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EMPLOYMENT ALERT

IN THIS ISSUE >

COVID-19 does not immunise employees from following lawful and reasonable instructions

As we move into 2021, in the midst of another lockdown and with the spread and effects of the COVID-19 pandemic worse than ever, employers and employees find themselves caught in the balance of what is reasonable in unprecedented circumstances.

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CLIFFE DEKKER HOFMEYR

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The recent CCMA case of *Botha v TVR Distribution* [2020] 12 BALR 1282 (CCMA) has shown that COVID-19, lockdowns and the unique times we find ourselves in, do not excuse a refusal to obey a lawful and reasonable instruction.

In this case Mr Botha (a sales executive) was dismissed for gross insubordination and insolence after refusing to attend work during the COVID-19 lockdown. The Commissioner found that the dismissal was substantively fair but procedurally unfair.

During the level 5 lockdown, Mr Botha was informed that the company had applied for a certificate from the Companies and Intellectual Property Commission (CIPC) to allow it to operate as an essential service during the lockdown and that he was required to work and present himself at the office to do so.


Mr Botha refused and provided a laundry list of excuses as to why he could not attend work, these being, among other things, that he hadn't been provided personal protective equipment, that he had not been given a permit, and that the level 5 lockdown regulations did not permit him to work and he would not break the law.

These allegations were shown to be false. The Commissioner found that the company had taken safety precautions, had the necessary personal protective equipment and that the CIPC certificate was sufficient to allow Mr Botha to travel. Ultimately, Mr Botha simply had no intention to attend work.

In coming to the decision, the Commissioner considered the evidence and stated with reference to various authors and the Labour Relations Act that:

- *"employees are obliged to respect and obey their employers because lack of respect renders the employment relationship intolerable and disobedience undermines the employer's authority."*

CDH'S EMPLOYMENT LAW PRACTICE CONTINUES TO BLAZE ITS TRAIL, expanding on its strong offering to clients by attracting a new suite of esteemed employment law experts to the team.

CLICK HERE for further detail regarding each expert and their areas of expertise. 

COVID-19 does not immunise employees from following lawful and reasonable instructions...*continued*

Should an employer issue a lawful and reasonable instruction, even in the midst of a pandemic, the employee is obliged to adhere to it and could face dismissal for failure to comply.

- Item 3(4) of Schedule 8 Code of Good Practice: Dismissal states that *"generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable"*.
- Item 3(5) of Schedule 8 states that *"when deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct, consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself"*. (We pause to mention that Mr Botha had a history of insubordination and insolence which contributed to the decision of dismissal.)
- Mr Botha had clearly refused to report for duty on 30 April 2020.

Given the above, the Commissioner found that Mr Botha had failed to obey a lawful and reasonable instruction, was insolent and insubordinate in doing so and that his dismissal was therefore substantively fair.

However, the Commissioner further held that the presiding chairperson and Mr Botha had had previous *"run-ins"*. The presiding officer could therefore have formed a negative opinion of Mr Botha prior to the hearing. In addition, Mr Botha was not given an opportunity to provide mitigating factors for his conduct. In light of these findings, the Commissioner ruled that the dismissal was not procedurally fair. Accordingly, the employer was ordered to pay one month's salary to Mr Botha as compensation.

The takeaway from this case is that employees should not labour under the impression that COVID-19 gives them the automatic and unfettered right to choose which instructions to obey and ignore. Should an employer issue a lawful and reasonable instruction, even in the midst of a pandemic, the employee is obliged to adhere to it and could face dismissal for failure to comply.

Employers should, however, still be weary, ensuring that they follow a fair procedure in a disciplinary hearing as a procedural irregularity could result in the employer being ordered to pay compensation, even in instances where dismissal is warranted.

Hugo Pienaar and Jaden Cramer

RETRENCHMENT GUIDELINE



CLICK HERE for the latest thought leadership and explanation of the legal position in relation to retrenchments, temporary layoffs, short time and retrenchments in the context of business rescue.



SEXUAL HARASSMENT IN THE WORKPLACE

Including the virtual
world of work

A GUIDE TO MANAGING SEXUAL HARASSMENT

The purpose of our 'Sexual Harassment in the Workplace – Including the Virtual World of Work' Guideline, is to empower your organisation with a greater understanding of what constitutes sexual harassment, how to identify it and what to do if it occurs.

[CLICK HERE TO ACCESS
THE GUIDELINE](#)

POPI AND THE EMPLOYMENT LIFE CYCLE: THE CDH POPI GUIDE

The Protection of Personal Information Act 4 of 2013 (POPI) came into force on 1 July 2020, save for a few provisions related to the amendment of laws and the functions of the Human Rights Commission.

POPI places several obligations on employers in the management of personal and special personal information collected from employees, in an endeavour to balance the right of employers to conduct business with the right of employees to privacy.

[CLICK HERE](#) to read our updated guide.

Our Employment practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.
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Imraan Mahomed ranked by CHAMBERS GLOBAL 2020 in Band 3: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2020 in Band 2: Employment.

Michael Yeates ranked by CHAMBERS GLOBAL 2020 as an up and coming employment lawyer.



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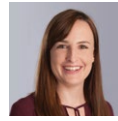
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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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