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EMPLOYMENT LAW **ALERT**

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The knock-on effect of national minimum wage increase on the farming industry

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There is no doubt that the COVID-19 pandemic has had a profound impact on the workplace, and it brings with it new challenges, particularly when it comes to the unique relationship which exists between an employer and an employee.

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Passing the buck: Reminder of employer obligations in cases of sexual harassment

The employee in question was a shop steward of her trade union. She attended a shop stewards' meeting during working hours at her employer's premises.

Sexual harassment has been described by our courts as "*the most heinous misconduct that plagues a workplace - not only is it demeaning to the victim, it undermines the dignity, integrity and self-worth of the employee harassed*". This is indeed true, and employers must be cognisant of their duty to take action against culprits of sexual harassment.

In a recent case of *Public Servants Association of South Africa obo AG/Department of Agriculture, Land Reform and Rural Development* [2021] 1 BALR 76 (CCMA), the employer was reminded of the consequences of failing to take action in cases of sexual harassment.

The employee in question was a shop steward of her trade union. She attended a shop stewards' meeting during working hours at her employer's premises. During the meeting, the employee was exposed and subjected to an obscene act of sexual harassment. After leaving the meeting, the employee lodged a formal grievance of sexual harassment in terms of the employer's grievance policy, which applied to all employees of the employer.

When the employee followed up on the status of her grievance, she was informed that the employer was unable to assist with her grievance because the incident took place between the employee (a union member) and a fellow union member, while they were fulfilling the interests of the union. The employee was therefore advised to refer the grievance to her trade union.

The employee was also informed that the employer could not investigate her grievance because the shop stewards' meeting was not approved.

The employee referred a dispute to the CCMA.

During the arbitration proceedings, the Commissioner found that there was prima facie evidence that the sexual harassment had occurred and that, sadly, the employer failed to investigate the grievance. The Commissioner referred to the employer's sexual harassment policy which applied to all employees. As such, the employer (and not the trade union) was obliged to investigate the grievance on the basis that the perpetrator and victim were employees when the incident occurred and, further, the incident occurred on the employer's premises while they were both on duty.

The Commissioner confirmed that it was irrelevant whether or not the shop stewards' meeting was authorised.

The Commissioner found that the employer's failure to investigate the grievance of sexual harassment rendered the employer liable in terms of section 60 of the Employment Equity Act 55 of 1998 (EEA). This section provides that, amongst others, an employer which fails to take the necessary steps to eliminate contraventions of the EEA, is deemed also to have contravened that provision of the EEA. In this regard, sexual harassment constitutes unfair discrimination in terms of section 6(3) of the EEA and is accordingly a contravention thereof.

Passing the buck: Reminder of employer obligations in cases of sexual harassment...*continued*

The relevant case law confirming an employer's duty to prevent discriminatory practices in the workplace was also relied upon.

The relevant case law confirming an employer's duty to prevent discriminatory practices in the workplace was also relied upon.

The Commissioner concluded that the employee had suffered sexual harassment in terms of section 6(3) of the EEA. The employer was, as a result, ordered to pay the employee 10 months compensation. In addition, the employer was ordered to take steps to prevent the same unfair discrimination against the employee, or similar practice occurring again in respect of other employees within 14 days of the award being received.

Employers are reminded of their duties to take all necessary steps to address and eliminate breaches of the EEA, including sexual harassment. Employers must also ensure compliance with their grievance and/or sexual harassment policies. Where employers fall short in this regard, the EEA provides that they will be deemed also to have contravened the EEA and may face liability as a result.

Sean Jamieson and Shandré Smith

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The knock-on effect of national minimum wage increase on the farming industry

Concerns have been expressed that this will adversely impact on jobs in a bid by employers to drive down production costs.

On 8 February 2021, the Minister of Employment and Labour gazetted an increase in the national minimum wage (NMW) from R20,76 to R21,69 effective from 1 March 2021. Previously, the prescribed NMW for farmworkers was R18,69 per hour. This has been increased to R21,69, an adjustment of about 16%. This increase has largely been described by the agricultural sector as drastic.

"*Wage*" refers to the amount of money paid or payable to a worker in respect of ordinary hours of work or, if they are shorter, the hours a worker ordinarily works in a day or a week. Concerns have been expressed by key industry players that this will adversely impact on job security as employers seek to drive down production costs. They are adamant that it will be impossible for the industry to absorb increased levels of remuneration. Some trade unions in the sector have gone as far as saying that if farmers cannot produce food affordably and employ agricultural workers on a large scale, there will be a food crisis and large-scale social upheaval as food insecurity and unemployment start to take root.

On 24 February 2021, during a briefing before the Portfolio Committee on Employment and Labour on the adjustment of the national minimum wage, the National Minimum Wage Commission submitted that research findings and the Annual Labour Force Survey revealed no negative impact on employment, including job losses, as a result of the introduction of the national minimum wage in 2019. Instead, the NMW had led to a statistically significant increase, albeit smaller than expected, and generally improved wages for workers. It is unclear whether these findings were industry specific or generalised across the working population.

In the event that an employer is unable to pay the said rate, they may apply for an exemption from paying the prescribed rates, in terms of section 15(1) of the National Minimum Wage Act. The exemption application must be lodged on the National Minimum Wage Exemption System and may only be granted if (i) the delegated authority is satisfied that the employer cannot afford to pay the minimum wage; and (ii) every representative trade union representing one or more of the affected workers has been meaningfully consulted or, if there is no such trade union, the affected workers have been meaningfully consulted.

Exemption from paying the NMW may be granted for a period not exceeding one year. The exemption must specify the wages the employer will be required to pay the workers, and any other relevant condition. An exemption would only be considered if the employer confirmed compliance with applicable statutory payments and obligations, including but not limited to the Unemployment Insurance Fund, the Compensation Fund and any applicable Bargaining Council Main Collective Agreement.

Accordingly, to the extent that employers are of the view that they cannot afford the increased NMW rates, they have recourse of applying for an exemption.

Phetheni Nkuna and Mthokozisi Zungu

Can employers discipline employees for conduct outside of the workplace that involves recklessly exposing themselves to COVID-19?

It is a long-established principle in labour law, that a transgression of the employer's health and safety policies and procedures, will lead to disciplinary action and may justify the termination of the transgressing employee's employment.

There is no doubt that the COVID-19 pandemic has had a profound impact on the workplace, and it brings with it new challenges, particularly when it comes to the unique relationship which exists between an employer and an employee.

Due to the unique and unprecedented times we have found ourselves, employers are required to adhere to the Occupational Health and Safety Act 85 of 1983 (OHSA) read with its regulations. In terms of the OHSA, employers are required to provide and maintain as far as is reasonably practicable a working environment that is safe and without risks to the health of workers and to take such steps as may be reasonably practicable to eliminate or mitigate the hazard or potential hazard of the Coronavirus.

The OHSA further requires employers, to ensure, as far as is reasonably practicable, that all persons who may be directly affected by their activities (such as customers, clients or contractors and their workers who enter their workplace or come into contact with their employees) are not exposed to hazards to their health or safety. Non-compliance by employers in this regard could result in the employer facing hefty consequences such as fines, legal action that could lead to imprisonment, and shutdown orders, depending on the nature and severity of the transgression.

It is a long-established principle in labour law, that a transgression of the employer's health and safety policies and procedures, will lead to disciplinary action and may justify the termination of the transgressing employee's employment.

The question of whether employers have the right to discipline employees for reckless (or even unlawful) conduct such as failing or refusing to wear a face mask in a public setting or on public transport, and consequently potentially exposing themselves to the highly infectious coronavirus disease *"outside of the workplace"* arises.

This question is pertinent to the high likelihood of the employer suffering reputational damage, if the employee's conduct can be traced back to the employer, or the respective employee potentially contracting the virus and causing the spread thereof within the workplace.

It is important, however, at this stage to distinguish between an employee becoming sick in the ordinary course and an employee who intentionally flouts the preventative measures put in place by the South African Government in order to curb the transmission of COVID-19. There is no general duty on any employee to avoid getting sick in the ordinary course. However, in terms of Government regulation, it is an offence to, for example, not wear a face mask in public.

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Can employers discipline employees for conduct outside of the workplace that involves recklessly exposing themselves to COVID-19?*...continued*

Generally, disciplining employees for misconduct outside of the workplace as a whole is usually not as straight forward as it may seem.

Generally, disciplining employees for misconduct outside of the workplace as a whole is usually not as straight forward as it may seem. The general rule in these circumstances is that actions performed outside of the workplace and working hours are beyond the scope of the employer's disciplinary authority. This is based on the premise that the private lives of employees are usually of no concern to their employers and resultantly employers have no right to dictate the conduct of employees outside of their working hours. However, disciplinary action for an employee's extramural conduct may be justified in certain circumstances, namely when a connection can be established between the extramural misconduct of the employee and the negative impact that this conduct has on the employer's business or the employment relationship.

There are a number of cases that support this stance. In the most recent case of *Edcon v Cantamessa* (2020) 41 ILJ 195 (LC) the court held that the posting of a racist comment on Facebook by a senior employee whose Facebook page identified her as an employee of the employer, justified disciplinary action even though she had used her personal computer whilst on leave and outside the ambit of her working hours or workplace. The test that the court applied in this case was whether this misconduct affected the employment relationship and not whether the conduct at issue was covered by the employment contract. It is clear that in order to take disciplinary action against an employee for misconduct outside of the workplace it is sufficient if the employer can establish that it has a legitimate interest in such conduct and that the conduct in question affects the employment relationship. Moreover in the 2005 case of *Tibett & Britten (SA) (Pty) Ltd v Marks & others* (2005) 26 ILJ 940 (LC), the court found that there is a standard of ethical behaviour that the employer does not need to remind the employee about and even if the misconduct is not included in the disciplinary code, the employee could still be disciplined for misconduct.

The above principles can similarly be applied within the context of COVID-19 in the workplace.

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Can employers discipline employees for conduct outside of the workplace that involves recklessly exposing themselves to COVID-19?*...continued*

All things considered, the challenge is describing the misconduct outside the workplace and framing the charges because most disciplinary codes focus on misconduct perpetrated at work and hardly cover misconduct out of the workplace.

Besides employers' obligations to provide a safe working environment for employees, there is a dual responsibility on employees to also comply with these standards. Therefore, by potentially exposing oneself to COVID-19, in contravention of the established legislative preventative measures, will be in contravention of the ethical behaviour that the employer need not remind the employee about in terms of taking reasonable precautions to curb the spread of the coronavirus.

Moreover, the fact that the employee's conduct may result in a potential outbreak at the place of business would naturally concern an employer, who not only has a statutory duty to ensure a safe and healthy working environment, but will also be concerned with productivity of employees, unplanned payment of sick leave or even death of vulnerable employees and the economic risk of having to shut down the place of business.

Dealing with misconduct out of the workplace is difficult

All things considered, the challenge is describing the misconduct outside the workplace and framing the charges because most disciplinary codes focus on misconduct perpetrated at work and hardly cover misconduct out of the workplace. To overcome this challenge the employer must prove that the rule the employee broke is so obvious and well-known that there was no need to communicate it. Alternatively, it is advisable that the employer provides for such in the disciplinary code that employees can be disciplined for external misconduct in relation to employees acting unlawfully and thus exposing themselves to COVID-19 because of the huge risk this poses to the business of the employer as well as health and safety of employees and the general public. The employer should inform employees that they are free to do as they please when they leave work, but that they should continue to act in accordance with the law and not act in a manner that will negatively affect their job or the health and safety of fellow employees outside of the workplace.

Michael Yeates, Kgodisho Phashe and Shanna Eeson

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EMPLOYMENT

RETRENCHMENT GUIDELINE

CLICK HERE for the latest thought leadership and explanation of the legal position in relation to retrenchments, temporary layoffs, short time and retrenchments in the context of business rescue.

2021 RESULTS

CHAMBERS GLOBAL 2014 - 2021 ranked our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2021 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2018 - 2021 in Band 2: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2020 - 2021 in Band 3: Employment.

Imraan Mahomed ranked by CHAMBERS GLOBAL 2021 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2021 in Band 2: Employment.

Michael Yeates ranked by CHAMBERS GLOBAL 2020 - 2021 as an up and coming employment lawyer.

TOP RANKED Chambers Global 2021

Our Employment practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.

Fiona Leppan is ranked as a Leading Individual in Employment in THE LEGAL 500 EMEA 2020.

Aadil Patel is recommended in Employment in THE LEGAL 500 EMEA 2020.

Gillian Lumb is recommended in Employment in THE LEGAL 500 EMEA 2020.

Hugo Pienaar is recommended in Employment in THE LEGAL 500 EMEA 2020.

Michael Yeates is recommended in Employment in THE LEGAL 500 EMEA 2020.

Jose Jorge is recommended in Employment in THE LEGAL 500 EMEA 2020.

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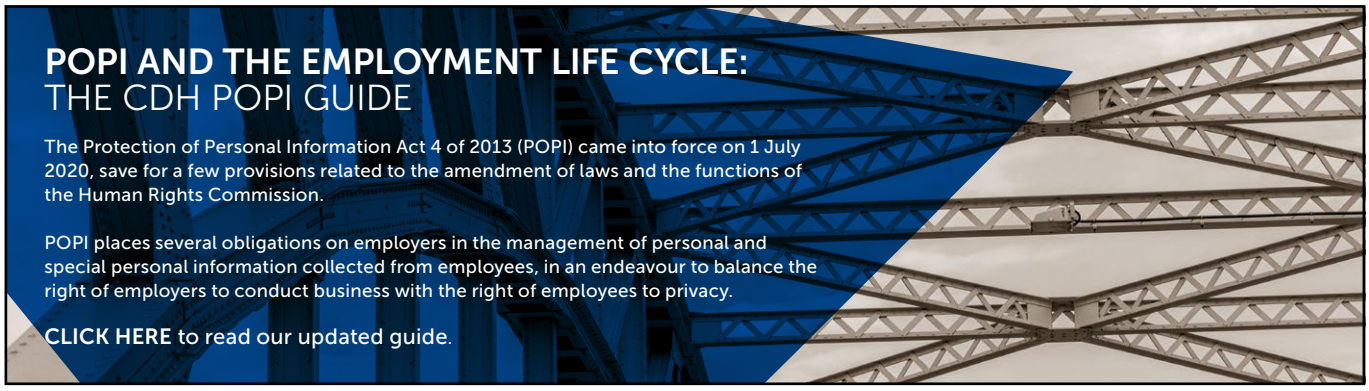
The LEGAL 500 EMEA



POPI AND THE EMPLOYMENT LIFE CYCLE: THE CDH POPI GUIDE

The Protection of Personal Information Act 4 of 2013 (POPI) came into force on 1 July 2020, save for a few provisions related to the amendment of laws and the functions of the Human Rights Commission.

POPI places several obligations on employers in the management of personal and special personal information collected from employees, in an endeavour to balance the right of employers to conduct business with the right of employees to privacy.

CLICK HERE to read our updated guide.

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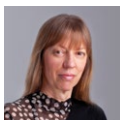

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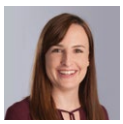

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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