Employee discipline in the face of Covid-19

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Covid-19 has brought about exponential change in the way in which companies, small and large, now conduct business. Traditional offices, boardroom meetings, greeting gestures such as handshakes and office visits have in most cases ceased to exist. Businesses are now mainly conducted remotely and virtually. Added to this, many South African companies have appointed a Covid-19 compliance officer and implemented numerous Covid-19 related documents, policies, protocols and procedures.

While this transition has not been without teething issues, Labour Dispute Resolution Forums have not been oblivious to the rather questionable and harsh sanctions imposed by certain employers when prosecuting employees for failing to adhere to Covid-19 workplace protocols. However, this does not mean that employees will get away with a mere slap on the wrist for blatantly disregarding these protocols. A few recent decisions taken by such forums make this evident and employers ought to take into account these decisions prior to dismissing employees for Covid-19-related transgressions.

In October v Teleperformance SA (Pty) Ltd [2021] 4 BALR 426 (CCMA), the employee (October), a call centre agent, was dismissed for 4 days unauthorised absence during the month of May 2020. October claimed that when the Covid-19 pandemic intensified, and following concerns raised by him in regard to Teleperformance SA's (employer) non-compliance with health and safety protocols which led to him fearing for his own personal health and safety, his Supervisor gave him permission to stay at home until he felt it was safe to return to work.

The employer claimed that it had complied with all lockdown directives issued by the Government and that October was the only agent who had declined to report for duty and had a rather poor attendance record. At arbitration, the Commissioner noted that a regulation issued by the Minister of Employment and Labour in April 2020 provided, inter alia, that employees could refuse to tender their services if such employees reasonably felt that doing so would pose an imminent threat of exposure to the virus, and that such employee/s could not be dismissed, disciplined or harassed for remaining away from work in those circumstances.

October's dismissal arose directly from the concern that he expressed about health and safety in the workplace to his Supervisor. Furthermore, October was informed that he could go home if he wished and that the policy of "no work no pay" would be applied as a result of his refusal to tender his services.

In the circumstances, the employer's reliance on the sick leave and disciplinary policies was misplaced as the applicable regulation issued by the Government ought to have been followed.

The Commissioner found that October's dismissal was a breach of the aforementioned regulation, which rendered October's dismissal unfair, and awarded October compensation equivalent to 4 months' salary.

In NUMSA obo Manyike v Wenzane Consulting & Construction [2021] 5 BALR 479 (MEIBC), the employee, a rigger, was dismissed for pulling his face mask below his chin while speaking to the Employer's security on his cell phone. The employee maintained that he had done so because the person he was speaking to would not have been able to clearly hear him and claimed, in a default arbitration hearing where the employer failed to attend, that his dismissal was substantively unfair.

The Commissioner accepted that not wearing a mask at all during the Covid-19 pandemic could have amounted to risky behaviour. However, the Commissioner found that confusion surrounded the rule that masks ought to be worn in the workplace and that more education was needed in this regard. In this matter, a sanction short of dismissal, such as a period of suspension without pay, would have been more appropriate. The employee was reinstated from the date of the award with no order being made as to arrear wages.

In DETAWU obo Jacobs v Quality Express [2021] 5 BALR 453 (NBCRFLI), the employee was dismissed for reporting for duty knowing that he was a Covid-19 risk, failing to remain in isolation and failing to notify the employer's management team that he had tested for the virus, was awaiting his results and that he had a symptom in the form of headaches.

The employee claimed that he had not breached any workplace rules as these did not exist and that his dismissal, in the circumstances, was unfair. At arbitration, the Commissioner noted that the employee had disputed the existence of a rule that required employees to not report for duty if they displayed symptoms of Covid-19, or for how long an employee displaying symptoms of the virus would have to isolate for.

The employee had previously isolated for the required period, as stipulated in the employer's Covid-19 protocol, which illustrated that he was well aware of the Covid-19 workplace protocols.

Given the seriousness of the pandemic, the Commissioner found that the employee could not hide behind ignorance of the rules. Taking into account that the employee had deliberately endangered the safety of his colleagues, the Commissioner found that the employee's offence was serious in nature and had damaged the trust relationship. The employee's dismissal was therefore upheld.

In a similar matter, Eskort Ltd v Mogotsi & others (2021) 42 ILJ 1201 (LC), the employee and Respondent (Mogosti) was dismissed for gross misconduct and gross negligence for his failure to observe the employer's Covid-19 health and safety protocols.

Mogotsi failed to disclose to the employer that he had undergone a Covid-19 test and was awaiting his results. Furthermore, and following receipt of his positive Covid-19 test result, Mogotsi had failed to isolate and instead reported for duty.

Mogotsi was a member of the employer's Coronavirus Site Committee and was responsible for, inter alia, placing awareness posters throughout the workplace. In addition, and post receiving his positive test result, Mogotsi was observed on the Employer's CCTV system hugging a fellow employee who had 5 years earlier undergone a heart operation and had recently been experiencing post-surgery complications. Furthermore, Mogotsi was observed walking in the employer's workshop without a mask.

In arriving at his decision to set aside the CCMA arbitration award, Judge Tlhotlhalemaje took into account the extensive evidence led by the employer, the egregious nature of Mogotsi's conduct and the impact of that conduct on the employer as well as Mogotsi's fellow employees.

These matters show that the Labour Dispute Resolution forums are not oblivious to employers utilising breaches of Covid-19 workplace protocols as a means to strategically decrease numbers in their workforce and will not readily uphold sanctions of dismissals for Covid-19 transgressions unless good and sound reason exists to do so. As illustrated in the Mogotsi case, the courts will also not hesitate to set aside arbitration awards whereby employees blatantly and willingly disregard the implementation of the employer's Covid-19 workplace protocols and procedures.

It is accordingly clear that when instituting any disciplinary action against employees for Covid-19-related transgressions, employers ought to take into account and understand the differentiating factors, before dismissing employees for their failure to adhere to Covid-19 workplace protocols. Failure to do so could result in financial and even reputational exposure.

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