

Short notes on:

DISMISSAL FOR REFUSING TO VACCINATE AGAINST COVID-19

Introduction

According to the South African government's official website at the time of writing, the country had 46.2% of its adult population (over 18 years of age) vaccinated. Although quite a substantial number, many employees are still deciding whether to vaccinate and how this will affect their employment should they choose not to.

A recent matter decided in the Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as 'the CCMA') provides authority to consider the position where employers have a mandatory vaccination policy in place, and employees refuse to get vaccinated.

Factual Background

In the matter of *Mulderij v Goldrush Group*¹ decided at the Johannesburg CCMA offices, the employer had referred a matter for arbitration wherein she submitted that her dismissal from the respondent's employee due incapacity based on the grounds that she refused to get vaccinated constituted a substantively unfair dismissal. As such, she was to be reinstated or awarded full compensation.

The employer, in short, had drafted and implemented a mandatory vaccination policy. It was submitted that the employer had taken all the proper steps in considering the employment environment and the need for the policy considering the nature of the work its employees were engaged in.

The employer conducted a thorough consultation process, even obtaining the expertise of a traditional healer, a lecturer in traditional health and a Human Rights Commissioner to assist the employees with any questions.

¹ GAJB 24054-21.

The employee, however, refused to get vaccinated on the constitutional grounds of bodily integrity. More specifically, it was stated that under Section 12(2) of the Constitution², all persons have the right to make decisions regarding the health and security of their body, including but not limited to the decision to reject getting vaccinated.

Based on this impasse, the employer considered the nature of the employee's work and the possible alternate roles she could fulfil. As a result, it was decided that she could not perform the role for which she was appointed. Furthermore, there was no alternate role she could fulfil without risking the safety of the other employees and external site-owners.

A hearing was held wherein it was established that the employee had no intention of ever getting vaccinated. The presiding officer in the hearing concluded that the employee was permanently incapacitated. Her decision meant that she could not meaningfully contribute and participate in a safe working environment.

Parties' Further Submissions

As part of her further submissions at the CCMA, the employee clarified that she had a great personal fear of the possible side-effects of taking the vaccine and found no comfort in the fact that the manufacturing companies and her employer would not be liable should she suffer temporary or permanent effects.

It was submitted that the employee had always stuck to the various COVID-19 protocols when interacting with internal and external parties. In addition, to her knowledge, she had not contracted the virus historically, showing that she was taking the proper precautions to avoid its spread.

The employer, conversely, submitted that the employee was introducing a substantial risk to the health and safety of the other employees by not getting vaccinated. The

² The Constitution of the Republic of South Africa, 1996.

employee further had failed in her attempts to qualify for a medical exemption and had also unsuccessfully tried to appeal the terms of the mandatory vaccination policy.

Consideration of the Matter

In consideration of the matter, the CCMA Commissioner applied his mind and leaned heavily on the statement made by the Deputy Judge President of the Gauteng Division of the High Court, Judge Roland Sutherland. In the Judge's memo to his colleagues on vaccinations in the workplace, he stated:

"There has been, as yet, only a mild protest that this violates freedom of choice... in my view this is the wrong question. The proper question is whether or not an individual is sufficiently civic-minded to appreciate that a duty of care is owed to colleagues and others with whom contact is made to safeguard them from harm. If one wishes to be an active member of a community then the incontrovertible legitimate interest of the community must trump the preferences of the individual."

Conclusion

The Commissioner, therefore, awarded in favour of the employer, dismissing the matter and ruling that under the circumstances, the employee's dismissal was substantively fair based on incapacity due to her refusal to get vaccinated.

Employees are advised to consider their position carefully as the safety of the many will seemingly outweigh the decisions of the few. If employers have a proper mandatory vaccination policy in place, refusal to get vaccinated in such circumstances without approval or medical exemption could cost employees their jobs. Before acting, it is always advised to seek legal advice from properly qualified professionals.

Contact SchoemanLaw Inc for all your labour law needs.