

EMPLOYMENT ALERT

IN THIS ISSUE

TOO DEPRESSED TO ATTEND AN ENQUIRY? HOW TO DEAL WITH BOGUS MEDICAL CERTIFICATES

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POLITICAL INSIGNIA HAS NO PLACE IN THE WORKPLACE

Unless an employer is a political organisation or has an interest in a specific political party, employers generally have a duty to create and maintain a politically neutral work environment. This does not mean that employees are prohibited from joining political parties or participating in political activities in their private time as this goes to the heart of freedom of association.

TOO DEPRESSED TO ATTEND AN ENQUIRY? HOW TO DEAL WITH BOGUS MEDICAL CERTIFICATES

While there are genuine cases of depression and the employer should be sympathetic to such cases, there are some employees who abuse medical certificates.

As a starting point, where the employer suspects foul play, the employer is entitled to contact the health practitioner.



It often happens that employees charged with serious misconduct produce sick notes from a doctor or psychologist claiming to be suffering from depression in order to seek a postponement of their disciplinary enquiry.

Such certificates often provide the standard wording that the employee is "unfit to attend work" and there is no indication given as to whether the employee can attend their disciplinary enquiry.

While there are genuine cases of depression and the employer should be sympathetic to such cases, there are some employees who abuse medical certificates.

Typically, this category of employees are on paid suspension and request a series of postponements on the basis of their sick notes until some indefinite time in the future thus, delaying the disciplinary enquiry at the employer's expense.

Employers are not without a remedy and there are some useful approaches when dealing with sick notes indicating "depression" that will help separate the wheat from the chaff.

Medical certificates should not be treated by the employer as a "magical document" that results in the postponement of a disciplinary enquiry.

As a starting point, where the employer suspects foul play, the employer is entitled to contact the health practitioner to enquire whether the practitioner did indeed issue a certificate and whether the practitioner consulted the patient.

The employer should further be guided by the Ethical and Professional Rules of the Medical and Dental Professions Board of the Health Professions Council of South Africa with respect to medical certificates. *This has been dealt with in our previous alert.*

An employer is also entitled to reject the certificate unless the doctor personally testifies at the disciplinary enquiry confirming their diagnosis. In the absence of such evidence, the chairperson of the enquiry is entitled to reject the medical certificate on the grounds that it constitutes hearsay evidence.

In Mgobhozi v Naidoo NO & others [2006] 3 BLLR 242 (LAC) the Labour Appeal Court confirmed that medical certificates without supporting evidence from doctors may amount to hearsay and the Courts should be especially vigilant to prevent abuse.

The issue of doctor patient confidentiality does not arise where the employee calls the doctor to testify as the employee is entitled to waive doctor patient confidentiality.

The doctor ought to be called by the employee to testify in person about amongst other things, their diagnosis, how such diagnosis was arrived at, whether this was a sudden onset or single episode, whether they have performed any tests on the employee to test their cognitive impairment and what was the employee's scoring on such tests.

TOO DEPRESSED TO ATTEND AN ENQUIRY? HOW TO DEAL WITH BOGUS MEDICAL CERTIFICATES

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The Employer is also entitled to request that the Employee subject themselves to an independent assessment by their own doctor or psychologist who may then testify as to their opinion of the diagnosis.



The Mini-Mental State Examination (MME) or Folstein test and the Montreal Cognitive Assessment (MoCA) are examples of widely used screening assessments for detecting cognitive impairment.

The MME is an 11-question measure that tests five areas of cognitive function: orientation, registration, attention and calculation, recall, and language. The maximum score is 30. A score of 23 or lower is indicative of cognitive impairment. The MMSE takes only 5-10 minutes to administer.

The MoCA test can be used to evaluate attention, concentration, and working memory.

The idea behind such questions is to elicit as much information as possible regarding the capacity of the employee to testify and give instructions to their representative to assess their capacity to participate in their disciplinary enquiry.

It is for this particular reason that a recommendation in a certificate which indicates that the employee is unfit to attend work is not sufficient. The employee is on suspension and is not "working" during the course of the disciplinary hearing. As stated above, they are simply required to either testify or provide instructions to their representative.

The Employer is also entitled to request that the Employee subject themselves to an independent assessment by their own doctor or psychologist who may then testify as to their opinion of the diagnosis.

It may be prudent where employees request postponements of their disciplinary enquiry on the basis of an illness, to obtain the assistance of a labour expert in ensuring the procedural and substantive fairness of refusing a postponement and proceeding with the hearing in the employee's absence.

Hugo Pienaar and Prinoleen Naidoo



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POLITICAL INSIGNIA HAS NO PLACE IN THE WORKPLACE

The employee, who was also a shop steward, was disciplined and dismissed for taking a photograph at the workplace of him wearing a t-shirt of a certain political party.

The Commissioner acknowledged that there is still a level of political intolerance in South Africa and stated that if such is not properly controlled in the workplace, it could lead to unnecessary tension.



Unless an employer is a political organisation or has an interest in a specific political party, employers generally have a duty to create and maintain a politically neutral work environment. This does not mean that employees are prohibited from joining political parties or participating in political activities in their private time as this goes to the heart of freedom of association.

The National Bargaining Council for the Chemical Industry (NBCCI) has confirmed this view in a recent arbitration award in the *NUMSA obo Kwena Masha and PFG Building Glass* case. The brief facts are that the employee, who was also a shop steward, was disciplined and dismissed for taking a photograph at the workplace of him wearing a t-shirt of a certain political party, and thereafter posting this photograph on Facebook thereby associating the employer with his political aspirations. Upon his dismissal, the employee referred an unfair dismissal dispute to the NBCCI and alleged, amongst other things, that the employer's policy against wearing political insignia infringed his freedom of association.

The employer argued that it had a rule against the wearing of political clothing in the workplace because it was not affiliated to any political party and did not want to create the impression that it was tolerant of any particular political party. It was common cause that the employee was aware of the policy against wearing political clothing in the workplace as this was communicated to him directly and was also placed on notice boards and was available on the employer's intranet.

In deciding whether the dismissal was substantively fair, the Commissioner found that the policy prohibiting the taking of photographs in the workplace was reasonable as it was intended to protect

the employer's trade secrets in the form of unique designs and equipment. The Commissioner found that at no time prior to being charged did the employee remove the contentious pictures on Facebook despite him being aware of the workplace rule.

The photograph was in the public domain and accessible to the employer's clients, which although indirectly, could have possible impact on the employer's business in a form of decreased orders. The Commissioner found that because the employee had also posted another picture on Facebook of him attending a political rally for the same political party and displaying a banner that the ruling party should fall, it was clear that this constituted participation in political activity. Such conduct could objectively have a negative impact on the employer's reputation.

The Commissioner acknowledged that there is still a level of political intolerance in South Africa and stated that if such is not properly controlled in the workplace, it could lead to unnecessary tension. Further, the Commissioner found that given the position of influence the employee enjoyed as a shop steward, he should have known better and acted with caution. On this basis, the Commissioner found that the sanction of dismissal was appropriate also taking into account the seriousness of the misconduct.

POLITICAL INSIGNIA HAS NO PLACE IN THE WORKPLACE

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Should an employer decide to introduce a rule against political insignia in the workplace, such rule must be applied consistently through all levels of management.



The arbitration award confirms that while employees have the right to freedom of association, that right is not absolute and may be limited provided that it is for the greater good. Wearing political clothing does not only have the potential to cause tension in the workplace but also impacts cohesion and constructive interaction which should take place between employees amongst themselves and the employer. An employer is therefore well within its rights to take reasonable steps to mitigate this.

Should an employer decide to introduce a rule against political insignia in the workplace, such rule must be applied consistently through all levels of management. This would alleviate the argument that management supports a particular political party or organisation. It will also assist to discourage claims of unfair treatment against the employer in future.

Fiona Leppan, Bheki Nhlapho and Cyprian Mthembu

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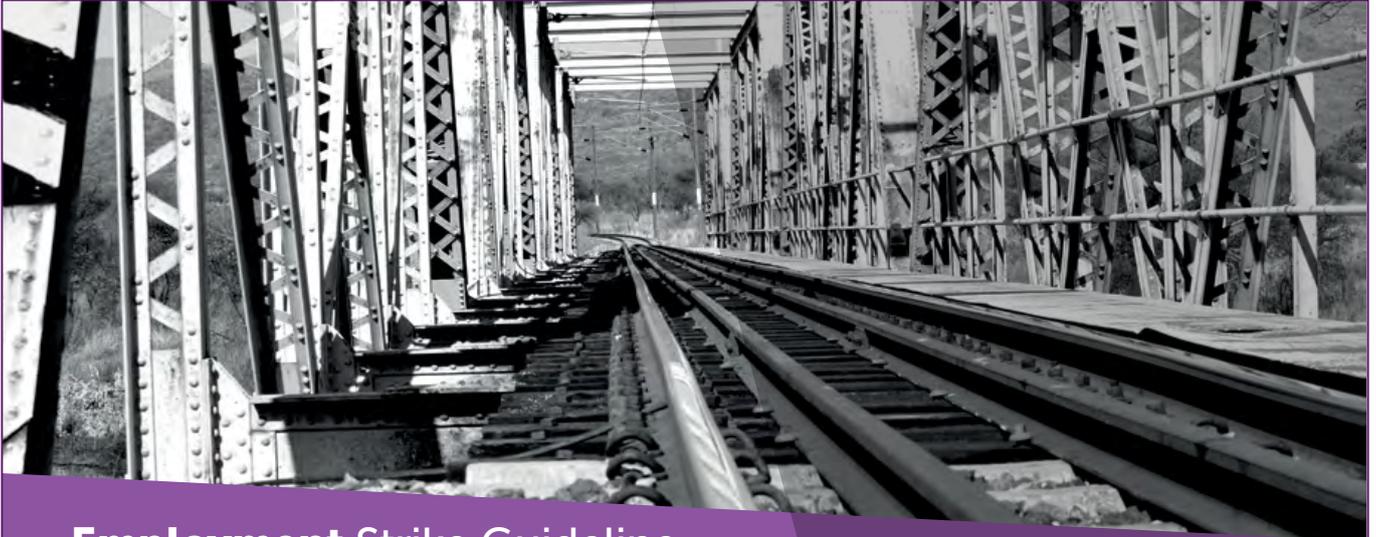
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