



## Negotiating with Unions

### Ten tactical negotiation skills

In May 2021, the Johannesburg Metropolitan Bus Service ground to a halt with drivers demanding an 18% wage increase; government and unions were way apart in their wage negotiations; and in the private sector, the national steel and engineering industry sector wage negotiations were about to start after postponement in 2020 because of Covid-19. **Collective bargaining** between unions and employers remains at the centre of their relationships. To optimise negotiation outcomes, employers must have top skills at the negotiating table. In this edition, we outline **ten tactical negotiating skills**. Plus, we unpack **meaningful work as a motivator** and look at Labour Appeal Court insights on **insubordination**. **...To Page 2**



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## Negotiating with Unions

### Ten tactical negotiating skills

In the book *Never Split the Difference* (Voss and Raz, 2016) Chris Voss, former FBI hostage negotiator, shares some of the skills he used with success in many hard negotiations where the outcomes determined whether people lived or died. Voss says that all negotiations serve two vital functions, (i) information gathering, and (ii) behaviour influencing. Negotiations include almost any interaction where each party wants something from the other side. The skills described by Voss will in the right context transfer from the hardcore hostage negotiation environment to collective bargaining where mutually satisfactory wage agreements are the desired outcome.

Here are ten tactical negotiation skills which have worked for Voss and are proven in many negotiation situations:

1. **Listen actively.** Negotiation is not a battle of arguments. You must focus intently on what the other party is saying. In the mode of genuine active listening, you make the other party feel safe. By making the negotiation about them and not us, by validating their emotions, by gaining their trust through showing that they heard and understood, you create a negotiating environment in which real conversation can take place.
2. **Slow it down.** Going too fast fosters a build-up of anxiety. The other party questions your side's sincerity and whether they are being heard. The passage of time is a powerful tool for negotiators. Slowing things down calms the negotiation down. The rhythmic back and forth between negotiating parties reflects an investment in the process of working towards agreement.
3. **Warm demeanour.** General demeanour and verbal delivery are within your control and are an effective way to influence the other party. Your demeanour signals to the other party whether you are ready to play, fight, laugh or cry. Your default demeanour should be warmth and acceptance. It will attract people to you. You may not like the other party's agenda or delivery. Mostly in collective bargaining you do not pick who represents the other side. Similarly, the default verbal tone should be positive/easy-going. If you adopt an assertive voice as your default voice, you will come across as signalling dominance over your counterpart. This will ignite push back. Rather relax and smile when it is your turn to talk.
4. **Mirroring.** This is the usually unconscious human behaviour of imitating the actions and words of those we interact with which builds comfort and rapport. The skill you must master is verbal mirroring which is the repetition of the one to three most critical words that your counterpart has just said. By doing so, you trigger the mirroring instinct, and your counterpart will inevitably elaborate on what was just said and sustain the process of connecting.
5. **Put yourself in their shoes** (or apply 'tactical empathy'). This is the skill of understanding the feelings and mindset of your counterpart in the moment and hearing what is behind those feelings. It is not about being nice or agreeing with the other side. It is about understanding their perspective and point of view.
6. **Be careful how you use the word "fair".** The behaviour of humans is significantly swayed by their sense of fair treatment. Rejecting perceived unfairness, even at substantial self-cost, is a powerful motivation. Here are two ways in which the use of "fair" can have negative consequences, and one way that is positive. Negative: something like "We just want what's fair." This is an assertion of having the moral high ground and is counterproductive. Wage negotiations usually occur in the context of a long-term relationship and it is dysfunctional to position your team as being the one who is fair and the other implicitly as unfair. A second inappropriate use of "fair" is "We've



given you a fair offer.” If you frame your position in such terms you must substantiate the fairness against credible measures or face flat disagreement. A positive and constructive use of the word “fair”, which sets the stage for honest and empathetic negotiation is a statement like, “I want you to feel like you are being treated fairly at all times. So please stop me at any time if you feel I’m being unfair, and we will address it.”

7. **Take the sting out of your negatives.** Attorneys representing alleged criminals in court routinely apply this skill in their opening arguments. They mention everything their client is accused of and all the weaknesses of their case. Immediately, the prosecution loses the opportunity to announce the negatives to the judge and imply that the defence has hidden information. In a wage negotiation, if a company has had a great sales year, or has attained market dominance (or some other collective bargaining negative) which raises employee expectations regarding the size of affordable increases, then the company negotiator should, rather than dance around these issues, include them and their implications at the start of negotiations.
8. **Labelling.** This is the skill of spotting the other party’s feelings, putting them into words and calmly and respectfully repeating their feelings back to them. By validating the other party’s feelings, you show that you identify with how the other party feels. A rule of the labelling skill is that once you have expressed a label, be quiet and listen. A label’s power is to invite the other person to reveal themselves.
9. **Ask calibrated questions.** Asking calibrated or open-ended questions that start with “How?” or “What?”, eliminate yes or no answers, and force your counterpart to apply their mental energy to solving your problems. Calibrated open-ended questions take the aggression out of a confrontational statement. They allow a negotiator to introduce ideas and requests without sounding overbearing or pushy.
10. **Anger.** Studies have shown that expressions of anger can work to a negotiator’s advantage. Anger shows passion and conviction that can help sway the other side towards your goal. Three cautions: expressions of unfelt anger (faking it) will

backfire and undermine trust between the parties; a negotiator must not be consumed by their anger as this will reduce their capacity for effective cognitive functioning; and a negotiator must avoid a personal attack and instead focus their anger on the issue.

Application of tactical negotiation skills in the absence of a well formulated end-to-end negotiation strategy will not be enough to get you to an acceptable agreement. The strategy should be signed off by the organisation executive who has the ultimate say in the team’s mandate. A carefully designed negotiation strategy can fall flat if an executive intervenes and introduces significant shifts in approach at the closing stages.

Additional success factors which create a framework for effective use of tactical negotiation skills include:

Prepare, prepare, prepare (Voss and Raz, 2016).

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*“When the pressure is on, you don’t rise to the occasion; you fall to your highest level of preparation.”*

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Chris Voss

Avoid trying to cram all your tactics into every negotiation encounter. Skilful negotiators are situationally aware and apply tactics based on the unfolding negotiation.

Consider identifying a process observer in your negotiation team. This person does not engage in the verbal exchanges. Their role is to closely watch and listen to both sides and give the team ongoing feedback during negotiations as to what tactics are being used and then provide further insights to the team during caucus breaks, or at between-round preparation sessions.

Finally, follow a 4-step implementation cycle for formal negotiation processes: **Learn • Practice • Apply • Debrief.** (i) Learn negotiating skills, learn about the market, learn about the collective bargaining environment, learn about the other team, and learn about your team. (ii) Before negotiations start, role play with your team to



develop your skills to deal with all circumstances that may arise. (iii) Apply your skills to take the negotiation to a successful conclusion. (iv) Debrief the process at each interval – at caucuses, between meetings, and after conclusion to record and reinforce learnings from the process. A **‘stop, start, continue’** analysis is useful in debriefs.

Source:

- (1) Voss, C. and Raz, T. (2016) Never Split the Difference. Negotiating as if your life depended on it. London: Penguin Random House

## Meaningful Work

### Key for motivated performance

All employers want *highly* motivated employees who consistently apply discretionary effort which translates into superior work performance to achieve organisational goals. A challenge is that, aside from short term situational actions, employees’ motivation originates from inside them. To build a workplace of sustained highly motivated work performance, organisations must provide an environment in which employees can find meaning in their work.

Extrinsic motivators have limited value in driving superior work performance. It is trite that almost everyone works for money. Money provides housing, gives children clothing and food, sends teens to college, and allows leisure activities, and eventually, retirement. To underplay the importance of money and benefits as motivation for people who work is a mistake. When an organisation has a fair remuneration regime in place, it needs to focus on other levers of motivation. (Heathfield, 2019)

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*“Nothing is really work unless you would rather be doing something else.”*

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James M. Barrie

Today, more and more employees demand much more than a good salary from their jobs. Money may lure people into jobs, but purpose, meaning,

and the prospect of interesting and valuable work determines both their tenure and how hard they will work while they are on the job. (Garrad and Chamorro-Premuzic, 2017)

Researchers have shown meaningfulness of employees’ work to be more important to employees than any other aspect of work, including opportunities for promotion, or working conditions. Meaningful work can be highly motivational, leading to improved performance, commitment, and satisfaction (Bailey and Madden, 2016).

How can an employer influence the meaningfulness of employees’ work?

A starting point is to create understanding among employees about the context of their work. All employees should know:

- The organisations’ purpose.
- Their team or department’s contribution to the organisation’s purpose?
- Their individual contribution to the organisation’s purpose?
- Who benefits from their work and how do they benefit?
- What does success look like for them and for their team?
- How are they doing in their roles?

Organisation leaders play a significant role in helping employees understand why their roles matter (Garrad and Chamorro-Premuzic, 2017). Leaders can foster employees’ sense of the meaningfulness of their work by applying in concert the following practices:

- **Be constantly curious.** Explore, ask questions, and engage people for ideas about the future. Help employees uncover a wider range of possibilities for how work gets done. Look for people to come up with new ideas to make their own experience of work more interesting.
- **Relentlessly challenge the status quo.** Leaders must remain ambitious in the face of both failure and success and push their people to remain dissatisfied with their accomplishments, thereby instilling a deeper sense of purpose in their teams and organisations.



- **Hire for values and culture fit.** People only find something valuable if it aligns with their core needs and motives. Values function like an inner compass or lens through which we assign meaning to the world. Leaders who pay attention to what each individual values are more likely to hire people who will find it easier to connect with their colleagues and the wider organisation, all of which help to promote a sense of meaning.
- **Trust people.** Most people hate being micromanaged. Overpowering and controlling bosses are a serious source of disempowerment for employees. This drains the impact from the work they do and makes them feel worthless. In contrast, trusting leaders are more likely to give them room to craft their roles and grow. Employees who customise their jobs tend to feel a much greater sense of importance and value because they feel that their leaders trust them.

#### Sources

1. Bailey, C & Madden, A. (2016) What Makes Work Meaningful or Meaningless MIT Sloan Review pp 53 – 64. Accessed 24 May 2021
2. Garrad, L. and Chamorro-Premuzic, T. (2017) How to Make Work More Meaningful for Your Team, HBR.org (Online) Available at: <https://hbr.org/2017/08/how-to-make-work-more-meaningful-for-your-team> Accessed 23 May 2021
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4. Lai, L. (2017) Motivating Employees Is Not About Carrots or Sticks. HBR.org (Online) Available at: <https://hbr.org/2017/06/motivating-employees-is-not-about-carrots-or-sticks> Accessed 30 June 2017

## Insubordination

### Serious misconduct

Every employee is under a duty to obey the employer's reasonable instructions and to behave in a respectful manner towards the employer and superiors. An employee who does not comply with these duties is insubordinate. Whether dismissal is an appropriate response by

the employer will depend on the relevant circumstances of the insubordination.

This case note is about dismissal for insubordination. A training officer, two years into a five-year fixed term employment contract was dismissed for gross insubordination. The misconduct charge was that the training officer refused to obey an instruction to attend a meeting to discuss an audit report of her performance. The training officer referred an unfair dismissal case to the CCMA. The commissioner decided that the dismissal was fair. Unhappy with that outcome, the employee took the case on review to the Labour Court. The Labour Court reversed the CCMA finding and ordered TMT to pay her salary for the balance of her fixed term contract, in effect, about three years' worth of pay. The employer appealed to the Labour Appeal Court (LAC).

The LAC set the scene for its judgement by referring to the authoritative author, John Grogan, who said that an enquiry into the gravity of insubordination must consider three aspects: the action of the employer prior to the deed, the reasonableness of the instruction, and the presence of wilfulness by the employee. The LAC noted that in this case, only the presence of wilfulness by the employee was controversial.

The material facts that gave rise to the employer's decision to dismiss the training officer were as follows. One afternoon the training officer's manager spoke by phone to the training officer. The manager gave the training officer an instruction to attend a meeting the following morning at 07h00 to discuss an audit report of the training officer's performance. A colleague of the training officer would also attend. The training officer was not comfortable with the colleague's attendance. Her manager said it was unavoidable because the colleague prepared the audit report.

The training officer claimed that no "instruction" was given because she initially heard about the meeting from her colleague, and she phoned her manager to enquire about the meeting. The LAC found that the training officer's subsequent email to her manager evidenced her understanding that an instruction was given by the manager.





In the evening following being instructed by her manager to attend the meeting, the training officer emailed her manager at about 20h40, well after working hours, in which she said:

*“As telephonically discussed today regarding the meeting that I found out about from [her colleague] late today that we will be meeting tomorrow at [head office] I am still not comfortable as indicated to you telephonically. My reasons are: (1) A proper notice was not given, please give me the proposed agenda for the meeting in order for me to prepare for the items as proposed. (2) I could be happy if you could reschedule the meeting for 3, 4 or 6 May, please choose a date that could best suit your schedule so that we can formalise the meeting, this proposal however does not mean that I am refusing the verbal meeting proposed by yourself but for the meeting to be formalised and have minutes thereafter for one to refer back to. I trust that is all in order.”*

The training officer, also at that moment, sent an SMS to her manager stating, *“...I have sent you an e-mail about tomorrow’s meeting. Please check it ...”*

The LAC noted that the SMS was vague and did not convey to the manager any urgency to read the email. The LAC also found that a person requesting a meeting postponement would expect an answer either agreeing thereto or refusing, in time to either attend or not, and in this case before setting off to work in Kempton Park or setting off to head office to the meeting.

The manager read and responded to the e-mail at 04h38 the next morning as follows:

*“This is not a counselling session or any form of disciplinary process therefor I do not need to give you a proper notice. It is an instruction from me for you to attend the meeting today at 7h00. The agenda will be to discuss your audit report where [your colleague] will explain the audit report to both of us of which thereafter I will ask [your colleague] to leave the meeting and discuss your punctuality as well as the email you have sent me. I told you telephonically yesterday about the meeting therefor saw no need to send you a meeting request. I find this email that you have sent me very disrespectful. See you at today’s meeting, 07h00 at [head office].”*

At the same time, the manager sent the training officer an SMS stating that the e-mail had been read and they would see one another at the meeting.

The training officer replied at 07h16 as follows: *“I only saw your email now I am already at Kempton Park depot [a site physically distant from the head office]. I am sorry if you find my email disrespectful but that was not my intention it was a sincere request. When we spoke telephonically yesterday you only informed me the meeting would be about the audit not my punctuality. Can we please arrange another day rather than this one?”*

The manager then phoned the training officer and an argument ensued. The training officer insisted on a formalised arrangement with written notice and an agenda as a condition for meeting to discuss the audit. Ultimately the meeting was rescheduled and held. The company also initiated a disciplinary hearing against the training officer on charges of gross insubordination.

Based on this chronology of facts the LAC found as follows:

In the absence of being released from the meeting, the training officer ought to have gone to it, not gone to Kempton Park. Having communicated a request for a postponement late in the evening prior to the meeting, it is inexplicable why the training officer did not react to the message that she must have been waiting for and which was sent by the manager at 04h38, well in time to alert her to come to the meeting and not go to her desk. The training officer claimed her cell battery ran down and she could not communicate with anyone before reaching her desk in Kempton Park at 07h00. The LAC said this behaviour was not in good faith. It was implausible that the training officer would not have been keen to get an answer and it would have been highly unlikely that she would have allowed the chosen means of communication through which she awaited an answer, to become inoperable. The inference to draw was that she contrived to procure a postponement by presenting the employer with a *fait accompli*. This is the true essence of the case.

In addition, the LAC found that:



The mere repetition of an instruction does not affect the true issue which is the giving of an instruction and its defiance.

“Persistence” is relevant to determining whether the employee indeed has defied the employer and not merely neglected to carry out instructions. It is thus an evidential tool to test a conclusion. The idea of “persistence” should not be allowed to slide into the basket of Labour Law myths which include the idea that an employee must be warned three times before disciplinary action can be taken. “Persistence” means an absence of capitulation to the employers will, not exclusively a reference to repeated refusals.

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*“Defiance of authority can be proven by a single act of defiance. There is no necessity for high drama and physical posturing to be present.”*

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Labour Appeal Court

Defiance of authority can be proven by a single act of defiance. There is no necessity for high drama and physical posturing to be present. The employer prerogative to command its subordinates is the principle that is protected by the class of misconduct labelled “insubordination” and addresses operational requirements of the organisation that ensure that managerial paralysis does not occur.

The conclusion that the LAC drew from these findings was that the arbitrator was correct. The training officer was insubordinate. In relation to severity of the misconduct and the appropriate sanction the LAC found that the evidence demonstrated a contrived, and indeed devious manipulation by the training officer to achieve a deferment of the meeting. It involved the defiance of an express direct and unequivocal instruction. The employer/employee relationship dynamic is premised on instructions being obeyed. It is intolerable that an employer is forced to negotiate day to day organisational arrangements with employees. The effect of the refusal was to undermine the working relationship with the manager whose trust she forfeited.

The LAC considered that the episode of defiance was an isolated event. The defiance seemed to have been triggered by apprehension rather than malice. The notice period to meet was a mere matter of hours and although not unreasonable in the circumstances, it plainly unsettled the training officer. Indications were that the training officer’s motives were self-preservation rather than a conscious desire to disrupt the orderly running of the business.

The LAC noted that these factors needed to be weighed together with the aggravating features of her conduct referred to above and concluded that the weighing of the manipulative dimension of the conduct was appropriate in the circumstances.

In considering the Labour Court’s decision to overturn the CCMA commissioner’s award that dismissal was fair, the LAC found that the Labour Court conflated an appeal with a review. The rationale of the commissioner’s award was that the deliberate manipulation of the situation by the training officer and the defiance of managerial authority was the dominant factor, and thus dismissal was appropriate.

The LAC upheld the employer’s appeal.

#### Case

TMT Services and Supplies (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (JA32/2017) [2018] ZALAC 36; (2019) 40 ILJ 150 (LAC); [2019] 2 BLLR 142 (LAC) (17 October 2018)

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