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EMPLOYMENT LAW ALERT

IN THIS ISSUE

Gordon Road Spar v The Economic Freedom Fighters & Others

Infographic: A quick step-by-step guide to managing objections to mandatory vaccinations

On a wing and a prayer: Considerations around applications for exemption from mandatory vaccination policies based on religious grounds

The World Health Organization introduces digital COVID-19 vaccination certificates



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Gordon Road Spar v The Economic Freedom Fighters & Others

In June 2021 the Labour Court in *Gordon Road Spar v The Economic Freedom Fighters and Others* (J605/21) interdicted the EFF from interfering with the employer's business and instigating violence at the workplace.

The imposition of the Economic Freedom Fighters (EFF) and its Labour Desk substructure has become a common occurrence in the South African workplace over the past few years. The first judgment in which the Labour Court took a strong stance against the EFF was in October 2018 in *Calgan Lounge v EFF and Others* (J2648/18), a matter in which CDH represented Calgan Lounge. We reported on the judgment in our [12 November 2018 Employment Alert](#).

Undeterred, the EFF and the EFF Labour Desk continue to interfere in workplace affairs. What is an employer to do when faced with such interference? It has become a recent trend that the EFF is quick to argue that the interference is not sanctioned by it and that whoever acted did not do so with the authority of the EFF, or that they were not EFF members despite EFF regalia being on open display. This is an attempt to overcome *Calgan Lounge*.

In June 2021 the Labour Court in *Gordon Road Spar v The Economic Freedom Fighters and Others* (J605/21) interdicted the EFF from interfering with the employer's business and instigating violence at the workplace.

The facts in brief

The dispute arose after the demotion of an employee on 15 April 2021. Aggrieved by the decision, some employees who were members of the EFF sought assistance from the party. On 12 May 2021 the EFF addressed a letter to the employer addressing various demands relating to working conditions and proposed a date to meet. The EFF arrived at the company's premises on 16 May 2021. Members of the EFF, including its branch secretary Mr Sono, arrived at the store and, together with some employees, demanded that cashiers leave their workstations and customers exit the store, and then barricaded the entrance to the shop. In an attempt to prevent the situation from becoming more volatile, Spar did not take any steps at this stage. On 28 May 2021 EFF members again protested at the store. Under pressure, the employer agreed to meet with the EFF on 30 May 2021. It appears from the judgment that the employer had not secured legal advice at the time. After getting legal counsel, the employer correctly proceeded to cancel the meeting and a letter was addressed to the EFF advising that if it attended at the store again, the employer would seek an urgent interdict. In the face

AN EMPLOYER'S GUIDE TO MANDATORY WORKPLACE VACCINATION POLICIES

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PRACTICE GUIDE, CLICK HERE

Gordon Road Spar v The Economic Freedom Fighters & Others...continued

The EFF's purported lack of knowledge of the protest action did not support the claim that Sono and its members created; the impression that they were engaged in protest action on the EFF's behalf.

of the cancellation, a protest again erupted and continued until 1 June 2021. This led the employer to approach the Labour Court to interdict the EFF from interfering with its business. The EFF was led by its branch secretary, Mr Sono.

The position of the court

In court the EFF denied having given Mr Sono and the employees the authority to speak in its name and act on its behalf. It argued that the protest and actions at the store were not mandated by the EFF. It held that the party had nothing to do with the actions and should not be liable for the unlawful conduct. It also argued that the wearing of EFF regalia did not mean that the protestors were members of the party because its regalia could be purchased anywhere. It further argued that it had no knowledge of what had happened because it was not present during the protest action and it could not be held liable for members who had acted on their own.

The court was unimpressed with the EFF's argument. Correctly so, in our view.

Drawing on *Calgan Lounge* and other applicable legal principles, the court found that the facts clearly demonstrated that the unlawful conduct was at the behest of Sono, who was acting on behalf of the EFF. The EFF's purported lack of knowledge of the protest action did not support the claim that Sono and its members created the impression that they were engaged in protest action on the EFF's behalf. The court also took into consideration that the EFF did not deny that Sono was a branch secretary and that it placed no evidence before the court that those who supported him were not EFF members. The employer

reasonably believed that Sono and the protesters were acting on behalf of the EFF. The court gave little weight to the EFF's argument that it can only warn its members against unlawful conduct but cannot enforce lawful behaviour. Where the unlawful conduct is perpetrated in the name of the party, without authorisation, the EFF is empowered by its constitution to enforce its provisions and act against members such as Sono and the protestors who participated in the unlawful protest action. The EFF did not hold either its members or Sono accountable in accordance with its constitution. The EFF therefore could not contend that it exists separately from its members and could not be held liable when they acted on their own. Accordingly, it was found that there was no substance to the argument that the EFF could not be held liable for the conduct of its members who ostensibly acted on their own behalf.

Conclusion

Following *Calgan Lounge* this is the next important judgment of the Labour Court in dealing with unlawful interference by the EFF in workplace issues.

As the court said in *Calgan Lounge*:

"As an employer, the applicant is entitled to expect its employees to comply with these objectives of the LRA [Labour Relations Act 66 of 1995] when seeking to resolve any disputes they may have with the applicant as employer. And for the EFF simply to negate all of this based on some misguided view of what the Constitution allows it to do, is simply unacceptable, and cannot be permitted".

Gordon Road Spar v The Economic Freedom Fighters & Others...continued

Business is not without protection from dystopian conduct and the law sets up a sufficient perimeter for protection.

The dispute at *Gordon Road Spar* related to an ordinary demotion dispute that could easily have been referred to the Commission for Conciliation, Mediation and Arbitration for resolution. The anarchy faced by the employer was unnecessary and the judgment in *Gordon Road Spar* now opens the door to civil damages being sought against the EFF for conduct of this form. This is the next frontier following the two well considered judgments of the Labour Court referenced in this article.

At this time there is already a civil claim by a SuperSpar against the EFF for damages of R500,000 after the EFF allegedly staged an illegal protest in November 2020 outside a Musina-based store. This was not in the employment context. There is also the matter in the Johannesburg High Court (21/23502) of *Afrisix (Pty) Ltd v EFF* in which

the court granted an interim interdict in June 2021 against the EFF for conduct similar to that seen in *Gordon Road Spar*. There are no judgments in these matters at this time.

Business is not without protection from dystopian conduct and the law sets up a sufficient perimeter for protection. When faced with unlawful conduct by the EFF, any other political party, or community leaders or protestors, the protection of the courts should be sought with haste. Businesses should know that our legal system was not designed to condone intimidation, unruly conduct, or a disrespect for the law and that there is clear protection against lawlessness.

Hugo Pienaar, Imraan Mahomed and Syllabus Mogashoa



A QUICK STEP-BY-STEP GUIDE TO MANAGING OBJECTIONS TO MANDATORY VACCINATION POLICIES

STEP 1 IMPLEMENT A MANDATORY VACCINATION POLICY

-  Clearly communicate the company's position in relation to mandatory vaccinations
-  To whom will the policy apply?
-  By when must employees be vaccinated?
-  Policy must allow for objections on medical or constitutional grounds.
-  Clearly set out the process to be followed when lodging an objection together with possible supporting documents necessary to support the application.

STEP 2 CONSIDER OBJECTION APPLICATIONS

-  Objections must be considered in light of the competing rights - the rights of the objecting employees, the rights of other employees and the business imperatives.
-  Allow employee to consult with trade union representatives/worker representative and the health and safety committee, if any.
-  HR/Objection committee to consider the application and communicate the outcome to the employee.
-  Allow for a process of appeal.
-  Detailed the manner in which appeal applications will be dealt with and how outcomes will be communicated to the employee.

STEP 3A REASONABLE ACCOMODATION



Where an employee has made out a case for exemption from the policy, an employer must determine whether they can reasonably accommodate the employee by implementing, among others, the following measures:

-  Temporary/permanent alternative placement
-  N95 mask to be worn at all times at the company premises
-  Isolation in the workplace
-  Continued remote working

OR

STEP 3B WHERE AN EMPLOYEE CANNOT BE REASONABLY ACCOMODATED

DISMISSAL MUST BE A MEASURE OF LAST RESORT

MISCONDUCT

- an employee may be dismissed for misconduct where they raise vexatious grounds of objection that are baseless and designed to undermine the company policy; or
- where an employee does not apply for exemption but fails to comply with the policy without any reasonable explanation

INCAPACITY/ OPERATIONAL REQUIREMENTS

- employees may be dismissed, where they cannot be reasonably accommodated, on the basis of an operational incapacity where the operational requirement is genuine and is the proximate cause of the dismissal;
- employers must ensure that the proximate cause of the dismissal is not a refusal to accept a change to terms and conditions of employment rendering the dismissal automatically unfair

On a wing and a prayer: Considerations around applications for exemption from mandatory vaccination policies based on religious grounds

Difficulties arise where an employer suspects that an exemption is applied for in bad faith, where an employer is unable to reasonably accommodate an employee, or where an employee rejects the offer of alternative arrangements made by the employer.

In terms of the directive issued by the Department of Labour, all mandatory workplace vaccination policies should allow employees to apply for an exemption from the policy on religious grounds.

We have written previously that employees bringing religious exemptions will most likely object to being vaccinated based on the incompatibility between their religious beliefs and vaccination policies. This might include both superstitious beliefs and those rooted in the interpretation of a religious text. Additionally, employees may raise an objection based on the content of the vaccines, which may or may not contain substances that are prohibited from consumption for religious reasons.

The absence of an exemption process may be fatal to the validity of the policy. Absence of an exemption process is the ground on which employees of the New York Department of Health are challenging a vaccine mandate in the ongoing case of *Dr A v Hochul* (1:21-CV-1009). The court granted an interim order in the matter and will be called upon to determine whether a vaccination policy that has no place for religious exemptions violates the First and Fourteenth Amendments, the Supremacy Clause, and the Equal Protection Clause of the US Constitution. This case will establish the importance of the presence of exemption clauses generally.

Employer and employee obligations

In the South African context, a failure to include an exemption procedure would result in the policy falling foul of the directive issued by the Department of Labour. Any South African mandatory vaccination policy is thus obliged to allow employees to approach the employer for an exemption.

Where a religious exemption is applied for, employers have an obligation to consider these exemptions carefully.

When making such applications, employees have an obligation to, at a minimum, establish that:

- taking a vaccine interferes with their ability to practice their belief/ faith; and
- the ability to practice, which has been interfered with, is a central tenet of their faith.

When these two criteria are met, an employer would assume the obligation to prove that nature of the employee's position inherently requires them to be vaccinated and reasonable measures were taken to accommodate the employee's belief. Difficulties arise where an employer suspects that an exemption is applied for in bad faith, where an employer is unable to reasonably accommodate an employee, or where an employee rejects the offer of alternative arrangements made by the employer.

On a wing and a prayer: Considerations around applications for exemption from mandatory vaccination policies based on religious grounds...*continued*

When approached with such discrimination cases, South African courts will ultimately undertake a proportionality exercise, weighing up the nature of the interference to the person's religion against the consequence for such refusal.

Where an employer dismisses an employee for operational or incapacity reasons on the basis of their unwillingness to be vaccinated, a disgruntled former employee might argue that such a decision discriminated against them on the grounds of their religion.

When approached with such discrimination cases, South African courts will ultimately undertake a proportionality exercise, weighing up the nature of the interference to the person's religion against the consequence for such refusal. Sachs J in *Christian Education South Africa v Minister of Education* described the task of assessing religious discrimination claims as striking a balance between two very different interests. On the one hand "[r]eligious conviction and practice [which] are generally based on faith. On the other, public or societal concerns which are generally assessed 'according to their reasonableness'".

In the United States, the Western District Court of Louisiana was recently approached in the case of *Magliulo v Edward Via College of Osteopathic Med.*, (3:21-CV-2304) by several university students claiming their university's mandatory vaccination policy infringed on their right to religion. The students had applied for an exemption from the university's vaccination policy on the basis of their belief that the vaccine was

derived from aborted foetal tissue. The university exempted them from the policy, but required that they undertake a range of additional safety measures.

The court decided that the university overreached in the implementation of additional safety measures and that the policy unduly infringed upon the students' constitutionally enshrined right to religion. The court failed to perform any analysis as to the legitimacy of the claim that the vaccine was derived from foetal tissue. Its assessment of the balancing of rights was equally threadbare. It must also be noted that US jurisprudence on the matter is not settled. In *Klaasen et al v The Trustees of Indiana University* (1:21-CV-238), the US District Court of Northern Indiana held that the University of Indiana's vaccination policy, which included a similar religious exemption provision to Louisiana's, "isn't used to burden religion, but instead gives those of religious conviction the benefit of freely practicing their religious conviction to refuse the vaccine."

It's apparent that there are no easy, universal answers to disputes involving religious rights. Employers looking to mitigate legal risk in these circumstances should seriously consider any applications for exemptions brought on religious grounds and take care to ensure that the process is dignified and duly respects the rights of all parties.

Alistair Dey-van Heerden
Overseen by *Aadil Patel*

The World Health Organization introduces digital COVID-19 vaccination certificates

The WHO has encouraged countries to design a certificate that includes a core data set, fraud prevention mechanisms and scenarios of use.

On 30 September 2021, President Cyril Ramaphosa announced that the Department of Health will soon be rolling out a vaccination certificate, which will serve as verifiable proof of vaccination.

The certificate can be used to facilitate travel, access to establishments, gatherings and other forms of activity that require proof of vaccination.

South Africa's approach will be guided by the World Health Organization (WHO) guidelines, which are in line with international best practice.

The WHO published a "*Digital Documentation of COVID-19 Certificates: Vaccination Status Technical Specifications and Implications Guidance*" document. According to the WHO, the certificate may be paper based or electronic. The WHO has encouraged countries to design a certificate that includes a core data set, fraud prevention mechanisms and scenarios of use.

- The core data set includes: name, date of birth, sex and unique IDs; vaccine brand; and country of vaccination.
- Fraud prevention mechanisms include security features such as water marks and holographic seals.
- Scenarios of use could include proof of vaccination for work, university education and international travel.

The certificate will be of great use to employers. It will act as proof of vaccination and will allow employers to verify the authenticity of certificates and prevent dishonesty.

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