EMPLOYMENT LAW
ALERT

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CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

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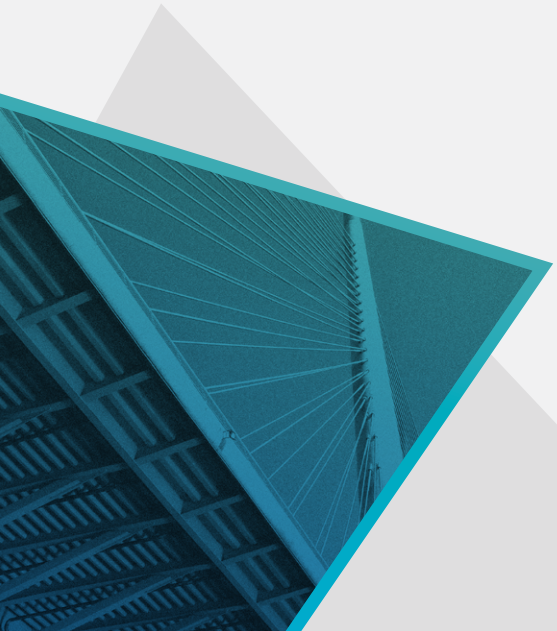
Side hustles – working towards workplace discipline

With the ravages of COVID-19 since early 2020, has come a rise in employees in full time employment taking on a 'side hustle' to supplement income. Further to this, remote working provides employees with a great opportunity to engage in secondary jobs, especially where once being at the office may have been a hindrance.



However, striking a balance between the demands of a second line of employment, whilst maintaining deliverables in one's primary 9-5, can result in blurred lines. There are potentially two practices at play; the first being moonlighting, or the more "*woke*" concept of a 'side hustle'. Moonlighting is when employees, during their own time (or even during employer time), and outside working hours of their primary employment undertake to offer services to another employer for reward. A 'side hustle' is typically defined as additional work which a person is more passionate about than their full-time day job that supplements their income.

The second practice at play is contractual obligations between the employer and employee. South African law does not explicitly preclude an employee from earning an additional income, and the general principle is that an employee cannot be unreasonably kept from supplementing their income. However, there are circumstances in which this may not be allowed, such as being expressly prohibited in terms of the employment contract, a workplace policy, and when it actually or potentially harms the primary employer's business, or when it negatively impacts the persons capacity to work.

To prevent uncertainties in the workplace, employers typically regulate this practice by expressly prohibiting a secondary occupation in employment contracts, workplace policies and/or collective agreements. This is mostly considered as best practice, and employers who do not have these forms of restrictions, are advised to do so, especially in the existing economic climate.

In addition, an employer may also limit the practice by providing that an employee must disclose the practice in advance and that it would be subject to the employer's discretion for the employee to continue with their additional venture.

If a prohibiting clause or workplace policy does not exist, an employee may have a secondary job provided that it does not contravene the standards of the primary employment relationship. Additionally, it should be stipulated that there is no conflict of interest with the primary employer and the primary employer is not prejudiced for instance by the employee incapacitating himself in some form by reduced output or performance. At the heart of the employment relationship are trust and confidence, and an employee is expected under the law to be honest, loyal and promote the business in the best interests of the employer.

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Side hustles – working towards workplace discipline

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If the employee's secondary job compromises the employment relationship it may result in possible disciplinary action and dismissal depending on the circumstances. The Labour Appeal Court has held that for moonlighting to be effectively prohibited there must be a specific rule stating that it is not permissible, and the rule should be known to employees.

There have also been instances where an employee takes sick leave to attend to their secondary job. When an employer suspects this is occurring in the workplace, the employer should conduct a fair investigation. Where the conduct is established in addition to moonlighting the employee would be guilty of dishonesty or fraud which would be a basis for dismissal.

In closing, employees who moonlight or 'side hustle' should do so with eyes wide open. Employers who do not regulate moonlighting or 'side hustles' should do so, as it is important to establish clear boundaries in the employment relationship.

IMRAAN MAHOMED AND STORM ARENDS

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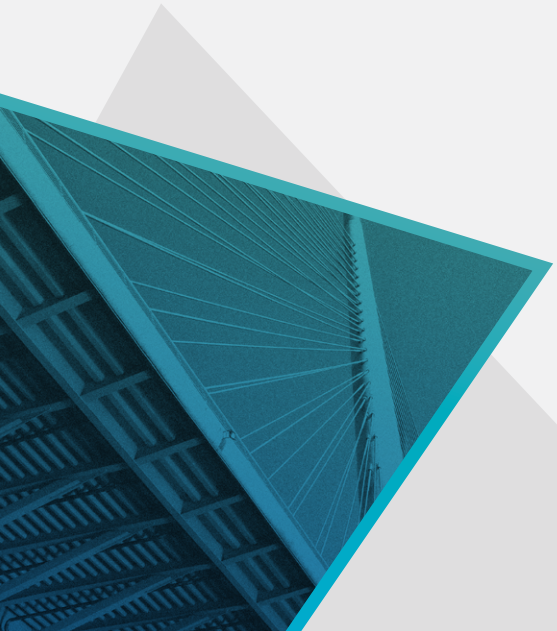
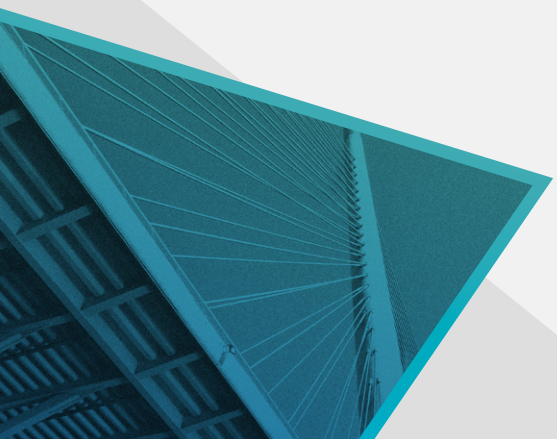


If you say you are sick, you better be sick! The Labour Appeal Court addresses the CCMA's lenient approach to dishonesty

In *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (PA12/2020) [2021] ZALAC 49 (10 December 2021), the Labour Appeal Court considered the consequences that flow from an employee being "*too sick*" to attend work, but well enough to attend a rugby match, all while enjoying the benefit of paid sick leave.



On 9 June 2018, the employee, a Mr Alexander, informed his manager that he was unable to attend work because he was too ill. On the same day, during working hours, he travelled from Jeffreys Bay to Port Elizabeth to attend a rugby match with his father. This is a trip of about 1 hour. Incidentally, the employee would only have had to travel 20 minutes to get to work, which he allegedly was too ill to do. When Alexander returned to work the next day, his manager asked him where he had been on the previous day. He admitted that he had been to a rugby match but, in his defence, stated that he had recovered from his illness before he attended the rugby match.

Alexander was charged with gross misconduct and subjected to a disciplinary hearing for breaching company policies and procedures by abusing authorised sick leave, for which he had been paid. He was found guilty of the allegation and dismissed. Alexander referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

The CCMA arbitrator found that Alexander's dismissal was procedurally and substantively unfair and reinstated him with full backpay. The arbitrator concluded that Alexander was not charged with dishonesty therefore the trust relationship had not been broken. Furthermore, Alexander did not try to hide the fact that he attended a rugby match while he was on sick leave. In addition, the arbitrator found that no evidence had been led about any previous warnings that were issued to Alexander in this regard.

The company launched a review application of the award. On review the Labour Court disagreed with the arbitrator's decision on procedural unfairness, but agreed that Alexander's dismissal was substantively unfair. In support of its decision, the Labour Court considered that the company had failed to prove that Alexander acted dishonestly or that there was a policy in place that required an employee who had been booked off sick to report for duty when his condition had improved.

The company appealed the Labour Court's decision. The Labour Appeal Court (LAC) considered the allegation against Alexander. He had been charged with gross misconduct, essentially for abusing sick leave. Alexander had admitted in cross examination that it was not honest of him to be paid for that portion of the day that he attended the rugby match. He had also admitted that that his conduct did not set a good example for his subordinates. The LAC found that while Alexander was not specifically charged with dishonesty,

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"manifestly, [he] *acted dishonestly in absenting himself from work on the basis that he was too ill to perform his duties but then travelled for at least an hour to support his local rugby team, knowing full well that he would be paid for the day"*. The LAC found that in the arbitrator's finding there had been no dishonesty which was clearly reviewable, even if the standard for review were so onerous that an award could only be set aside on the basis of an egregious error. The court found that in this case the arbitrator had in fact committed an egregious error, which had been repeated in the Labour Court.

In considering the arbitrator's order of reinstatement, on the basis that Alexander's conduct did not render a continued employment relationship impossible, the LAC found that *"this lenient approach to dishonesty cannot be countenanced"*. Alexander was employed in a relatively senior position, he confirmed that his behaviour was not a good example for his subordinates, and he was *"palpably"* dishonest in that he expected to get away with enjoying a rugby match while enjoying the benefit of paid sick leave. It was this dishonest conduct that negatively damaged the trust relationship. The LAC found further that it was manifestly justifiable for the company to adopt the approach that Alexander was required to act with integrity and abide by the company's policies, procedures and codes. The LAC found that it was clear that the trust relationship had broken down and that dismissal was the appropriate sanction.

This judgment is to be welcomed. It sends a message to Commissioners of the CCMA that they should not take an overly technical approach to the allegations against an employee and that they should adopt a 'common sense' approach in considering the true impact of an employee's misconduct on the trust relationship. Employees are required to conduct themselves with the utmost honesty and integrity in their dealings with their employer. Where the trust relationship is broken a continued employment relationship is simply untenable.

JOSE JORGE AND TARYN YORK

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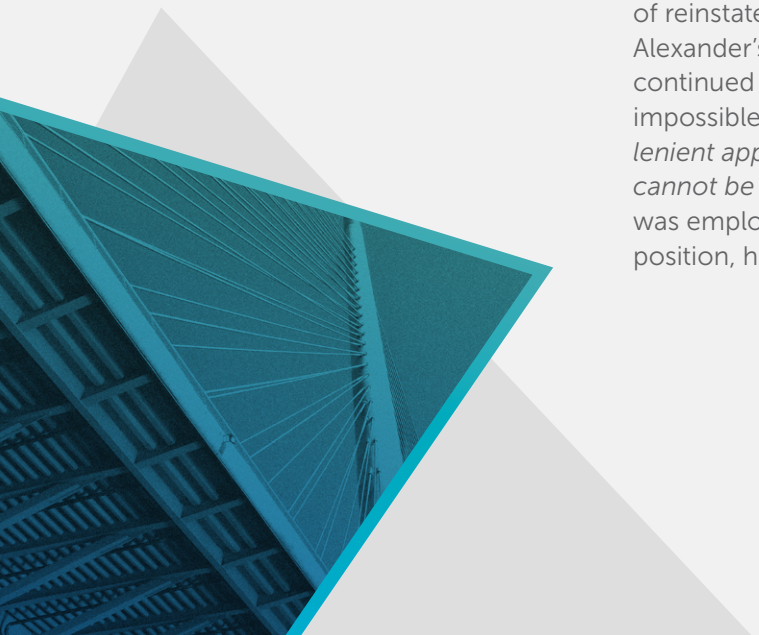

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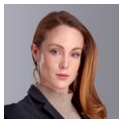

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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