

EMPLOYMENT LAW ALERT

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CLIFFE DEKKER HOFMEYR

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The new normal, 'side hustles' and an employee's duty of good faith to their employer

Many businesses have implemented flexible work arrangements, which entail a combination of remote working and rotational attendance at the office, as a component of their return-to-work policies. While this means that many employees will have the opportunity to work from home fully or partially, there is always a risk that some people will abuse the system and not perform their duties as required during traditional office hours.



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With employees working from their homes in the new normal, many may venture into working on their own small businesses, commonly known as 'side hustles', to make extra income to cushion the rising cost of living. Although 'side hustles' are generally perceived as work which employees would engage in after hours or on weekends, they do create risks for the employer.

In the recent matter of *Bakenrug Meat (Pty) Ltd t/a Joostenberg Meat v CCMA and Others* (LAC) [2022], the Labour Appeal Court (LAC) grappled with the issue of whether an employee owes their employer a duty of good faith to disclose their side-line business in circumstances where it may constitute a conflict or might prejudice their ability to perform their work for their employer.

In this matter, the employee was dismissed after being found guilty of dishonesty because she failed to disclose to her employer, which produces and sells various meat products, that she was operating her

own independent business which concerned the sale of certain dried meat products, such as biltong.

The employee subsequently referred an unfair dismissal to the Commission for Conciliation, Mediation and Arbitration, where the commissioner found the dismissal to be substantively fair. The commissioner reasoned that since there was an alignment between the business of the employer and that of the employee, the employer should have at least been made aware of the employee's activities and the fact that she chose not to make a disclosure of her business interests, amounted to unacceptable behaviour and an act of dishonesty.

DUTY OF GOOD FAITH

The Labour Court, however, took a different view. It found that the evidence presented indicated that the employee appeared to have operated her business mainly over weekends, although the court accepted that in some instances she may have been sorting out orders and queries during her working time with her



The new normal, 'side hustles' and an employee's duty of good faith to their employer

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employer. In this sense, the court found that since she ran her business outside working hours, there was no nexus between the performance of her duties in terms of her contract of employment and the operation of her own business as a side-line project. As such, the court held that the commissioner had arrived at a decision which a reasonable decision maker could not reach.

The LAC was particularly critical of the approach adopted by the Labour Court where it had indicated that there was no duty placed on an employee to inform the employer about a potential conflict of interest. Instead, the LAC placed emphasis on the fact that the employee was running a "side-line" business in the same market as the employer. This was an essential and important fact that the employer should have been made aware of, and the employee's

failure to disclose this state of affairs meant she was acting in violation of the duty of good faith she owed to her employer even if there was no obvious competition between the enterprises. On this basis, the LAC found that the decision of the commissioner was reasonable, set aside the judgment of the Labour Court and replaced it with an order dismissing the review application. The employee's dismissal was therefore confirmed to be substantively fair.

This important decision emphasises the well-known, salient principle that employees owe a duty of good faith to act in best interests of their employer. Moreover, this decision builds upon in what has recently articulated in a recent [CDH Alert, dated 17 January 2022](#). As businesses move to the new normal, it is important that adequate mechanisms and controls are put in place to ensure

that employees do not abuse their new working arrangements by using time that they should be dedicating to their employer to focus on their own 'side hustles'. Where possible, employers must request employees to declare their side businesses so that the employer can assess and ensure that there is no conflict of interest or interference with the employee's ability to perform their work to the expected standard.

FIONA LEPPAN, MAYSON PETLA AND DEAN TENNANT

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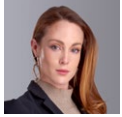


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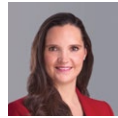
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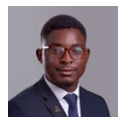
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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