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EMPLOYMENT LAW ALERT

IN THIS ISSUE >

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Protecting employees from COVID-19

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Potential closing of gap in social protection for self-employed workers

In its discussion paper, it identifies the fact that self-employed workers in the informal sector are not afforded maternity and parental benefits as a critical gap in the state's social protection system.

On 23 July 2021, the South African Law Reform Commission (SALRC) released a media statement and discussion paper relating to its investigation into maternity and parental benefits for self-employed workers in the informal economy in South Africa. The investigation and its recommendations signal an important recognition of and move to address the inequalities between women and men in South Africa and the obstacles to women's full participation in the economy.

The SALRC is an advisory body seeking to renew and improve the law of our country. In its discussion paper, it identifies the fact that self-employed workers in the informal sector are not afforded maternity and parental benefits as a critical gap in the state's social protection system. The ultimate purpose of the SALRC's investigation is to give effect to South Africa's obligations in terms of the Constitution and applicable regional and international gender equality conventions.

While parental, adoption and commissioning parental leave and benefits are recent positive changes in our law, these are currently restricted to employees. Employees who suffer a loss of earnings while on maternity, parental, adoption or commissioning parental leave can claim benefits in terms of the Unemployment Insurance Act 63 of 2001 (UIA) and the Unemployment Insurance Contributions Act 4 of 2002 (UICA). These benefits are primarily funded through mandatory contributions from both employers and employees to the Unemployment Insurance Fund (UIF). Contribution to the fund is a prerequisite for accessing the benefits.

This raises one of the challenges that will need to be addressed if maternity and parental benefits are extended to self-employed workers in the informal economy namely, whether informal workers will contribute to the fund and, if so, how; and whether participation will be compulsory or voluntary. The discussion paper makes a number of recommendations in relation to the nature of the benefits which may be extended, including that the UIF system be extended by the Department of Employment and Labour to self-employed workers to allow for the granting of maternity and parental benefits, as currently provided for in the UIA and Basic Conditions of Employment Act 75 of 1997 (BCEA), to all workers.

Another important consideration is the scope of the definition of *"self-employed worker"*. The discussion paper recommends that *"self-employed worker" be defined as "any person, including an independent contractor, who (a) has created her or his own employment opportunities and is not accountable to an employer; (b) works for a company or entity that is not incorporated and not registered for taxation; or (c) in any manner assists in carrying on or conducting the business of an employer in the informal economy."* It is further recommended that the definition of *"self-employed worker"* be integrated into the definition of *"employee"* in the relevant provisions of the UIA, UICA and BCEA.

The discussion paper is open for public comment and input by no later than 29 October 2021.

Gillian Lumb and Mbulelo Mango

Protecting employees from COVID-19

The question of whether an employer can dismiss an employee for failing to abide by its COVID-19 policies and safety protocols has received particular attention.

It is trite that the Occupational Health and Safety Act 85 of 1993 (OHSA), read with its regulations, requires an employer to provide and maintain as far as is reasonably practicable a working environment that is safe and without risks to the health of workers, and to take such steps as may be reasonably practicable to eliminate or mitigate such risk.

In the context of the COVID-19 pandemic, these obligations have been placed in the spotlight as employers find themselves with an onerous duty to curb the spread of the COVID-19 virus in the workplace. The mandatory use of personal protective equipment (PPE) both in the workplace and in public has been identified as a key measure to fulfil this duty.

The question of whether an employer can dismiss an employee for failing to abide by its COVID-19 policies and safety protocols has received particular attention. Section 14 of the OHSA calls out the reciprocal duties of an employee towards their employer by providing that every employee must take reasonable care of their own health and safety and that of other persons who may be affected by their acts or omissions; have regard to the statutory duties and requirements imposed on their employer; co-operate with their employer and carry out lawful and reasonable instructions relating to health and safety rules and protocols laid down by their employer; and report to their employer any unsafe practices that come to their attention.

In the context of PPE, covering one's nose and mouth with a mask is a requirement when entering the workplace or any public place. The Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces (Consolidated Direction) issued in terms of the Disaster Management Act 57 of 2002 mandates the wearing of masks in the workplace, while the adjusted alert level regulations make it compulsory to wear a mask in any public place.

However, the question of whether an employer can dismiss an employee for a failure to abide by the rule that mandatory masks must be worn in the workplace has arisen in several fora. There is a distinction between the sanctions imposed on an employee who fails to adhere to such rule and, as seen in several cases, an employee's COVID-19 infection status at the time of committing the offence.

In an instance where an employee is knowingly positive with the virus and still fails to abide by the Consolidated Direction and requirements of the alert level regulations, the Labour Court, in the decision of *Eskort Ltd v Mogotsi and Others* (2021) 42 ILJ 1201 (LC) (28 March 2021) has made plain that such an infraction constitutes both gross misconduct and negligence which could warrant dismissal. In this case, the Labour Court found that *"[i]t is one thing to have all the health and safety protocols in place and on paper. These are however meaningless if no one, including employers, takes them seriously."*

Protecting employees from COVID-19

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While the Commissioner rightfully accepted that not wearing a mask during the COVID-19 pandemic could have amounted to risky behaviour, they found that there was supposedly confusion surrounding the rule that masks ought to be worn in the workplace.

Generally, employers have embraced this challenge and taken action to ensure that such protocols and policies are taken seriously by their employees, even resorting to serious sanctions such as dismissal in order to ensure that a safe working environment is maintained as far as is possible.

Taking the above decision into account, the respective dispute resolution fora have subsequently reiterated the seriousness with which employers should treat violations of COVID-19 related policies and regulations.

Risky behaviour

In *NUMSA obo Manyike v Wenzane Consulting and Construction* [2021] 5 BALR 479 (MEIBC) the employee was dismissed for pulling his face mask below his chin while speaking to a person on the phone. The employee was already subject to a written warning for the same misdemeanour, a fact that the Commissioner failed to consider. While the Commissioner rightfully accepted that not wearing a mask during the COVID-19 pandemic could have amounted to risky behaviour, they found that there was supposedly confusion surrounding the rule that masks ought to be worn in the workplace. As more education was required in this regard (according to the Commissioner), a sanction short of dismissal, such as a period of suspension without pay, would have been more appropriate. The employee was reinstated from the date of the award with no order being made as to arrear wages.

In the Commission for Conciliation, Mediation and Arbitration (CCMA) decision of *Ngcobo v East Coast Board (Pty) Ltd*, (CCMA case no. KNDB3595-21 unreported) the employee was dismissed for not wearing a mask at the workplace. What is interesting is that despite receiving a final warning for the same offence, the employee still failed to wear a mask. In trying to justify his actions, the employee raised the argument that the adjusted alert level regulations had been relaxed at the time of the alleged misconduct and that he had further seen customers enter the workplace premises without wearing a mask. These arguments made it easier for the Commissioner to uphold the dismissal and he reiterated that it did not matter if these lockdown regulations had been relaxed as the employee himself conceded that other employees might still have been infected as a result of him failing to wear his mask.

In the CCMA decision of *Diabela v Shoprite Checkers*, (CCMA case no. GATW712-21 unreported) the employee in this case was a fresh produce manager. She had reported for work while awaiting her COVID-19 test results, which subsequently came back positive. As a result of her actions, she was dismissed. The employee made two arguments in her defence, first that she had not presented any symptoms secondly, that she was unaware of the communication sent out via WhatsApp by her employer which instructed employees to isolate while awaiting their COVID-19 results.

Protecting employees from COVID-19

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These decisions emphasise that it is a collective effort by employers and employees that will help stem the spread of the pandemic.

The Commissioner was of the view that the conduct of the employee was both reckless and was a flagrant breach of the relevant workplace rules and regulations in place. As a result, the Commissioner found that the employee's arguments were without merit and the sanction of dismissal was upheld.

Test for gross negligence

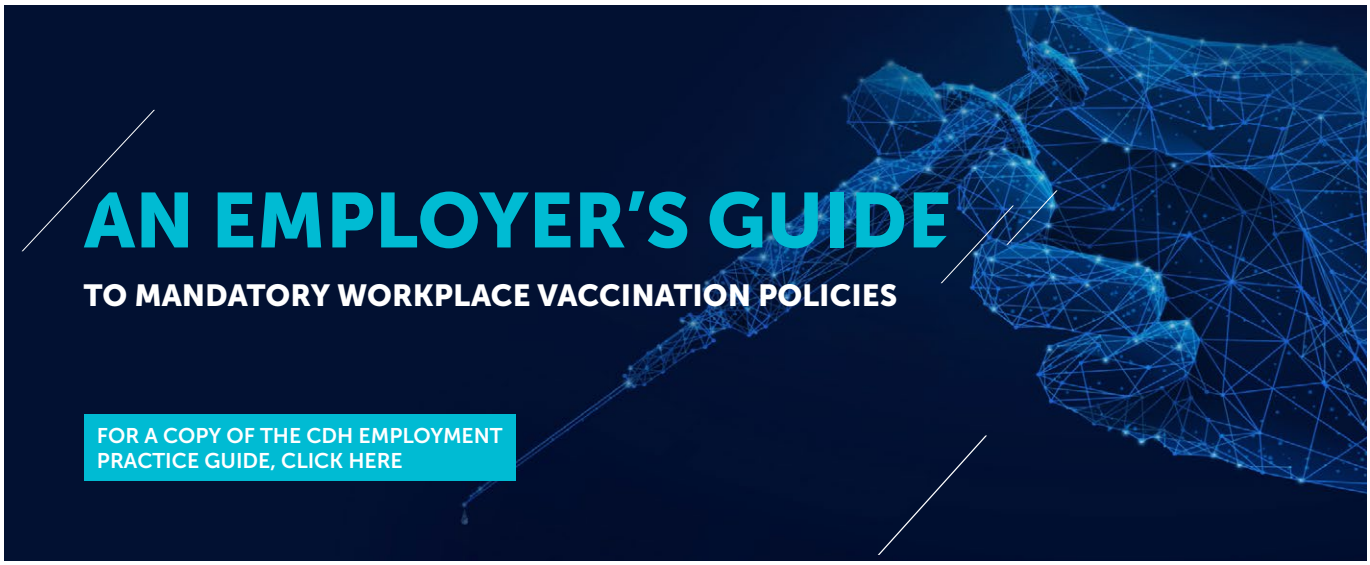
Despite the above, in another CCMA decision of *Mothapo v Alliance International Medical Services* (CCMA case no. GATW684-21 unreported), the employee was dismissed for gross negligence for not wearing a mask in the workplace. At the time of the incident, she had not been feeling well and subsequently tested positive for COVID-19. The employee was of the view that her dismissal was substantively and procedurally unfair.

The test for gross negligence is whether the employee demonstrated a reckless disregard for her acts or omissions, and negligence points to the failure to exercise the standard of care that should be reasonably expected of an employee with their degree of knowledge and experience. The Commissioner noted that the employee was a team leader. When reviewing the appropriateness of the sanction of dismissal, the Commissioner found that the employee had taken full responsibility for her actions of not wearing a mask and, furthermore, she had pleaded guilty at her disciplinary hearing. In light of these concessions, the Commissioner found that the sanction of dismissal was too harsh.

The Commissioner also found that the employer was at fault as the employee was suspended while self-isolating as required by the Consolidated Direction. However, the employee was also required to appear physically at her disciplinary hearing despite requesting that it be held virtually. As a result, the employee received compensation equal to six months' salary.

These cases show that employers are playing their part in endeavouring to maintain a working environment that is safe and without risk to the health of their employees by issuing appropriate COVID-19 protocols and disciplining employees who fail to abide by their responsibilities. These decisions emphasise that it is a collective effort by employers and employees that will help stem the spread of the pandemic.

Employment Law Department



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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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