughout the suspension and investigation. Only those who need to know should be privy to sensitive information, safeguarding the integrity of the process and the employee's privacy.
7. **Limit access if necessary:** In certain instances, employers may need to restrict the employee's access to company property, systems, or confidential information during suspension. This may be necessary if there are concerns about ongoing misconduct or tampering with the investigation.
8. **Post-suspension follow-up:** Once the suspension is over, employers should provide the employee with clear instructions on the next steps, including when and how the disciplinary hearing will take place. This helps the employee understand what to expect and ensures the process moves forward smoothly.

Consequences of failing to meet employer responsibilities

1. **Unfair suspension claims:** If an employer does not follow the correct procedures or provide sufficient justification, the employee may claim the suspension was unfair. This could result in disputes or accusations of wrongful treatment.

2. **Legal repercussions:** Improper suspension practices may lead to legal actions, including claims of wrongful termination or discrimination. Following the correct procedures reduces the risk of facing such lawsuits.
3. **Deterioration of employee morale:** Unfairly handled suspensions can harm workplace morale. Employees who feel mistreated may lose trust in the employer, which could decrease motivation and negatively affect the overall work environment.

Paid vs. unpaid suspension

There are clear rules regarding whether an employee should be paid during a suspension. While employees are generally entitled to full pay during suspension, certain conditions allow for suspension without pay.

Paid suspension: Typically, in South Africa, employees are entitled to full pay while suspended, especially when awaiting disciplinary action. This ensures that the employee's income is protected until the matter is resolved. However, employees may voluntarily agree to waive their right to pay, in which case the suspension may be unpaid.

Unpaid suspension: In specific cases, employers may suspend an employee without pay, but this must occur under certain conditions:

1. **Employee agreement:** The employee agrees to the unpaid suspension as part of a mutual arrangement with the employer.
2. **Legal or collective agreement provisions:** Some legislation or collective agreements may permit unpaid suspension under certain conditions.
3. **Delays in the disciplinary process:** If the employee causes delays in the disciplinary process (e.g. by requesting multiple postponements), the employer may opt to suspend them without pay until the hearing occurs.

Suspending an employee should always be a carefully considered decision. By adhering to legal procedures, maintaining clear communication, and ensuring fairness, employers can minimise legal risks while protecting both the employee's rights and the integrity of the workplace.

Contact our payroll team on info@hrtorque.co.za for any pay-related queries.

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5. Your questions answered: Understanding your total package (TCOE) – what's included beyond your salary

Author: Candice Zulu

When you receive a job offer or look at your payslip, it is easy to focus only on the number next to 'net pay'. But your salary is just one part of your overall **cost to company (CTC)**, the full value of what your employer spends on you as an employee.

Understanding your total package is important when comparing job offers or budgeting your finances. This total package is often referred to as your **TCOE – Total Cost of Employment**. It reflects everything your employer spends on you as an employee, and not just your take-home salary.

Here is what's often included beyond your basic salary:

1. **Medical aid contributions:** Many companies subsidise or contribute fully to your medical aid. Even if it is deducted from your salary, it is a benefit – especially when the employer pays a portion.
2. **Retirement fund contributions:** This could be a **pension**, **provident**, or **retirement annuity fund**. Employers typically contribute a percentage of your salary towards your retirement, which helps secure your future.
3. **Group risk cover:** This can include **life insurance**, **disability**, or **critical illness cover**. These are benefits you might not notice unless something happens, but they form part of your CTC and provide vital support.
4. **Bonuses or incentives:** Performance-based bonuses or 13th cheques aren't guaranteed, but if included in your offer or contract, they are part of your total earnings.
5. **Fringe benefits:** Things like company cars, cell phone allowances, or access to wellness programmes can be considered taxable benefits and are part of your total remuneration package.
6. **Skills development and training:** Support for studies, in-house training, or attending workshops are long-term benefits that contribute to your personal and professional growth.

Knowing your **total package** helps you appreciate the full value of your employment, beyond just what is paid into your bank account. It is also useful when negotiating future roles, understanding deductions, or comparing offers.

Need help unpacking salary structures or want to guide employees through what their package really means?

[Contact us](#) to find out more about our employee onboarding sessions and salary structure workshops.

Next in the series: *How income tax works in South Africa – The basics*

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6. On the Case: A business built on lies: When loyalty becomes leverage

Author: Nicky Hardwick

In this month's edition, we explore a disciplinary hearing involving a long-serving, high-ranking employee who used his position to **solicit money from subordinates, recruit staff into a side venture, and mislead junior employees about business dealings**. The case raises serious questions around **manipulation, power imbalance, and the cost of misplaced trust**.

Background

The employee, a regional team leader with over a decade of service, was **highly regarded and deeply embedded** in the organisation. He had assisted in launching new branches (even internationally) and mentored junior staff.

But beneath the surface, he was slowly building something else - **his own business**, and using company time, resources, and staff to do it. Over time, it became clear that:

- He had encouraged at least two junior employees to leave and join him.
- He received substantial payments (over several months) from a young administrative assistant, who believed she was investing in his new business.

- He failed to declare this conflict of interest, **breaching both his contract and the company's code of conduct**.

A pattern of exploitation

The most striking part of the case involved a series of financial transfers made by the junior employee. These included:

- Repeated requests for loans, framed as temporary help until his salary or external payments came through.
- A large, lump-sum payment sold as a business investment in a new venture he called "*Ears on the Move*".
- False assurances about product purchases, profit-sharing, and future involvement.

When asked for repayment, he delivered second-hand hearing aids as "proof of investment" – devices that later turned out to belong to company clients and had little to no resale value.

The manipulation playbook

This wasn't an isolated act of bad judgment, it was a **calculated pattern**. He used his authority to gain trust and legitimacy, he preyed on emotional connection – promising loyalty and partnership, and he relied on complexity – financial jargon and vague future promises – to obscure accountability. When caught, he redirected blame, suggesting he had been given informal approval to start a business.

The hearing outcome

The disciplinary chairperson found the employee guilty on multiple charges:

- Gross misconduct and dishonesty
- Breach of company policy (offering/accepting money from staff)
- Conflict of interest (recruiting employees and soliciting investment)
- Misuse of company property (undisclosed retention of second-hand hearing aids)

The evidence showed not only policy breaches but a **fundamental breakdown of trust**, especially for someone in a leadership role. The employee was **summarily dismissed**.

Lessons for employers

1. **Charisma ≠ compliance:** Just because someone is trusted doesn't mean they are trustworthy. Long service is not a shield from scrutiny.
2. **Clear boundaries are essential:** All businesses should have clear rules around employee-to-employee loans, side businesses, and the handling of client property.
3. **Protect junior staff:** Power dynamics matter. Junior employees often feel unable to say no, even when uncomfortable. Safeguards must exist.
4. **Watch out for red flags:** Frequent cash requests, sudden new "ventures," and off-platform communication (like WhatsApp) can all signal deeper issues.
5. **Investigate properly:** This case was only uncovered after a separate suspension prompted deeper investigation. Take employee concerns seriously and follow leads thoroughly.

How we can help

We assist employers with:

- Conducting disciplinary hearings with independence and legal fairness
- Developing codes of conduct and conflict-of-interest protocols
- Training staff on workplace ethics and professional boundaries

- Auditing employee-client transactions and outside interest disclosures

Need help tightening your internal controls? Contact us at info@hrtorque.co.za.

✦ COMING NEXT in “On the Case”

Blurred lines – When casual conversations turn into a formal complaint

A senior employee lodges a sexual harassment complaint, but as the facts emerge, it becomes clear that **both parties played a role** in blurring the boundaries.

We explore how well-meaning workplace banter can slide into uncomfortable territory, and why **clear policies and early intervention** are essential.

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7. This month's highlights

Author: Candice Zulu

1. **Tax filing season** opens on the 7th July to the 20th October 2025. You can read the full SARS [article here](#).
2. **Compensation Fund (COIDA) earnings threshold increase:** On the 31st March 2025, the Department of Labour signed a Gazette Notice that states the maximum amount on which an assessment of an employee shall be calculated.
With effect from:
 - 1 March 2024 to 28 February 2025 the threshold is R597 328 per annum
 - 1 March 2025 to 28 February 2026 the threshold increase is R633 168 per annum
3. **ROE system issues:** The ROE online system will remain open until the **31st July 2025** to allow employers additional time to complete submissions due to earlier system challenges.
NB – The following documents remain compulsory and must be uploaded on the online system no later than the 31st July 2025:
 - Confirmation of Employer Registration Details form
 - A detailed payroll report reflecting employee earnings for the period 1 March 2024 to 28 February 2025
4. We know that the ins and outs of HR can sometimes feel like navigating a maze. That is why we have put together our **HR Managers' Pocket Guide**, a powerful resource designed to simplify your HR journey. [Find it here](#).
5. **Income tax number:** We can assist you with the registration of your employees for income tax purposes, managing the process from start to finish. Our consultants obtain the employee's personal information from your payroll administrator and complete the necessary applications. The turnaround time for this process is 24 hours and the cost per application is R150 plus VAT. A volume discount will be negotiated in cases where there are more than 20 applications at a time. Should you need assistance please contact Dave Beattie on 031 564 1155 or dave@hrtorque.co.za.
6. HRTorQue hosts a range of weekly, online, **HR-focused mini workshops**, assisting and guiding your managers to perform more optimally. View our list of [trainings here](#) or [email us](#) for more information.

7. For our latest recordings from our **Wednesday webinars** take a look at our [YouTube channel](#), filled with informative HR, payroll, and legislation tips and tricks. If you are not receiving our weekly invites, subscribe [here](#).

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