19 APRIL 2021

EMPLOYMENT LAW ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

Time for introspection – are we taking COVID-19 protocols seriously?

On 5 August 2020, Mr Mogotsi decided to take a COVID-19 test. He did not inform his employer and he continued going to work. He was informed on 9 August that he had tested positive. Notwithstanding the results, Mr Mogotsi still went to work on 9 and 10 August 2020.

The COVID-19 pandemic is not a joke. At the time of writing, in South Africa alone there were almost 1,6 million positive cases identified and close to 54,000 deaths, in just over a year. Internationally, there have been more than three million deaths. Despite the health and economic devastation caused by the pandemic, some people just don't seem to care. The Labour Court had to consider one such case in the recent judgment of *Eskort Limited v Stuurman Mogotsi*.

Mr Mogotsi was an assistant butchery manager. He was also a member of the in-house "*Coronavirus Site Committee*" at work. The committee is instrumental in, amongst other things, informing employees about the risks of COVID-19, what symptoms to look out for and what to do in the event of exposure.

Mogotsi used to travel to and from work with a colleague. On 1 July 2020, the colleague felt unwell and consulted with his doctor. He was booked off from work until 04 July 2020, and subsequently admitted to hospital on 6 July 2020. On 20 July 2020, he was informed that he had tested positive for COVID-19.

At about the same time, Mr Mogotsi started experiencing chest pains, headaches and coughs. He consulted a traditional healer, who booked him off sick on 6 and 7 July 2020, and again from 9 to 10 July 2020. The traditional healer happened to be his wife.

Despite his employer advising him to stay at home Mr Mogotsi reported to work after 10 July 2020. He continued to come to work even after he became aware of the fact that his colleague had tested positive on 20 July 2020. On 5 August 2020, Mr Mogotsi decided to take a COVID-19 test. He did not inform his employer and he continued going to work. He was informed on 9 August that he had tested positive. Notwithstanding the results, Mr Mogotsi still went to work on 9 and 10 August 2020.

While at work, he disregarded the employer's social distancing protocols, and often did not wear a mask. To make matters worse, on the day after he had received his result, Mr Mogotsi was seen hugging a fellow employee who happened to have a heart operation five years earlier and had recently experienced post-surgery complications. On 10 August 2020, when he personally handed the results of his COVID-19 test to his employer, he was sent home to self-isolate.

Quite correctly, the employer instituted disciplinary proceedings against Mr Mogotsi when he returned to work. He was dismissed for gross misconduct (for failing to disclose to his employer that he had taken a COVID-19 test) and for gross negligence (in that after receiving his results he failed to self-isolate, continued working, and put the lives of his colleagues at risk).

Time for introspection – are we taking COVID-19 protocols seriously?*...continued*

The court found that Mr Mogotsi's carefree attitude was incomprehensible. The consequences of his conduct were not only dire for his employer but equally so for his colleagues, their families and the community.

Mr Mogotsi referred a dispute to the CCMA. His defense was that in July he had informed management of his initial contact with his colleague but that he was not given any directive as to what to do. Instead, he alleged that he was victimised and questioned about his sick notes. The CCMA Commissioner made short shrift of the victimisation argument and found Mr Mogotsi guilty of the allegations against him. However, the Commissioner found that the sanction of dismissal was inappropriate as the employer's disciplinary code suggested only a final written warning for this type of dismissal. He reinstated Mr Mogotsi, albeit without backpay and with a final written warning. The Commissioner, in making his decision, had regard to the provisions of the Labour Relations Act (LRA), the CCMA Guidelines and the Code of Good Practice.

The employer, with good reason, instituted review proceedings in the Labour Court. Needless to say, the court was suitably unimpressed with Mr Mogotsi's conduct. The court found that the Commissioner had concluded that Mr Mogotsi's conduct was "*extremely irresponsible in the context of the pandemic*". That should have been the end of the matter. The court was critical of Commissioners who paid lip-service to the provisions of the LRA and the Code of Good Practice. It found that reference to these provisions without actually applying them to the facts of a case was a meaningless exercise.

In this matter it had clearly escaped the Commissioner that the employer's disciplinary code was not prescriptive and was merely a guideline insofar as sanctions were concerned. The court reiterated that, ultimately, irrespective of what a disciplinary code may say, a Commissioner is obliged to make an assessment of the nature of the misconduct in question, determine if whether, combined with other factors and the evidence led, the misconduct in question can be said to be of a gross nature. Once that assessment is made, and the invariable conclusion to be reached is that the misconduct in question is of such gross nature as to negatively impact on a sustainable employment relationship, then the sanction of dismissal will be appropriate.

The court found that Mr Mogotsi's carefree attitude was incomprehensible. The consequences of his conduct were not only dire for his employer but equally so for his colleagues, their families and the community. The court was shocked that Mr Mogotsi, despite clearly foreseeing the monumental harm he had caused, rather than show remorse he played the "*often used*" victim card. The court found that Mr Mogotsi was not only grossly negligent and reckless, but he was also dishonest in failing to disclose his health status over a period of time and completely disregarded all workplace health and safety protocols.

The court was also concerned that more needed to be done in the workplace and in the communities to ensure that employers, employees and the general populace are sensitised to the realities of the pandemic and to reinforce the obligations of employers and employees in the face of exposure to COVID-19. It found that "*fancy*" COVID-19 protocols were meaningless if they were not taken seriously. As we prepare for the third wave of COVID-19 in South Africa, this is a warning that must be heeded.

Jose Jorge and Mbulelo Mango

An employer's quest to change the outcome of its own disciplinary hearing

Rhodes advocated that the Applicant's behaviour, which had included serious allegations of sexual harassment, warranted dismissal.

In the case of *M v Rhodes University and Another* [2021] 3 BLLR 306 (ECG), the High Court had to decide whether the employer, who was dissatisfied with the outcome of a disciplinary hearing handed down by an independent chairperson, could institute internal review proceedings, appoint an internal review body, and motivate that such outcome be set aside and possibly substituted with a different outcome on verdict and a far harsher sanction.

After being found guilty of only one of three charges against him, Mr M (the Applicant), was awarded a final written warning, present a written apology to his employer, Rhodes University (Rhodes) and undergo a counselling process for a 12-month period. One of the charges for which he was not found guilty related to sexual harassment. However, Rhodes considered the outcome of the independent chairperson to be aberrant and constituted a decision no reasonable decision-maker could have reached. Rhodes advocated that the Applicant's behaviour, which had included serious allegations of sexual harassment, warranted dismissal.

Rhodes instituted the internal review process, in response to which the Applicant instituted an urgent application in the High Court on the basis that such internal review constituted a breach of the terms of his employment contract because the disciplinary code had been incorporated therein and did not make provision for such internal review.

The High Court laid down several reasons why an employer may internally review a decision taken by a disciplinary chairperson even when this is not expressly provided for in the disciplinary code or the employment contract. The High Court found that Rhodes had reserved for itself the right to make policies binding on its employees and included that which provided for the internal review process to meet its obligation to eradicate sexual harassment at the workplace. However, the disciplinary code and the employment contract had listed the Labour Relations Act among other labour law prescripts, as relevant authorities in support of such review. The High Court held that the Applicant's employment contract "*must be interpreted within the context of applicable labour law principles which are based on the fundamental principle of fairness*".

The High Court quoted the case of *Van Rensburg v Rustenburg Base Metal Refineries (Pty) Ltd* which held that where a chairperson, duly appointed in terms of a disciplinary code was unduly lenient, the employer may review the sanction imposed by the chairperson, if the following was evident –

i. the facts available to the employer at the time of the disciplinary hearing did not adequately illustrate the gravity of the employee's conduct;

ii. the outcome, based on the facts before the chairperson, was so shocking that it warrants an inference of bias or bad faith or a failure to apply his or her mind; and

An employer's quest to change the outcome of its own disciplinary hearing...*continued*

The High Court found that Rhodes was able to prove that the factual findings and sanction imposed by the chairperson were so inappropriate that it warranted interference.

iii. the sanction does not accord with the substance of the disciplinary code itself.

Therefore, the High Court found that Rhodes was able to prove that the factual findings and sanction imposed by the chairperson were so inappropriate that it warranted interference. Furthermore, the High Court found that the disciplinary code and reference to the labour legislation applicable did not restrict an internal review, notwithstanding that the employment contract did not make express provision for it.

Conclusion

It is to be noted that the right to fair labour practices is a constitutional right that is provided to every employee. In the same manner that an employee can challenge an adverse outcome of a disciplinary hearing, so too in deserving circumstances can an employer challenge an unfair or unreasonable outcome or sanction. A key take from this is that disciplinary codes are guidelines aimed at creating and maintaining fair labour practices. With that said, procedural deviations may be condoned in pursuit of fairness and in the interests of justice, as long as the substance thereof is maintained, and the employee and the employer are not unduly prejudiced thereby.

Fiona Leppan, Kgodisho Phashe and Kananelo Sikhakhane

KENYA

Employment (Amendment) Act, of 2021: Introduction of pre-adoptive leave

Employees are now entitled to one month's pre-adoption leave with full pay from the date a child is placed in the continuous care and control of the employee under the provisions of the Children Act 2001.

On 30 March 2021, the President of Kenya assented to the Employment (Amendment) Bill of 2019. The Employment (Amendment) Act, of 2021 (the Act) amends the Employment Act, 2007 (the Employment Act) by introducing pre-adoptive leave to parents who apply for adoption of children who are not born to them by birth. The Act came into force on 15 April 2021.

Employees are now entitled to one month's pre-adoption leave with full pay from the date a child is placed in the continuous care and control of the employee under the provisions of the Children Act 2001.

The Act has amended section 2 of the Employment Act by inserting the definition of an exit certificate. It is defined as a written authority given by a registered adoption society to a prospective adoptive parent to take the child from the custody of the adoptive society.

An employee eligible for pre-adoptive leave is required to do the following:

a) Notify the employer in writing of the intention of the adoption society to place the child in the custody of the employee at least fourteen (14) days before the placement of the child; and

b) Provide together with the notice in (a), documentation evidencing the intention of the adoption society such as a custody agreement and an exit certificate evidencing the intention of the adoption society to place a child in the custody of the employee.

The Act provides that an employee who proceeds on pre-adoptive leave has the right to return to the job which they held immediately prior to the pre-adoptive leave or to a reasonably suitable job on terms and conditions not less favourable than those which would have applied had the employee not been on pre-adoptive leave.

The Act also provides that an employee is not deemed to have forfeited their annual leave entitlement on account of having taken pre-adoptive leave.

Where the pre-adoptive leave is extended with the consent of the employer or immediately on expiry of pre-adoptive leave before resuming duties the employee proceeds on sick leave or with the consent of the employer on annual leave, compassionate leave, or any other leave, the one month pre-adoptive leave is deemed to expire on the last day of such extended leave.

Both male and female employees are eligible for pre-adoptive leave of one month. Interestingly, under the Employment Act, 2007 women are entitled to a longer period of paternal leave of three months while male employees enjoy paternal leave of fourteen (14) days. The Act is however clear, and the period applies equally to both male and female employees.

The effect of this Amendment is that it now requires employers to amend their human resources policies to allow their employees to proceed on pre-adoptive leave.

The above alert is meant for general information and does not constitute legal advice. In case of any inquiries or if you require any further information or advice on how the Notice could affect your business, please feel free to contact Desmond Odhiambo and Njeri Wagacha.

Desmond Odhiambo and Njeri Wagacha

Unemployment Insurance Fund Introduces e-Compliance Certificate Online System

The UIF e-Compliance Certificate system has paved the way for an expeditious and cost effective compliance process in the digital era.

The Unemployment Insurance Fund (UIF) has embraced technology and has adapted to the digital era. On 1 February 2021, the UIF, launched its online system called the "*Electronic Compliance Certificate*" (e-Compliance Certificate) system. This new e-Compliance Certificate system is a free online service which completely replaces the manual application process for compliance certificates and enables employers, entrepreneurs, small businesses or tax practitioners to apply for compliance documents online and validate the authenticity of compliance certificates.

There are two pieces of legislation which govern the UIF - the Unemployment Insurance Act 63 of 2001 and Unemployment Insurance Contributions Act 4 of 2004. Employers are obligated by these Acts to register with the UIF, submit declarations of employees and make monthly contributions to the UIF.

According to the UIF the benefits of the e-Compliance system include –

- improved turnaround times where certificates were previously issued in 10 working days, they are now issued within minutes;
- the digital system has eliminated human errors and fraudulent activities;
- improved employer compliance with UIF legislation regarding declarations and contribution of its employees; and
- improved authenticity of the compliance certificates produced.

The system also aims to improve debt collection, reduction of costs associated with printing and photocopying. It allows clients to generate a duplicate certificate in the event that the client loses the original certificate.

Furthermore, the system also enables entrepreneurs and companies to submit applications for potential business opportunities much faster, including government tenders. A UIF certificate is usually required when doing business with the government.

In this regard, the UIF e-Compliance Certificate system has paved the way for an expeditious and cost effective compliance process in the digital era.

To apply for a UIF Compliance Certificate, small businesses, companies and entrepreneurs must register on the system using their UIF reference number. The system will immediately, generate a Compliance Certificate, which may be printed, in the event that the applicant is fully compliant. If the applicant is not compliant, the system will generate a non-compliance letter with reasons for the said rejection. The website may be easily accessible at uifcompliance.labour.gov.za or www.labour.gov.za and applicants are to click "*UIF e-Compliance Certificate*" under the "*online systems*" tab to register and apply.

Tamsanqa Mila, Mariam Jassat and Keenan Stevens


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 it if occurs.
CLICK HERE TO ACCESS
THE GUIDELINE


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A CHANGING
WORK ORDER
CASE LAW
UPDATE 2020
CLICK HERE to access CDH's 2020 Employment Law booklet, which will assist you in navigating employment relationships in the "new normal".

2021 RESULTS

CHAMBERS GLOBAL 2014 - 2021 ranked our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2021 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2018 - 2021 in Band 2: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2020 - 2021 in Band 3: Employment.

Imraan Mahomed ranked by CHAMBERS GLOBAL 2021 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2021 in Band 2: Employment.

Michael Yeates ranked by CHAMBERS GLOBAL 2020 - 2021 as an up and coming employment lawyer.

TOP RANKED Chambers Global 2021

2021 RESULTS

Our Employment Law practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2021.

Fiona Leppan is ranked as a Leading Individual in Employment Law in THE LEGAL 500 EMEA 2021.

Aadil Patel is ranked as a Leading Individual in Employment Law in THE LEGAL 500 EMEA 2021.

Gillian Lumb is recommended in Employment Law in THE LEGAL 500 EMEA 2021.

Hugo Pienaar is recommended in Employment Law in THE LEGAL 500 EMEA 2021.

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Imraan Mahomed is recommended in Employment Law in THE LEGAL 500 EMEA 2021.

Anli Bezuidenhout is recommended in Employment Law in THE LEGAL 500 EMEA 2021.

The LEGAL 500 EMEA

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.

AN EMPLOYER'S GUIDE

TO MANDATORY WORKPLACE VACCINATION POLICIES

FOR A COPY OF THE CDH EMPLOYMENT PRACTICE GUIDE, CLICK HERE

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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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