

Employment law update

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Traditional healer certificates

In the case of *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others* [2014] 3 BLLR 207 (SCA) the Supreme Court of Appeal (SCA) was asked to consider the Labour Court's finding that the employee's dismissal for failing to obey an instruction to resume work was substantively unfair. The employee had remained off work in order to complete her training as a traditional healer. The employer's version was that the employee had wilfully been absent from work after the employer had refused to grant her leave for purposes unrelated to her employment. The employee's case, on the other hand, was that her absence was for reasons beyond her control as in terms of her culture she had a calling from her ancestors to train as a traditional healer and she genuinely believed that she would suffer misfortune if she returned to work and did not complete her course.

When the employee first pursued her calling to be a traditional healer she requested that the employer accommodate her by not requiring her to work the afternoon shift so that she could attend her training. This request was accommodated. Later in the year the employee again approached the employer and requested that she be granted about five weeks' unpaid leave to attend further training as a traditional healer. Given the fact that the employee had exhausted her annual leave, sick leave and compassionate leave entitlement and the fact that the employer was short staffed and would not be able to provide a proper service to its guests without her, the employee was granted only one week's unpaid leave and was instructed to return to work immediately thereafter.

Before going on unpaid leave the employee left an envelope on her manager's desk containing two notes from her traditional healer. The first note requested that the employee be excused from work for approximately five weeks to allow her to complete her traditional healer's course. The other note was a certificate stating that the employee had been diagnosed as having 'perminisions [sic] of ancestors'. The certificate recorded that the employee would only resume work on 8 July 2007, approximately five weeks later. The day before the employee was required to return to work she phoned her employer to check that they had received the documents contained in the envelope. She was advised that her application for leave had been rejected and that the employer would institute disciplinary action in the event that she did not report for duty. The employee did not report for duty and was charged with, *inter alia*, insubordination and being absent from work for more than three days without permission. At the disciplinary inquiry, the employee contended that she was unable to return to work as she was seriously ill in that she was 'disturbed in her spirits'. This was

confirmed by the letter from her traditional healer and thus the employee alleged that her absence should be treated as sick leave. She argued that the employer should attach the same weight to the letter as it would to a medical certificate. The employer refused and maintained that the employee had committed misconduct by absconding from work to attend a course that was unrelated to her employment in contravention of the employer's policies and procedures. This was particularly because the letter from the traditional healer was not a medical certificate issued and signed by a medical practitioner as contemplated in the Basic Conditions of Employment Act 75 of 1997. The employee was found guilty of the charges against her and dismissed.

The employee referred an unfair dismissal claim to the Commission for Conciliation, Mediation and Arbitration (CCMA). The employer argued, at the CCMA, that the employee had been denied unpaid leave as it would have been short staffed and unable to provide a proper service to its guests in the event that the employee had been granted five weeks' unpaid leave. The employer contended that the fact that the employee wanted to attend a traditional healer's course was irrelevant to its decision, which was based purely on operational requirements. The employee argued that she was of the view that she was seriously ill as she saw visions of her ancestors and was required to complete her training as a traditional healer. She believed that if she did not attend the training her health would have seriously deteriorated. The traditional healer testified at the CCMA that if the employee did not attend the training, death might have befallen her. This evidence was not challenged by the employer. However, the employer stated that it would have only treated the absence as sick leave in the event that the employee had submitted a medical certificate from a medical practitioner. The commissioner found that the employer did not understand the employee's cultural beliefs and that if such beliefs had been properly understood then the employer would have considered the employee's condition as an illness and granted her sick leave. The commissioner further found that the employee had no option but to disregard her employer's instructions to report to work as she genuinely believed that her health would deteriorate if she did not adhere to her ancestors' calling to train as a traditional healer. The commissioner concluded that the employee's absence was due to circumstances beyond her control and that her dismissal was substantively unfair.

When the commissioner's decision was taken on review, the Labour Court found that the award was well reasoned and accordingly dismissed the review application. Similarly, the Labour Appeal Court (LAC) dismissed the appeal and found that the commissioner had properly applied his mind to the facts.

On appeal to the SCA the employer argued that the commissioner committed a gross irregularity in terms of s 145(2)(a)(ii) of the Labour Relations Act 66 of 1995 in that he misconceived the true nature of the inquiry. In this regard, it was alleged that the commissioner should have considered the fact that the employee had no contractual entitlement to unpaid leave. Furthermore, the operational requirements of the employer could not justify a period of absence of five weeks. It was also alleged that the commissioner was required to consider the fact that the employee had been insubordinate in refusing to report for duty. Thus, the employer alleged that if the

commissioner had considered whether the employer applied the correct principles applicable to a request for unpaid leave as opposed to determining whether the employee was justified in not reporting for duty, then he would have found that the dismissal was substantively fair.

Cachalia JA found that where an employee is dismissed for being absent without authorisation, and even in direct contravention of an employer's instructions, a court may intervene if the employee's failure to obey an instruction to report for duty is reasonable and justified. The commissioner was, therefore, entitled to determine whether there was a justifiable reason for the employee failing to obey the instruction. It was significant that the employer stated that the employee would not have been dismissed if she had submitted a medical certificate from a medical practitioner. Such absence would have been tolerated despite the employer's operational requirements. The request for unpaid leave was thus rejected purely on the basis that it was supported by the traditional healer's note as proof of incapacity.

The employer seemed to understand the cultural significance of training to become a traditional healer as it had accommodated the employee on two occasions to enable her to carry out her training. However, the employer did not accept that the employee was sick in the absence of a medical certificate from a registered medical practitioner. Cachalia JA considered the fact that the World Health Organisation found that 80% of South Africans make use of traditional medicine and that traditional medicine considers the spiritual origin of illness, which includes communication with the ancestors. It was noted that while the courts are equipped to deal with conventional medicine, they have not been equipped to deal with religious doctrine and cultural practices. Thus, Cachalia JA found that it is not up to the courts to decide the acceptability, logic, consistency or comprehensibility of the belief – the courts should only be concerned with the sincerity of a person's belief and whether or not there is an ulterior motive for invoking the belief. Cachalia JA pointed out that there may be operational requirements that justify terminating an employment relationship where an employee is on extended absence due to ill health but this was not the process followed in these circumstances.

Cachalia JA (with Brand JA, Leach JA, Willis JJA and Zondi AJA concurring) concluded that the LAC's decision was correct and dismissed the appeal.

- See also 2014 (Apr) *DR* 42 and 2012 (Oct) *DR* 53.

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Curriculum Vitae fraud – dishonest act which warrants dismissal

Rainbow Farms (Pty) Ltd v Dorasamy and Others (unreported case no D 303-11, 25-2-2014 (Cele J)).

The employee was dismissed for what is commonly referred to as CV fraud. The first respondent arbitrator found her dismissal substantively unfair and as a result thereof the employee was awarded reinstatement without back pay.

On review the applicant employer sought to have the arbitrator's decision set aside and substituted with a finding that the employee's dismissal was substantively fair.

The employee took up a permanent position with the employer in 1999 as a vaccine technologist. In 2006 the employee held the position of virologist and was promoted to quality manager in 2007.

In response to an internal advertisement, the employee applied for the post of vaccine manager and submitted her CV wherein she listed her qualifications as –

- Matric exemption – 1992;
- Diploma: Biotechnology – 1998;
- Bachelors of Technology Degree: Business Administration – 2002; and
- Bachelors of Technology: Quality Management – 2005.

Subsequent to submitting her CV, but before being interviewed, it came to the attention of her manager that the employee had not obtained her Bachelors of Technology: Quality Management degree in that one course for the degree remained outstanding. Her manager advised her to change her CV to reflect this, which in turn prompted the employee to insert the word 'current' after listing the aforementioned degree.

Having been interviewed by her manager and two others, the employee was asked to produce copies of her qualifications. At that point it became apparent that the employee had not yet completed another degree, that being her Business Administrative degree and was charged and dismissed for dishonesty, more particularly for the reason that she was aware that she had to expressly qualify in her CV which qualifications remained incomplete.

Arbitration

Having heard the evidence of both parties the arbitrator held the following:

The employer would have sooner or later ascertained the employee's error – it funded the employee's studies and gave the latter time off to prepare and write her exams. As such, it could be expected that the employer had a file with all the relevant documentation pertaining to the employee which, among others, would have included the employee's qualifications. Therefore, if the employer wanted to verify the employee's qualifications it should have accessed the employee's personal file. Had it done so, it could have informed the employee of her error and rectified it.

In her explanation the employee stated that when listing the qualification of Business Administrative, the corresponding year she inserted in her CV was intended to reflect the year she commenced her studies for that qualification. In light of the fact that the

employee was aware she had not completed her studies for that course, the arbitrator accepted the employee's explanation.

In his conclusion the arbitrator held that the employee was not dishonest and at best could be described as a person who did not know how to compile a CV. In support of this, the arbitrator accepted that the qualification under review was not relevant to the post the employee applied for and further that the employee's non-disclosure of the qualification in question would not have altered the fact that the interviewing panel found her to be the preferred candidate for the post.

With regard to remedy the arbitrator found that it was fitting to reinstate the employee into the position of vaccine manager or a position similar or to her previous position of quality manager.

Review

In adopting the appropriate test on review the court, per Cele J, set aside the award on the following grounds:

First the court found it unreasonable for anyone to accept the employee's version with regard to her interpretation of the corresponding year inserted next to the qualification Business Administrative. In support of this finding the court noted that when listing her first two qualifications, the corresponding year the employee inserted was the year she obtained such qualifications; this, according to the court, strongly inferred that the employee appreciated the conventional understanding of what a corresponding year means, listed next to a qualification, but yet seems to relinquish this understanding, without explanation, when it came to the qualification under review.

With regard to the arbitrator's first finding, the court said the following:

'The commissioner's findings that the applicant would have sooner or later found out about the third respondent's misrepresentation or ought to have found out about it and brought it to her attention by looking at her personnel file was completely unreasonable and based upon an incorrect premise. There was no need to tell the third respondent what she very well knew. She was the creator of her CV and the commissioner benefitted her with ignorance that she was never entitled to in the first place.

It is not a defence to an allegation of fraud that the person to whom the representation was being made, could have by the exercise of reasonable care, discovered the truth of the misrepresentation and ought never to have been duped by it.'

The court further held that on a proper assessment of the employee's conduct one is left with the inescapable conclusion that the employee was guilty of a dishonest act, the effect of which severed the trust relationship between employer and employee and thus justifying dismissal.

The award was set aside and replaced with a finding that the employee's dismissal was substantively fair. No order as to costs was made.

Note: Unreported cases at date of publication may have subsequently been reported.

Do you have a labour law-related question that you would like answered? Please send your question to derebus@derebus.org.za
