

EMPLOYMENT ALERT

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MEDICAL CERTIFICATES FROM TRADITIONAL HEALERS - THE DEBATE CONTINUES

An employee who is absent from work for reasons of ill health is required to submit a medical certificate as proof of such incapacity to be entitled to paid sick leave. In terms of s23 of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA), the medical certificate must be "issued and signed by a medical practitioner or any other person who is certified to diagnose and treat patients and who is registered with a professional council established by an Act of Parliament."

The question that arises in a culturally diverse nation such as ours is whether a certificate issued by a traditional healer would constitute sufficient proof of incapacity for purposes of s23 of the BCEA and the entitlement to paid sick leave.

In *Kievits Kroon Country Estate (Pty) Ltd v Johanna Mmoledi and others* [2012] 11 BLLR 1099 (LAC), the employee had tendered two letters addressed to her employer written by a traditional healer, that requested that the employee be excused from work for one month. Following her employer's refusal to grant her the one month unpaid leave to attend a traditional healer's course, the employee nevertheless attended the course.

Upon her return to work, the employee was subjected to a disciplinary enquiry and was found guilty of non-compliance with the employer's managerial instructions, being absent from work without a valid reason and gross insubordination. The chairperson of the enquiry concluded that the employee "did not hand in any letter by any medical practitioner as required by the BCEA that would provide proof of this alleged illness."

The employee was dismissed. She subsequently referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). During arbitration proceedings at the CCMA, the traditional healer made representations that the

employee would have suffered great misfortune had she ignored her ancestors' call. The employer's response was that had the employee submitted a certificate by a registered medical practitioner she would not have been dismissed.

The arbitrator lamented the lack of cultural diversity in the employer's workplace and further found that the employee's only recourse was to break the employer's rules to save her own life. The arbitrator found that the employee was an ordinary person and that she was not so brave as to risk her own life and not attend the course. The employer's refusal to grant unpaid leave to the employee was therefore found to be unreasonable and the employee's dismissal was ruled substantively unfair.

The employer instituted review proceedings in the Labour Court to have the arbitrator's award reviewed or set aside. The Court reiterated that in assessing the fairness of a dismissal for absenteeism, the following factors are normally considered:

- the employee's work record;
- the reason for the employee's absence; and
- the employer's treatment of the same misconduct in the past.

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Furthermore, the onus falls on an employee to tender a reasonable explanation for their absence from work.

The Court observed that the employer had previously accommodated the employee's course by agreeing to a shift change from February 2007 to May 2007. However, when the employee required a month of unpaid leave at the end of May 2007 to complete her course, the employer refused to grant a month of leave.

The Court noted that the employer knew the reasons for the intended absence, knew the duration for which the employee would be absent, knew the whereabouts of the employee and noted that the employee had worked for the employer for eight years.

The Court found that the award was one that a reasonable decision-maker would have made and dismissed the review application. On appeal, the Labour Appeal Court (LAC), per Tlaletsi JA, remarked that it was "not the case that the employee was sick or ill in the conventional sense." Rather, the employee had a certain 'condition,' which was a calling from her ancestors.

The LAC emphasised that the employer had initially accepted the circumstances of the employee without any question of her being ill in the conventional sense. At first, she had not been asked for any proof of illness. It was only after she had requested a month of unpaid leave and had deemed a week of unpaid leave as insufficient, that the question of medical proof arose.

The LAC observed that the employee was not seeking any remuneration for the period of her absence. It must therefore follow that s23 of the BCEA is of no application. Any argument based on this provision during these proceedings could therefore not be entertained.

The employer had also presented a floodgates argument: that the arbitrator's award will essentially give the "the green light to employees who subscribe to Africans traditions and culture to unilaterally diagnose themselves and bully employers into accepting sick notes from traditional healers..." The LAC mentioned that a society as diverse as our own will always create challenges and that reasonable accommodation of each other is required.

The LAC found that the arbitrator's conclusions were supported and that she had properly applied her mind. The employer's appeal was dismissed.

Where an employee is absent from work and tenders a sick note or certificate from a traditional healer, the employer should consider accommodating the employee and accepting such note as an explanation for the employee's absence from work. However, the employer need not pay the employee for such period of absence as the decision does not equate medical certificates from registered medical practitioners with those from traditional healers.

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