

EMPLOYMENT LAW ALERT

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CCMA Strikes again: Mandatory Vaccinations are acceptable

On 25 January 2022, the CCMA published an award in the matter of *GK v Ndaka Security and Services (FSWK2448-21)*. In this matter, the commission was called upon to determine whether the employer committed an unfair labour practice in terms of section 186(2)(b) of the Labour Relations Act 66 of 1995 (LRA) when an employee was prevented from accessing the workplace and therefore could not carry out his duties following his refusal to comply with the employer's mandatory vaccination policy.



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In essence, the employee's complaint was that the employer instructed him not to return to the workplace until he had been vaccinated against COVID-19. He was however offered an alternative to submit weekly negative COVID-19 test results, at his own cost.

The employee is employed as a safety practitioner at Ndaka Security and Services, in the business of providing security services to, among others, Sasol Ltd (Sasol). In providing the services to Sasol, the employer runs its operations at the Sasol site with approximately 36 guard posts. The employee's post includes identifying risks on the site and engaging various stakeholders including his colleagues, clients, and the public. The employer's decision to send the employee home was informed by Sasol's requirement to have a 100% vaccination rate on site. The employee subsequently referred a dispute on the grounds that he was unfairly suspended from duty.

The commissioner considered the procedure followed by the employer in arriving at its decision. The employer had conducted three risk assessments over the course of 2020 and 2021 to determine appropriate measures to safeguard its employees and clients against the spread of COVID-19. Clearly influenced by Sasol's imperative to have a 100% vaccination rate, the last risk assessment conducted in October 2021 identified classes of high-risk employees and requested those employees to become vaccinated.

The employer engaged in negotiations with trade unions and arrived at an agreement in respect of a mandatory vaccination policy. Following the process to determine the need for a mandatory vaccination policy and who would be affected by it, the employer approached the employee to request that he become vaccinated. A further meeting was held with the employee to discuss his concerns regarding vaccination and to persuade him to comply with the policy.

He persisted in his refusal, so the parties offered him an alternative of submitting weekly negative COVID-19 test results, at his cost. This, and some other alternative accommodations were extended to other employees including working in an isolated office and working from home on a 'no work, no pay' basis to those able to perform their duties under those circumstances.

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The decision to suspend the employee was informed by his refusal to comply with either of the choices offered to him: vaccinate or submit weekly COVID-19 test results. The employee informed the employer that his reasons for refusal included that, among others, he was protected in terms of section 12 of the Constitution (the right to freedom and security), he was a devout Christian, and relied on his body's natural immunity and his faith to recover from COVID-19. The employee was unwilling to submit weekly negative COVID-19 test results either.

As the employer disputed that the instruction to stay at home amounted to suspension, the first issue the commissioner was required to determine was whether the decision taken by the employer fell within the ambit of an unfair labour practice i.e., whether this conduct constitutes a form of suspension within the parameters of the LRA.

In order to arrive at a finding the CCMA considered various factors and legal principles. The employer is a security company providing an

essential service and its employees are considered frontline workers under the Regulations to the Disaster Management Act. The employee shared an office with ten colleagues and his duties included visiting all sites and interacting with all personnel. The employee's reliance on his religion as a reason to refuse vaccination was found to be woefully lacking as there was no theological or scientific support that the Christian faith precludes its members from being vaccinated. Finally, while many recover from Covid-19 without the benefit of the vaccine, it has been proven that vaccination curbs the rate of infection and significantly reduces the risk of severe Covid-19 symptoms.

Having considered these factors as well as various legal principles from the Constitution to regulations empowering employers to implement mandatory vaccination policies, the employer's decision to send the employee home was indeed a suspension, however the CCMA found that it was not unfair and therefore did not constitute an unfair labour practice.

The CCMA has reiterated its support for employers who lay down procedures in the workplace in the interest of the health and safety of its employees and the public at large. The CCMA recently adjudicated a similar dispute based on mandatory vaccination policies in *TM v Goldrush Group (GAJB 24054-21)* where the employee's dismissal pursuant to her refusal to be vaccinated was found to be fair.

Read the CCMA's finding [here](#), to follow this developing area of law more closely.

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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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