Employment Law

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SOUTH AFRICA

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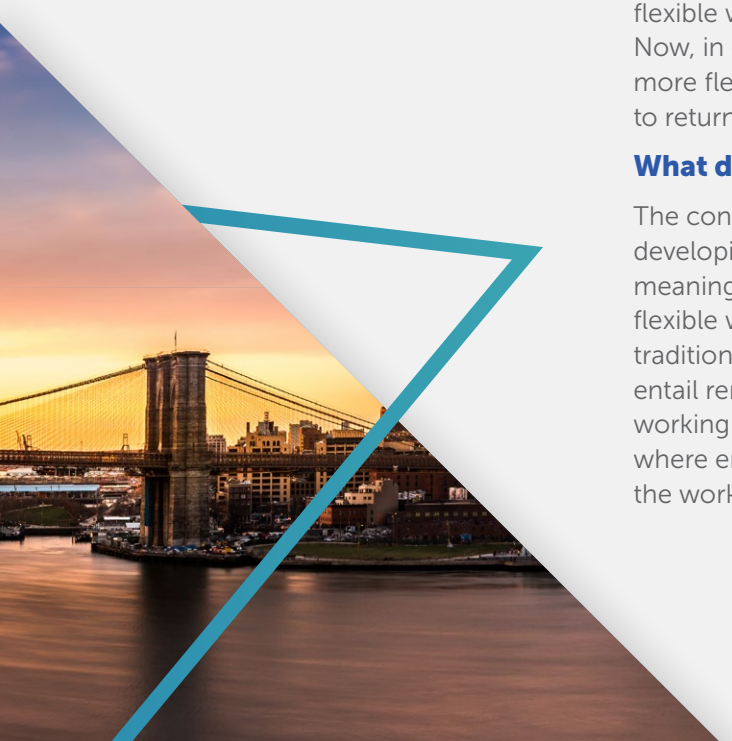
Flexible working practices: Balancing business needs and employee preference



Prior to the COVID-19 pandemic and the lockdown regulations that followed, most workplaces implemented traditional norms in relation to regulating working hours. Employees were expected to report to work at a certain time, were entitled to a meal break, and exited the workplace at the end of the workday.

The aftermath of the COVID-19 lockdowns has compelled employers to reconsider these norms and to find new ways of establishing and sustaining productivity in what we have come to understand as "*the new normal*". Many companies have implemented various work flexibility models, such as hybrid working, in order to ensure that employees, while restricted, can continue to meet the companies' objectives.

Years after the pandemic, employers are still grappling with flexible working arrangements, but for different reasons. Now, in corporate South Africa, employees are requesting more flexibility while many employers are identifying a need to return to the office.

What does flexible work look like?

The concept of flexible work is fairly new and fast developing. What we do know is that it has a much broader meaning than remote work, which is an example of flexible work. Flexible work can be anything outside of the traditional 8 hour workday or 45-hour work week; it could entail remote work, sharing job duties with colleagues, working from abroad, or even working on a flexi-time basis where employees determine the start and end time of the workday.

One of the advantages of flexible working arrangements is that they allow employees to curate a better work-life balance for themselves. Employees are afforded time to meet their family's needs and personal obligations, or are even allowed to take breaks in order to combat what Kathleen Hogan, Executive Vice President for Human Resources and Chief People Officer at Microsoft, has termed a "*human energy crisis*". This term describes the increasing levels of burnout in corporate environments. Despite the benefits that flexibility models may present, it is important to be mindful that these benefits are not available to all employees in corporate South Africa and must be considered against the various benefits that in-office work presents.

Among such benefits is the ability to form and build good relationships in the workplace. The importance of face-to-face time with colleagues cannot be understated; it allows for better communication and coherence, which go a long way in helping to form lasting professional relationships. Another possible benefit is the opportunity for better mentoring, especially in the case of junior employees. Contact time with mentors affords employees the necessary training and development that remote working, for example, may not be able to offer. A third benefit of office time is visibility.

What is clear is that there are significant benefits to flexible work and the traditional work model and these must be weighed against each other. We have also seen that employers and employees alike are struggling to find a balance between retaining flexibility and maintaining productivity.

Flexible working practices: Balancing business needs and employee preference

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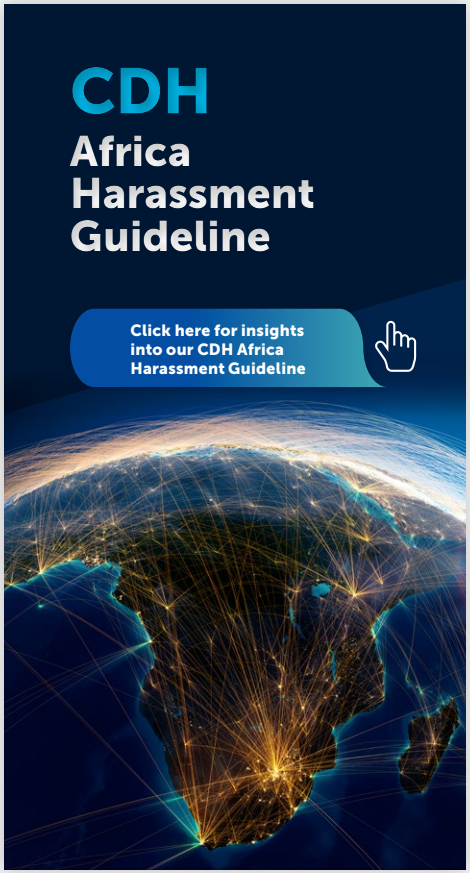

The law

The trend towards flexibility can be seen on an international level. Australia's Fair Work Legislative Amendment (Closing Loopholes No.2) Bill of 2023, for example, will establish the right to disconnect into Australian law. This affords employees the right to refuse to engage in work or work-related communication outside of working hours or at home.

In the South African context, however, neither the Basic Conditions of Employment Act 75 of 1997 nor the Labour Relations Act 66 of 1995 provides for the right to disconnect or to work remotely. Employers should not expect any legislative changes any time soon.

For now, we recommend that flexible working arrangements be regulated in terms of policies. Employers should take proactive steps to discuss and decide what is practical within their environment and then clearly communicate their expectations to the staff who are impacted. Points to consider include availability, communication outside of working hours (including contact by third parties such as clients), connectivity, the impact of loadshedding and online or remote meeting etiquette. What these requirements will look like will depend on the circumstances of the employer.

Anli Bezuidenhout, Nadeem Mahomed and Kirsten Davids

Is a clear criminal history an inherent requirement of the job?

In the recent case of *O' Connor v LexisNexis (Pty) Ltd* (P18/24) [2024] ZALCPE 11, the Labour Court considered, on an urgent basis, whether the refusal to appoint an individual on the basis of them having a criminal record amounted to unfair discrimination under section 6 of the Employment Equity Act 55 of 1998 (EEA).

Brief facts of the case

Mr Elsworth O'Connor (the applicant), applied for the job of *"Senior Data Discovery and Enrichment Expert I"* with LexisNexis (Pty) Ltd (the respondent). The applicant, as part of the interview process, filled out a *"Refcheck Consent and Indemnity form"* which would verify whether his credentials were valid, check whether he had a criminal record, and verify any references from previous employers. While all of this was being conducted, the applicant was offered the job on condition that he complied with the conditions set out in the contract of employment, one of which spoke to a clear criminal record check. It was later discovered through *"Refcheck"* that the applicant had a criminal record for *"six counts of theft, one count of fraud, and two counts of defeating the course of justice"*. Upon discovering this, the respondent retracted its *"conditional offer"* of employment.

The matter was then referred to the Commission for Conciliation, Mediation and Arbitration for Conciliation (CCMA) by the applicant. However, the respondent did not participate in the process and a certificate of non-resolution was issued. The applicant then brought the matter before the Labour Court.

The Labour Court

In the Labour Court the applicant brought three claims, pleaded in the alternative:

1. That an automatically unfair dismissal took place on an arbitrary ground of past convictions within the realm of section 187 of the Labour Relations Act 66 of 1995.
2. A repudiation of the contract of employment within the scope of section 77(3) of the Basic Conditions of Employment Act 75 of 1997.
3. Unfair discrimination in terms of section 6 of the EEA.

The court proceeded to consider each claim with regard to whether it fitted within the realm of urgency. It firstly found that a claim for unfair dismissal cannot be considered to be urgent as it is a claim that has sufficient statutory mechanisms to deal with it adequately in the ordinary course.

Regarding the claim of repudiation and specific performance, the court found that there would be greater prejudice towards the applicant if urgent relief were not granted. As such, the court found that it was appropriate to consider the claim on an urgent basis.

Regarding the claim of unfair discrimination, the court held that even though a dispute of this nature would ordinarily be in the form of a trial, as contemplated under Rule 6 of the Labour Court Rules, there is no prohibition in granting interim relief if such an order is justified. It found that Rule 6

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is not entirely prescriptive that unfair discrimination falls solely under it, and the court found that even if it were, it is part of the rules that an applicant can seek condonation for non-compliance. The court held that section 50 of the EEA allowed it to *"make any appropriate order that is just and equitable"* and that this allowed the court to hear the matter on an urgent basis given the fact that there would be greater prejudice towards the applicant if the matter was not heard on an urgent basis.

The court found that the offer of employment was subject to, among other things, the applicant's criminal record coming back clear. The court held that the respondent was entitled to retract the conditional offer when the applicant's criminal record revealed previous convictions. It therefore, found that the respondent did not repudiate the applicant's contract of employment.

On the question of unfair discrimination, the court cited the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices (Code of Good Practice) at paragraphs 7.3.32 and 17.3.6 respectively where it states that:

> *"An employer should only conduct integrity checks, such as verifying the qualifications of an applicant, contacting credit references and investigating whether the applicant has a criminal record, if this is relevant to the requirements of the job...*
>
> *An employer may not collect personal data regarding an employee's sex life, political, religious or other beliefs, or criminal convictions, except in exceptional circumstances where such information may be directly relevant to an employment decision."*

The court relied on these provisions to support its decision that a past criminal conviction can only be used where it is linked to the inherent requirements of the job.

The court held that there was no indication on the papers before it that the job required a significant amount of trust and that the applicant's criminal history was relevant to the job. It is worth noting that the court remarked that its finding might have been different if the respondent had responded to the applicant's unfair discrimination claim on the merits. It concluded that the retraction of the offer by the respondent solely based on the applicant having a criminal history constituted unfair discrimination as contemplated in section 6 of the EEA.

Discussion

In its judgment the court relied on the Code of Good Practice in holding that a past criminal conviction is only relevant to the extent that it is an inherent requirement of the job. This is because such information pertains to an individual's private or personal information, which is protected. This is why it is recognised in the Protection of Personal Information Act 4 of 2013, under the definition of *"personal information"* in section 1, which states that *"information relating to the education or the medical, financial, criminal or employment history of the person"*.

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An individual's past criminal conduct is inherently linked to their constitutional right to privacy and, as such, there is only a need or requirement to disclose this where the information would have a legitimate bearing on the employment in such a manner that, if not considered, may jeopardize the rights or legitimate interests of the employer.

This judgment does not establish any new principle regarding the element of trust in an employment relationship. The principle of trust is at the heart of an employment relationship and this has been emphasised in both the Constitutional Court and the Labour Appeal Court in the cases of *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others* [2019] 40 ILJ 1957 (CC) and *Malamlela v SA Local Government Bargaining Council and Others* [2018] 39 ILJ 2454 (LAC). Therefore, it is important that an employer considers this before it can appoint an individual, specifically in a situation where the individual may be handling sensitive information or funds, or they are placed in a position of high authority, among other considerations. In such cases there is a heightened level of trust required between the employer and employee and there may be a justification for a clear criminal background for specific offences.

The respondent was required to put evidence about the nature of the work of a "*Senior Data Discovery and Enrichment Expert I*". It would have been important for the legitimate interests of the respondent to be probed, particularly if the applicant was required to deal with sensitive information that had the potential to adversely impact the legitimate interests of the respondent. This put the court at a disadvantage when needing to make a just and equitable order.

With regard to the nature of the relief granted, a material dispute of fact should in the ordinary course go to trial. In matters of unfair discrimination, a dispute of fact generally does arise and, as such, in accordance with Rule 6 of the Labour Court Rules, should be determined in a trial. Therefore, the granting of a final order may not always be appropriate.

Conclusion

An individual has the right to privacy as entrenched in the Constitution and this includes the right to protect their personal information, but this has to be weighed against an employer's legitimate interests. It is therefore important for an employer in each case to assess the extent of the trust required of an employee by assessing the scope and extent of the job, its inherent requirements, the level of seniority of the employee, whether such employee will be exposed to sensitive information, as well as any other relevant information linked to the position under consideration.

Fiona Leppan, Biron Madisa, Onele Bikitsha and Leah Williams

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:

Aadil Patel
Practice Head & Director:
Employment Law
Joint Sector Head:
Government & State-Owned Entities
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

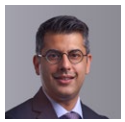
Anli Bezuidenhout
Director:
Employment Law
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com

Asma Cachalia
Director:
Employment Law
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com

Jose Jorge
Director:
Employment Law
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com

Fiona Leppan
Director:
Employment Law
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com

Imraan Mahomed
Director:
Employment Law
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com



Nadeem Mahomed
Director:
Employment Law
T +27 (0)11 562 1936
E nadeem.mahomed@cdhlegal.com

Yvonne Mkefa
Director:
Employment Law
T +27 (0)21 481 6315
E yvonne.mkefa@cdhlegal.com

Phetheni Nkuna
Director:
Employment Law
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com

Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Hugo Pienaar
Sector Head:
Infrastructure, Transport & Logistics
Director: Employment Law
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com

Thabang Rapuleng
Counsel:
Employment Law
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com

Njeri Wagacha
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com

Mohsina Chenia
Executive Consultant:
Employment Law
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com

Jean Ewang
Counsel:
Employment Law
T +27 (0)11 562 1499
E jean.ewang@cdhlegal.com

Ebrahim Patelia
Legal Consultant:
Employment Law
T +27 (0)11 562 1000
E ebrahim.patelia@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:

Rizichi Kashero-Ondego
Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com

Jordyne Löser
Senior Associate:
Employment Law
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com

Leila Moosa
Senior Associate:
Employment Law
T +27 (0)21 481 6318
E leila.moosa@cdhlegal.com

Christine Mugenyu
Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E christine.mugenyu@cdhlegal.com

Kgodisho Phashe
Senior Associate:
Employment Law
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com

Taryn York
Senior Associate:
Employment Law
T +27 (0)11 562 1732
E taryn.york@cdhlegal.com

Malesela Letwaba
Associate:
Employment Law
T +27 (0)11 562 1710
E malesela.letwaba@cdhlegal.com

Biron Madisa
Associate:
Employment Law
T +27 (0)11 562 1031
E biron.madisa@cdhlegal.com

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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CDH INCORPORATED