

EMPLOYMENT LAW ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

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Vaccination: Not necessarily an operational requirement?

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Vaccination: Not necessarily an operational requirement?

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The Respondent implemented a mandatory vaccination policy (policy) requiring all its employees to be vaccinated and alleged that the vaccination of its employees was an operational necessity as vaccinated persons are less likely to miss work due to illness. In addition, the Respondent was ensuring a safe working environment for its employees.

The Applicant worked as a senior inventory controller for the Respondent, and refused to vaccinate on medical grounds, due to an alleged adverse reaction to the influenza vaccine ten years prior. The Respondent requested a medical certificate confirming this adverse reaction, and the Applicant provided the Respondent with two medical certificates from medical doctors to satisfy this request - these medical notes were not accepted.

The Respondent dismissed the Applicant based on operational requirements and refused severance pay, as the Applicant had supposedly not provided 'a reasonable and substantiated medical certificate'.

In his decision, the Commissioner discussed the reasonableness of the Respondent's vaccination policy, the issue of severance pay, and whether the dismissal was substantively fair.

REASONABLENESS OF THE POLICY

According to the Commissioner, the Respondent did not lead any evidence to show the effectiveness of the implementation of a blanket mandatory vaccination policy in any other organisation. In addition, the Consolidated Direction of 11 June 2021, issued in terms of Regulation 4(10) of the Regulations under section 27(2) of the Disaster Management Act 57 of 2002, which was in force at the time of this dispute, did not provide for or permit a "blanket mandatory vaccination policy".

The Commissioner also averred that the implementation of such types of policy are illogical as the employees 'do not live in a cocoon' and would come into contact with numerous people, who are not subject to a mandatory vaccination policy on a daily basis, and therefore, still be at risk of contracting COVID-19, and having to work from home or take leave.

The Commissioner noted that the Respondent did not lead any evidence relating to the alleged risk assessment that it had supposedly conducted prior to implementing the policy. According to the Commissioner, this was either because it wasn't done, or because they did not want to produce it. The Commissioner in his award stated that all the Respondent has is, "a nicely worded policy document, but which does not talk to the reasonableness of the rule itself."

Vaccination: Not necessarily an operational requirement?

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SEVERANCE PAY

The Commissioner took issue with the Respondent's argument that the Applicant would only be entitled to severance pay if she was able to provide a reasonable and substantiated medical certificate. However, the Respondent would still have dismissed her regardless of this requirement. It therefore could not be said that there was an alternative offered to the Applicant, other than having to be vaccinated.

SUBSTANTIVE FAIRNESS

The Commissioner held that the Respondent's decision was substantively unfair, and that the Applicant was entitled to severance pay.

Notably, the arbitration award communicates a view that a blanket mandatory vaccination policy has no place in the labour market.

This award may still be taken on review to the Labour Court.

CDH'S EMPLOYMENT LAW PRACTICE

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The Legal 500 EMEA 2022 recommended **Fiona Leppan** and **Aadil Patel** as leading individuals for employment.

The Legal 500 EMEA 2022 recommended **Hugo Pienaar, Gillian Lumb, Anli Bezuidenhout, Imraan Mohamed, Jose Jorge and Njeri Wagacha** for employment.

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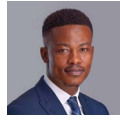
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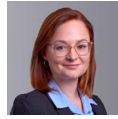
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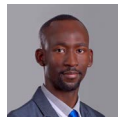
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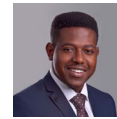
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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