EMPLOYMENT LAW
ALERT

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CLIFFE DEKKER HOFMEYR

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Retrenchment for refusal to vaccinate: Is an employee entitled to severance pay?

In the arbitration between Ms Cecilia Bessick (Applicant) and Baroque Medical (Pty) Ltd (Respondent), the Commissioner had to determine whether the Applicant was unfairly retrenched based on her refusal to vaccinate (in light of a mandatory vaccination policy) and whether she was entitled to severance pay.

Retrenchment for refusal to vaccinate: Is an employee entitled to severance pay?

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The facts in this matter are relatively simple. The Respondent, a supplier of medical devices, implemented a compulsory COVID-19 vaccination policy for its staff and the Applicant refused to comply with the policy based on *"medical, personal and religious reasons"*. It is apposite to note that the Applicant's medical grounds remained unsubstantiated at all stages in the process, and the Commissioner found that her objections on personal and religious grounds did not have any merit. Consequently, she was retrenched on the basis of operational requirements.

After assessing the evidence and arguments submitted by both parties, the Commissioner concluded that the Respondent had made out a case for the retrenchment process that it had embarked upon.

> *"The rationale for the decision to impose a mandatory vaccination policy is clear: in supplying medical products to a number of medical disciplines, the Respondent engages with hospitals and medical practitioners. Accordingly, to safeguard its own employees and ensure that the operations of the employer are not severely affected by absences as a result of staff contracting the COVID-19 virus, and that those entities and individuals that had contact with staff members of the employer are adequately protected, it embarked on a risk assessment which made it apparent that a mandatory vaccination policy had to be imposed."*

The risk assessment conducted by the company, as well as the policy itself, were never challenged by the Applicant. Since the employer's evidence in this regard remained unchallenged, it was accepted by the Commissioner, who stated that he was satisfied that the Respondent had shown that the implementation of a mandatory vaccination policy was a justifiable operational requirement.

PROCEDURAL FAIRNESS AND EMPLOYMENT ALTERNATIVES

The procedural fairness of the Applicant's dismissal was not challenged. With regard to the substantive fairness of her dismissal, the only challenge was that the Respondent did not adequately consider alternatives to retrenchment.

In this regard, the Respondent's evidence was that, for whatever alternative position the employer could have considered for the Applicant, the requirement of vaccination remained the same. Although the Respondent considered the option of allowing the Applicant to work from home, this was not a reasonable alternative since her duties necessitated her presence at the office.

The Commissioner held that the consequence of the Applicant's decision not to comply with the Respondent's mandatory vaccination policy was that she was not able to continue the performance of her duties and that the Respondent

Retrenchment for refusal to vaccinate: Is an employee entitled to severance pay?

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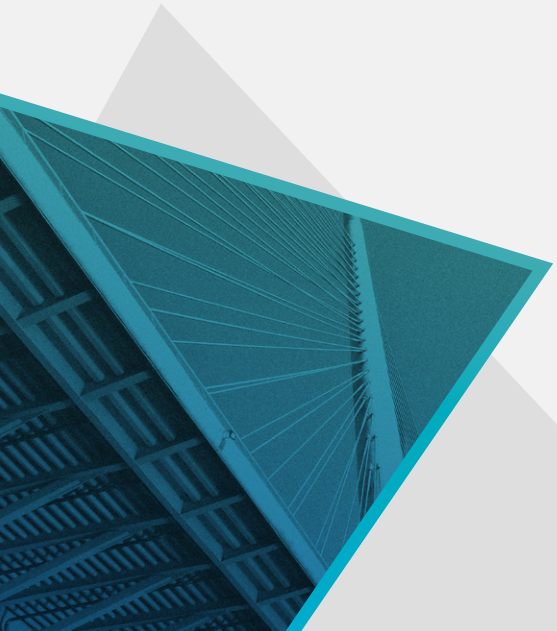

had thus not "*committed any wrongdoing in its decision to terminate the Applicant's services by reason of operational requirements*". Consequently, the Commissioner held that her dismissal was substantively fair.

SEVERANCE PAY

The final issue that the Commissioner considered was whether the Applicant was entitled to severance pay. In this regard, section 41(2), read together with section 41(4), of the Basic Conditions of Employment Act 75 of 1997 (BCEA) was considered. It provides that an employee who unreasonably refuses to accept an employer's offer of alternative employment with that employer or any other employer, is not entitled to severance pay in terms of section 41(2).

In determining the issue, the Commissioner referred to *Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical, Energy, Paper, Printing, Wood and Allied Workers Union* [2013] 12 BLLR 1194 (LAC), in which the court considered a previous examination of the scope of section 41(2), read together with section 41(4), of the BCEA, by Zondo JP (as he was then) in Irvin and Johnson Ltd CCMA [2006] 27 ILJ 935 (LAC), [2006] 7 BLLR 613 (LAC) at 16:

> "*In a further analysis of the scope of the section, Zondo JP held that there was no basis by which an employee could obtain both severance pay and alternative employment. There was however a case where the employee would get neither severance pay nor alternative employment*:
>
> '***Where he has himself to blame because he has acted unreasonably in refusing the offer of alternative employment***.' (at para 45)."

The Commissioner then referred to *Freshmark (Pty) Ltd v CCMA and Others* [2003] 6 BLLR 521 (LAC), in which the court held that an offer by an employer to an employee of his or her position on different terms constitutes an offer of alternative employment – it is the employment that should be alternative, not the position.

In considering the present matter, the Commissioner held that the different condition was the vaccination requirement, which, given the Respondent's operations, became an operational requirement. Accordingly, the Applicant had the choice to vaccinate and retain her employment. However, she refused to vaccinate and her refusal to do so had no merit and was accordingly unreasonable.

In light of the above, the Commissioner held that it would be grossly unfair to expect the Respondent to pay any severance pay in the circumstances.

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