

Investigating the Possibility of Dismissing an Employee on Account of Breach of COVID-19 Regulations

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Abstract

The taking of disciplinary action against employees who fail to comply with COVID-19 regulations appears to be a route that employers would prefer to ensure the safety of employees and other people in the workplace. Generally, employers are compelled by law to provide a safe working environment. Employees, on the other hand, are also obliged to play their role in ensuring their own safety and that of fellow employees. Safety measures in the workplace will include compliance with COVID-19 regulations. If employees fail to comply with COVID-19 regulations, their conduct will put the lives of other employees or people in the workplace at risk of contracting the virus. To enforce compliance with safety rules and COVID-19 measures, employers need to adopt a policy that will regulate COVID-19-related conduct and consequences for the failure to comply with such regulations. The failure to comply with a policy that regulates the conduct of employees in the workplace may constitute misconduct. An employer may impose a sanction of dismissal on such employees. The question that arises is whether dismissal for the failure to obey COVID-19 rules will be an appropriate sanction and perhaps justified in terms of the Constitution? The article argues that the dismissal will be justified in terms of section 36 of the Constitution. It will aim to achieve the worthwhile purpose of protecting employees against COVID-19 transmission and saving their lives as the virus has killed many people in the past two years. It will also save the employer from liability for the failure to ensure a safe working environment as such employees will risk other employees with the transmission of the virus.

Keywords: COVID-19; misconduct; dismissal; appropriate and justified

Introduction

Since the beginning of 2020, coronavirus (commonly known as COVID-19), has been a thorny issue in South Africa and the world at large. COVID-19 was first detected in China and has since spread to all nations of the world. This virus is contracted through social contact and other social conduct that includes an unclean environment. Since it was detected, it has affected and killed many people throughout the world. Although vaccination for the virus has been invented and is being rolled out in many countries, the virus continues to infect and kill people.¹ The working environment is not immune to these challenges even though it has changed drastically since the virus was first detected in Wuhan – China towards the end of 2019. It is a fact that in the workplace, workers come together to discharge their contractual obligations. In the mines, for example, it is impossible for workers to practice social distancing which is one of the measures recommended by the World Health Organisation (WHO) to prevent the spread of COVID-19. As a result, the workplace becomes a risky area for the spread of the virus with workers becoming more vulnerable to cross-infections from one another unless the employer puts protective measures in place to deal with the transmission of the virus (Rubenstein and DeCamp 2020, 321). To deal with the issue of coronavirus, employers are expected to adopt policies that will regulate the conduct of employees in the workplace in relation to COVID-19. These measures must be in line with those adopted by the WHO and the Department of Health in South Africa. These measures, which are non-pharmaceutical in nature, include the regular washing of hands, sanitisation, use of a mask and safe social distancing. The article argues that since vaccination drugs have been made available, it is expected that employers will, in addition to the non-pharmaceutical measures recommended by WHO, adopt a policy on vaccination of employees as part of the safety measures in the workplace. In South Africa, the vaccination of employees is currently voluntary. Voluntary means that some employees may submit to vaccination while some employees may refuse to vaccinate. This article intends to investigate whether the employer can dismiss an employee for failure to comply with COVID-19 rules or regulations and whether such dismissal would be justified.

Measures Adopted to Curb the Spread of COVID-19 in South Africa

Since South Africa is not an isolated island, but forms part of the nations of the world, it is bound to operate on the same platform as other countries do. For example, the adoption and implementation of measures to prevent the spread of COVID-19 should be in line with those adopted by the WHO. As stated above, these include non-pharmaceutical measures such as the regular washing of hands, social distancing and

1 As of today, 14 January 2022, there are a total 3 552 043 positive cases. Information accessed on 14 January 2022 at <https://sacoronavirus.co.za/2022/01/14/update-on-covid-19-friday-14-january-2022/>.

sanitising. To supplement these measures, developed and under-developed countries have introduced vaccinations in their jurisdictions to protect people against infection by the virus.

At the beginning of 2021, developed and under-developed countries invented and rolled out vaccinations to protect their people against infection by the virus. South Africa implemented its first vaccination drive around April 2021. Currently, getting vaccinated for COVID-19 is voluntary in South Africa. This is believed to be in line with the right to bodily integrity guaranteed in the Constitution.² Despite being voluntary, some employers have adopted a firm stance on vaccinations, compelling employees to vaccinate or face a harsh sanction if they refuse. Some of the first companies to announce that their employees should vaccinate include Discovery Health, Sanlam, Old Mutual and MTN, and universities such as Wits and Stellenbosch have also proposed mandatory vaccination from the beginning of 2022. It is believed that employers will take this position to comply with the duty to provide a safe working environment in terms of the Constitution³ and legislation.⁴

There may be many reasons the employees could advance for refusal to vaccinate. These may include the right to bodily and physical integrity, religion, privacy, conscience and beliefs. It would be advisable for the employer to take reasonable steps to accommodate such employees. For example, if an employee objects to vaccination, the employer needs to evaluate the risk that the objection poses, particularly if the employer mandates that employees must be vaccinated against COVID-19. As a form of guidance on the vaccination of employees whether mandatory or otherwise, the Department of Employment and Labour has published an updated COVID-19 Consolidated Direction on Occupational Health and Safety measures (OHS Directives).⁵ In terms of these Directives, employers have the discretion to consider whether mandatory vaccination may be appropriate for some or all employees in the workplace based on the employers' operational requirements. The Directives gave employers a strict deadline of 21 days from the date the OHS Directives came into operation, to implement a vaccination policy that details the circumstances under which employees may be required to be vaccinated and the consequences of deciding against vaccination.⁶ Section 3(1)(a)(ii) of the OHS Directives provided that every employer who employs 10 or more employees must undertake a risk assessment. The risk assessment required the employer to determine whether it intends to make vaccination mandatory, taking into account its operational requirements. The said section further identified the categories of employees who are at risk of transmission of COVID-19 through their work, or at risk of severe

2 Section 12(b) of the Constitution of the Republic of South Africa, 1996.

3 Section 24 of the Constitution.

4 Sections 8 and 9 of the OHSA.

5 See GG No. 44700 of 11 June 2021.

6 *ibid.*

COVID-19 disease or death due to their age or co-morbidities, or in circumstances where these employees interact with members of the public at their workplace.

The OHS Directives also provided guidelines with which employers must comply. These include the provision that every employee identified as being at risk of contracting COVID-19 had to be notified of the obligation to be vaccinated; the employee's right to refuse vaccination on constitutional or medical grounds; and opportunity for the employee, at the employee's request, to consult a health and safety representative, a worker representative or a trade union official.⁷ Should an employee refuse to be vaccinated on constitutional or medical grounds, the employer should provide counselling to the employee, if requested, and allow the employee to seek guidance from a health and safety representative, a worker representative or a trade union official; and/or refer the employee for further medical evaluation. Should there be a medical contraindication for vaccination; the employer should take steps to reasonably accommodate the employee in a position that does not require the employee to be vaccinated if necessary.⁸

COVID-19 and the Provision of Safe and Healthy Working Conditions in the Workplace

The Constitution guarantees a general right to a safe environment.⁹ The rights in the Constitution and the Bill of Rights¹⁰ in particular, are binding to everyone including juristic persons.¹¹ This means that employers are bound in terms of the Constitution to ensure that the working environment is safe for employees to work in. In addition to these constitutional provisions, the protection of employees against hazards, including compensation for damage suffered at work, is regulated by common law and various pieces of legislation.¹² The former requires the employer to provide a safe and healthy place of work, safe machinery and tools to ensure that safety procedures and processes

7 Section 3(1)(a)(ii) of the OHS Directives issued in terms of section 27 of the Disaster Management Act 27 of 2002 as amended GG No.44700 of 11 June 2021.

8 Reasonable accommodation means any modification or adjustment to a job or to the working environment that will allow an employee who fails or refuses to be vaccinated to remain in their employment. This will include an opportunity for the employer to allow the employee to work from home or in isolation within the workplace.

9 Section 24(a) of the Constitution provides that "everyone has the right to an environment that is not harmful to their health or wellbeing."

10 The Bill of Rights is in Chapter 2 of the Constitution.

11 Section 8 of the Constitution provides that "a provision in the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right".

12 Examples of these pieces of legislation include the Occupational Health and Safety Act 85 of 1993; Mines Health and Safety Act 29 of 1996; Compensation for Occupational Injuries and Diseases Act 130 of 1993; and Occupational Diseases in Mines and Works Act 78 of 1973.

are followed.¹³ Employers will be in breach of their duties if they fail to meet these obligations.¹⁴ In fact, the employer will be in breach of their contractual obligations since the contract of employment is primarily regulated by common law (Collins 1986, 1). Common law provides a detailed account of the duties of the employer in providing safety to employees while performing their contractual obligations and corresponding duties of employees in relation to their safety and those of other people in the workplace. Despite the contract of employment being regulated by common law, legislation supplements common law where the former falls short in regulating a particular issue facing employees in the workplace. This is acknowledged by section 39(2) of the Constitution which provides that “when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”. Grogan states that due to the shortfalls in common law, the legislature adopted various pieces of legislation to supplement the common law on the provision of a safe and healthy working environment (Grogan 2009, 53–57). These include the Occupational Health and Safety Act¹⁵ (OHSA), the Mines Health and Safety Act¹⁶ (MHSA), the Compensation for Occupational Injuries and Diseases Act¹⁷ (COIDA), and the Occupational Diseases in Mines and Works Act¹⁸ (ODMWA). Among these pieces of legislation, the OHSA is the primary legislation when it comes to the safety of employees in the workplace, generally. In this regard, the OHSA compels the employer to provide a safe and healthy working environment.¹⁹ It states that all employers have a duty to provide and maintain, as far as reasonably practicable, a safe working environment that is free of risk to the health of their employees.²⁰ These duties include, *inter alia*:

- (a) the provision and maintenance of systems of work, plant and machinery that, as far as is reasonably practicable, are safe and without risks to health;
- (b) taking such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment;
- (c) making arrangements for ensuring, as far as reasonably practicable, the safety and absence of risks to health in connection with the production, processing, use, handling, storage or transport of articles or substances; and

13 *Van Deventer v Workmen’s Compensation Commissioner* 1962 (4) SA 28T.

14 *NUM and others v Chrober Sate (Pty) Ltd* [2008] 3 BLLR 287 (LC); *Oosthuizen v Homegas* 1992 (3) SA 463 (O).

15 Act 85 of 1993.

16 Act 29 of 1996.

17 Act 130 of 1993.

18 Act 78 of 1973.

19 Section 8 and 9 of the OHSA.

20 Section 8 of the OHSA.

(d) establishing, as far as is reasonably practicable, what hazards to the health or safety of persons are attached to any work which is performed, any articles or substance which are produced, processed, used, handled, stored or transported and any plant or machinery...²¹

According to Mischke and Garbers, this does not only mean that the physical place of work must be safe and secure, but entrances to and exits from premises must also be safe (Mischke and Garbers 1994, 2). They further stress the need for the employer to discharge their responsibilities in terms of section 8(2)(e) of the OHS Act which is to ensure that employees are trained in what they must do to reduce potential risks attributable to a lack of knowledge or inexperience.²² The training should be extended to include public relations officers and other employees responsible for issuing crisis risk communications.²³

The MSHA grants workers the right to remove themselves from any location at a mine when circumstances arise which appear, with reasonable justification, to pose a danger to their health or safety.²⁴ This means that in the mines, if the employer fails to provide a safe and healthy working environment, employees can refuse to work under such conditions. In addition, the OHS Directives provide that an employee may refuse to perform any work if circumstances arise which, with reasonable justification, appear to that employee or to a health and safety representative to pose an imminent and a risk of exposure to COVID-19. The OHS Directives further provide that “an employee who has refused to perform work in terms of the OHS Directives must, as soon as is reasonably practicable, notify the employer, either personally or through a health and safety representative, of the refusal and the reason for the refusal.”²⁵ In *De Heus (Pty) Ltd v South African Commercial Catering & Allied Workers Union (SACCAWU) & others*,²⁶ members of SACCAWU embarked on an industrial action on 9 July 2020. The industrial action was sourced from allegations or by revelations that one of the employees in the workplace had tested positive for COVID-19. The employees demanded that the Department of Employment and Labour conduct an inspection and that measures be taken and implemented to mitigate any exposure to the virus. The

21 *ibid.*

22 *ibid.*

23 As illustrated by the crisis communications issued by one of the institutions examined – although crisis communication directives were available, the content of the data messages sent were confusing and counterproductive.

24 Section 23 of the MSHA states that an employee has the right to leave any working place whenever:

“(a) circumstances arise at that working place which, with reasonable justification, appear to pose a serious danger to the health or safety of that employee; or

(b) the health and safety representative responsible for that working place directs that employee to leave that working place.”

25 Direction 14(1) and (2) of the OHS Directive.

26 (2021) 42 *ILJ* 887 (LC).

union contended that workers had the right to refuse to undertake their duties if they had reason to believe that they might be exposed to the risk of COVID-19. The court observed that the conduct of employees met the requirements of a strike²⁷ as defined in section 213 of the Labour Relations Act²⁸ (LRA). However, it was noted that the said strike did not comply with section 64 of the LRA.²⁹ The court found that while health and safety issues in the current climate of COVID-19 are paramount and the safety of employees at all workplaces should not be compromised, this did not entitle employees to embark on industrial action on a whim, without first raising the issues with their employer, or the department where the regulations had not been complied with, or without first complying with the provisions of sections 64(1) of the LRA. In this regard, the court found that the industrial action embarked upon by the employees was unprotected.³⁰

Employers and the duty to adopt safety policies in the workplace

The employer is entitled to determine the rules and standards of application in the workplace (Du Toit et al. 2015, 443). The Guidelines for Misconduct Arbitrations explain this as follows:

It is the employer's responsibility to determine the rules and standards in the workplace. It is not the arbitrator's role to second-guess those rules. This does not constitute deference to the employer, but compliance with the Code.³¹

In *County Fair Foods (Pty) Ltd v CCMA*³² it was held that “[i]t remains part of our law that it lies in the first place within the prerogatives of the employer to set the standard of conduct to be observed by its employees and determine the sanction with which non-compliance with the standard will be visited”. The OHSWA encourages employers to adopt a safety policy that will regulate the conduct of workers in the workplace.³³ It is assumed that a policy regulating the conduct of employees in relation to COVID-19 belongs to this category. In this regard, it is clear that the employer can only dismiss an employee if they have in place policies or health and safety codes of conduct that

27 A strike is defined in section 213 of the LRA as “the partial or complete concerted refusal to work, or the retardation of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to ‘work’ in this definition includes overtime work, whether it is voluntary or compulsory.”

28 Act 66 of 1995.

29 *De Heus (Pty) Ltd v SACCAWU and others* at 891.

30 *ibid.*

31 Item 189 of the Guidelines for Misconduct Arbitrations published by the CCMA in terms of section 115(2)(G) of the LRA 1995 GG No 38573 of 17 March 2015.

32 (1991) 11 BLLR 1117 (LAC) para 11.

33 Section 14 of the OHSWA.

regulate the conduct of employees in the workplace and the employee failed to comply with such rules.

The employer may not unilaterally adopt such policy without consulting the existing union(s) in the workplace as this will constitute a matter of mutual interest. The phrase ‘matter of mutual interest’ is not specifically defined in the LRA. However, from the reading of the LRA, it should be interpreted to mean all the terms and conditions of employment that may have a direct or indirect impact on employees and the employer or on the way the business of the employer operates. Matters of mutual interest have been interpreted widely to mean proposals for the creation of new rights or the diminution of existing rights. (Du Toit et al. 1998, 198).³⁴ Employees may not be accused of misconduct if they refuse to obey an instruction to work in accordance with the conditions in the workplace that have been unilaterally created or altered by the employer.³⁵

When it comes to COVID-19, the article argues that the policy developed by the employer in consultation with the unions does not have to be specific to COVID-19 but needs to explicitly state that any breach of occupational health and safety regulations or code of conduct will not be tolerated. As a result, the policy will need to be made known to all employees and other people in the workplace. There are three ways in which a policy or rule can be made known to employees and people in the workplace, namely: it can be attached to the employee’s contract of employment; it can be displayed on a notice board or entrances which all employees have access to; and it can be verbally communicated to employees or people that will be affected. In all these instances, the policy should be communicated in the language that is used or spoken in the workplace or it must be in a vernacular.³⁶ The existence of a policy and participation of employee representatives in its formulation strengthens its validity. It also ensures that the employees know when they act contrary to it and the type of sanction that can be taken against them. The failure to comply with a policy that applies in the workplace may constitute misconduct.³⁷ Employers are not expected to tolerate misconduct.³⁸ Depending on the degree or seriousness of misconduct, the sanction of dismissal may be appropriate in certain instances. The test is whether the employee’s action has the effect of rendering the trust relationship between the employer and employee

34 *SADTU v Minister of Education and Others* (2001) 22 ILJ 2325 (LC) para 432; *Gauteng Provincial Administration v Scheepers* (2000) 21 ILJ 1305 (LAC); *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport and Allied Workers Union and others* (2009) 30 ILJ 1099 (LC); *Gauteng Provinsiale Administrasie v Scheepers and others* (2000) 21 ILJ 1305 (LAC) 1309 para 8; *HORSPERSA and another v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC) 1070.

35 *ICHAWU v CCMA* (2015) 36 ILJ 3086 (LC).

36 *National Union of Metalworkers of SA on behalf of Mkhanda & others and Getaway Trailers* (2006) 27 ILJ 419 (BCA).

37 *Mphaphuli v Ramotshela NO and others* (2020) 41 ILJ 242 (LC).

38 *Rustenburg Platinum Mines v SA Equity Workers Association obo Bester* (CCT127/17) [2018] ZACC 13 (17 May 2018).

intolerable.³⁹ In *Eskort Ltd v Mogotsi & others*,⁴⁰ the employer had in place COVID-19 policies, procedures, rules and protocols. All employees had been constantly reminded of these measures through memoranda and various other means of communication posted at points of entry and through emails. One day, an employee by the name of Mogotsi tested positive for COVID-19. He failed to disclose his status to the employer and as such failed to follow the required protocols as stated in the policy. He was then dismissed for misconduct for his reckless conduct and putting the lives of other employees at risk. The employment tribunal found that the employee's conduct was extremely irresponsible and grossly negligent. Despite this conclusion, the commissioner awarded the employee a reinstatement after finding that the dismissal was not an appropriate remedy. However, on review, the Labour Court held that the employee's conduct negatively affected the sustainable employment relationship and thus the dismissal was an appropriate sanction.

By now, it is clear that COVID-19 presents new challenges in the workplace since it spreads quickly, particularly if there are vulnerable people in the workplace.⁴¹ In *Eskort Ltd v Mogotsi*, Mr Mogotsi was seen hugging an employee who just had a heart operation while having tested for COVID-19. He was also seen roaming the workplace without a mask. All these factors were taken into account in arriving at a decision to dismiss him.⁴² Therefore, employers in general should veer on the side of caution when considering issues that could affect their employees and/or pose a risk of their potential exposure to COVID-19.⁴³ This implies that employers should take certain measures with regard to their own operations and operational requirements, as long as the necessary safety checks and balances are put in place to ensure the safety of employees and to minimise the risk of potential exposure to COVID-19. The same will apply to a failure to comply with COVID-19 regulations once these have been made a policy that regulates the conduct of employees in the workplace. It is a good thing to have all the health and safety protocols in place on paper, but they are meaningless if no one, including employers, takes them seriously.⁴⁴ In this regard, once safety and health measures, including COVID-19 rules, have been adopted and made part of the rules regulating the conduct of employees in the workplace, it is expected that everyone in the workplace will take such measures seriously.

39 *Miyambo v CCMA* [2010] 10 BLLR 1017 (LAC).

40 (2021) 42 *ILJ* 1201 (LC).

41 A vulnerable employee is defined as "any employee, as contemplated in the Department of Health Guidelines [i.e. Guidance on vulnerable employees and workplace accommodation in relation to Covid-19 of 25 May 2020] – (a) with known or disclosed health issues or comorbidities or any other condition that may place the employee at a higher risk of complications or death than other employees if infected with Covid-19; or (b) above the age of 60 years is at a higher risk of complications or death if infected."

42 *Eskort Ltd v Mogotsi* at 1208.

43 *Soobedar and Another v Minister of International Relations and Cooperation and Another* 1769.

44 *Eskort Ltd v Mogotsi and others* 1209.

In *Soobedar & Another v Minister of International Relations & Cooperation & Another*,⁴⁵ the Labour Court held that it has no jurisdiction to determine the application or otherwise of Direction 14(8) and (9) of the Consolidated Directives on Occupational Health and Safety Measures in Certain Workplaces (OHS Directives).⁴⁶ Direction 14(8) prescribes that a dispute relating to refusal to work due to fear of exposure to COVID-19 has to be referred to either the CCMA or relevant bargaining council in accordance with the provisions of section 191 of the LRA. Direction 14(9) makes provision for the appointment of an arbitrator to make a finding, which clearly excluded the court's jurisdiction other than on review.⁴⁷ In *NUM obo Masha & others v Samancor Ltd (Eastern Cape Chrome Mines) & others*,⁴⁸ the employees were dismissed for failure to follow a safety instruction from the mine overseer. The court held that the employees had allowed themselves to work in an area that was clearly not safe after they were given an instruction not to work under such conditions.⁴⁹ It further held that where clear instructions were issued both verbally and in writing to the employees to comply with safety requirements which the employee disregarded, a dismissal that follows thereafter could be considered to be one that a reasonable decision-maker could have made in the circumstances.⁵⁰ Relying on *Impala Platinum v Jansen & others*,⁵¹ the court held that the employees undermined their supervisor and therefore their dismissal for misconduct was justified as they put their lives and those of other workers at risk.⁵² The court explicated the degree of seriousness which accompanies a failure to observe safety regulations in the mining context as follows:

[I]t is clear that the mining industry has been under tremendous scrutiny regarding safety measures due to the high risk in the nature of the work done. In order to have a safe mining environment, the regulations which were contravened by Jansen were promulgated to ensure that workers doing underground work underwent competency training and were declared competent before being allowed to do underground work. By his actions Jansen did not only undermine the regulatory framework and put in danger the life and limb, he also placed his employer at risk of sanction for contravening the statutory regulations.⁵³

In this regard, all workers in the workplace must adhere to the provisions prescribed in the policy, applicable legislation and common law. Once all these have been complied

45 (2021) 42 *ILJ* 1761 (LC).

46 Issued by the Minister of Employment & Labour on 28 September 2020 in terms of regulation 4(10) of the regulation issued by the Minister of Cooperative Governance & Traditional Affairs pursuant to section 27(2) of the Disaster Management Act 57 of 2002 on 29 April 2020.

47 *Soobedar and Another v Minister of International Relations and Cooperation and Another* 1767.

48 (2021) 42 *ILJ* 1818 (CC) 1767.

49 *NUM obo Masha & others v Samancor Ltd (Eastern Cape Chrome Mines) and others* t 1890.

50 *ibid* para 27.

51 (2017) 38 *ILJ* 896 (LAC).

52 *Samancor Ltd (Eastern Cape Chrome Mines) v CCMA and Others* (2020) 41 *ILJ* 2771 (LAC).

53 *ibid* para 26.

with and an employee flouts such rules or provision(s), employers are at liberty to discipline such workers. The sanction that the employer may impose may include dismissal for misconduct provided a fair procedure is followed before such dismissal is effected.⁵⁴ However, an employer who dismisses employees on the grounds of failure to adhere to COVID-19 rules without the necessary policies in place, could be found to be unfair.

The Refusal to Comply with COVID-19 Policy and Remedy Available to the Employer

Due to the unique and unprecedented times South Africa found itself in, employers and employees are required to adhere to the OHS rules and regulations. If a policy on COVID-19 is applicable in the workplace, both the employer and employees will have to comply with such policy. Failure to comply with a policy regulating the conduct of employees in the workplace may constitute misconduct. Failure by an employee to comply with a policy regulating COVID-19 may amount to misconduct in the form of insubordination. Insubordination means a refusal to obey an employer's instructions.⁵⁵ The employee's duty of obedience applies to work-related orders performed during working hours and depends on whether or not the instruction which is disobeyed is lawful and reasonable.⁵⁶ However, courts have held that employers can discipline an employee for misconduct committed outside working hours when there is a link between the offence committed and the profitability and continuity of the employer's business or where it renders the continuation of the employment relationship intolerable.⁵⁷ If the instruction is disobeyed, Grogan states that insubordination is more serious than rudeness because it presupposes a calculated breach by the employee of the duty to obey the employer's instructions (Grogan 2017, 225). The act of insubordination must be grossly serious to warrant dismissal for misconduct.⁵⁸ In *Metal & Allied Workers Union v Transvaal Pressel Nuts, Bolts and Rivets (Pty) Ltd*,⁵⁹ the court refused to accept as proof of insubordination an employee's refusal to clean an area normally assigned to another employee. In *Wasteman Group v SAMWU*,⁶⁰ it was held that the provision in the Code which states that it is generally not appropriate to dismiss an employee for a first offence, except if such misconduct is serious, should be followed.

54 Section 188 of the LRA read with the Code of Good Practice: Dismissal for Misconduct in schedule 8 to the LRA.

55 *CCAWUSA v Wooltru Ltd t/a Woolworths* (Randburg) (1989) 10 ILJ 311 (IC).

56 *Kahn v Rainbow Chicken Farms (Pty) Ltd* (1985) 6 ILJ 60 (IC).

57 *Khutshwa and SSAB Hardox* (2006) 27 ILJ 1067 (BCA), and *Nyembezi v NEHAWU* [1997] 1 BLLR 94 (IC).

58 *CWIU and another v AECI Paints Natal (Pty) Ltd* (1988) 9 ILJ 1046 (IC); *Humphries and Jewell (Pty) Ltd v FEDCRAW and others* (1991) 12 ILJ 1032 (IC); *Armitage Shanks SA (Pty) Ltd v Mnisi* (1995) 16 ILJ 61 (LAC).

59 (1988) 9 ILJ 129 (IC).

60 (2012) 33 ILJ 2054 (LAC).

The court further held that in the case of the dismissal of a shop steward for refusing to report to his manager, who suspected him of malingering after having been refused permission to attend a union meeting, was not so serious an act of insubordination as to warrant dismissal. In *Slagment (Pty) Ltd v Building Construction & Allied Workers Union*,⁶¹ two workers who refused to accept the authority of a newly appointed supervisor were held to have been fairly dismissed.

The Code requires that defiance by employees must be gross to justify dismissal. This means that the insubordination must be serious, persistent and deliberate and that the employer should adduce proof that the employee was in fact guilty of defying an instruction.⁶² In collective bargaining, a persistent display of belligerence and obduracy by a shop steward may justify dismissal.⁶³ In *SAMWU v Ethekwini Municipality*,⁶⁴ two shop stewards had locked the gates of a depot in an attempt to induce their employer to succumb to workers' demands and refused an instruction to unlock them. They were told in no uncertain terms by the Labour Appeal Court that they acted under the misapprehension that being shop stewards allowed them to bulldoze management as they pleased. Their dismissal for misconduct was upheld. In *Air Products (Pty) Ltd v CWIU*⁶⁵ the employee refused to accept a transfer from one plant to another because he would be required to work night shifts and did not wish to do so "for personal reasons". The court held that as the proposed transfer did not entail different work, and because it was not a term of the employee's contract that he would perform only day work, his refusal to move amounted to gross insubordination that justified dismissal.

For example, the question of whether employers have a right to discipline employees for reckless conduct such as failure or refusal to wear a face mask in a public setting or on public transport, and consequently exposing themselves and other workers to the risk of infectious disease arises.⁶⁶ In *Mphaphuli v Ramotshela NO & others*,⁶⁷ an employee tested positive for alcohol in contravention of the zero-tolerance management instruction which clearly identified alcohol-related cases as those that were covered by the company's zero-tolerance approach. The commissioner found that after testing positive for alcohol, the employee's access to the mine premises presented a safety hazard to himself and other employees.⁶⁸ The dismissal of the employee for misconduct

61 (1994) 15 ILJ 979 (A).

62 *CWIU and another v AECI Paints Natal (Pty) Ltd* (1988) 9 ILJ 1046 (IC); *Humphries & Jewell (Pty) Ltd v FEDCRAW and others* (1991) 12 ILJ 1032 (IC); *Armitage Shanks SA (Pty) Ltd v Mnisi* (1995) 16 ILJ 61 (LAC).

63 *SACTWU and another v Ninian and Lester (Pty) Ltd* (1995) 16 ILJ 1041 (LAC); *Acrylic Products (Pty) Ltd & another v CWIU and another* [1997] 4 BLLR 370 (LAC); *Adcock Ingram Critical Care v CCMA and others* (2001) 22 ILJ 1799 (LAC).

64 [2016] 12 BLLR 1208 LAC).

65 [1998] 1 BLLR 1 (LAC).

66 *Eskort v Mogobotsi* (2021) 42 ILJ 1201 (LC).

67 (2020) 41 ILJ 242 (LC).

68 *ibid* 252.

was therefore justified.⁶⁹ In *NUMSA obo Manyika and Wenzane Consulting & Construction*,⁷⁰ the employee was dismissed for failure to comply with COVID-19 rules. The evidence led before the CCMA Commissioner revealed that the employee was seen on CCTV footage entering the premises with his face mask hanging around his neck and engaging in conversation with a security guard.

If the employer, together with the existing or recognised union(s) in the workplace, have adopted a COVID-19 policy and there was failure to comply with such policy, the employee will be charged with misconduct and dismissal will be a sanction. In *Eskort Limited v Stuurman Mogotsi and others*,⁷¹ the Labour Court expressed little sympathy for an employee who was dismissed for the failure to adhere to COVID-19 protocols by coming to work knowing he had been exposed to the virus, thereby acting with little regard for the health and safety of colleagues and customers. The court upheld his dismissal on the grounds that the employee's conduct negatively impacted a sustainable employment relationship and thus dismissal was to be the appropriate sanction.⁷²

The powers given to the employer by legislation and common law entail that they can dismiss an employee for flouting COVID-19 regulations as this may constitute misconduct. The concern will be that such employee(s) will put the lives of other employees at risk of infection. Coming to work infected by COVID-19 would also affect the employer as they will fail in their obligations to provide a safe working environment to their workers if they are infected in the workplace through the employee's conduct.⁷³ Since this will constitute misconduct, it may attract remedies in terms of the law and depending on the degree of misconduct committed, a dismissal may be an appropriate sanction, if gross misconduct was involved, for example.⁷⁴ Gross misconduct, refers to misconduct of such gravity that it almost inevitably makes a continued employment relationship intolerable and may justify dismissal even for a first infringement.⁷⁵ For example, wilfully endangering the safety of others and gross insubordination.

Misconduct is one of the three grounds recognised by the LRA for which dismissal is permissible.⁷⁶ The other grounds are incapacity or poor work performance and failure

69 *ibid* 253.

70 (2021) 42 *ILJ* 2341 (MEIBC).

71 Case number JR1644/20.

72 *Eskort v Mogobotsi* at 1209.

73 Section 8 of the OHSA.

74 *Sidumo v Rustenburg Platinum Mines Ltd* (2006) 27 *ILJ* 2076 (SCA).

75 Item 3(4) of Schedule 8 of the Code.

76 Section 188 of the LRA provides that "(1) a dismissal that is not automatically unfair, is unfair if the employer fails to prove

That the reason for dismissal is a fair reason –

related to the employee's conduct or capacity; or

(ii) based on the employer's operational requirements; and

That the dismissal was effected in accordance with a fair procedure."

to meet operational requirements.⁷⁷ However, dismissal should be reserved for the most serious form(s) of misconduct and should be an action of last resort. Misconduct will be considered serious if it has a negative effect on the trust relationship between the employer and employee. The trust relationship must have broken down irretrievably for the employer to impose a sanction of dismissal (Grogan J 2017:205). Before the sanction of dismissal is imposed on the employee, the employer must ensure that the reason for dismissal is fair and that it was effected in accordance with a fair procedure taking into account the Code of Good Practice: Dismissal for Misconduct⁷⁸ (Code). The Code provides mere guidelines to employers and they need not be followed inflexibly.⁷⁹ An employer can dispense with the guidelines in appropriate circumstances and this will not in itself render a dismissal unfair, provided reasons are given for dispensing with the Code.⁸⁰ The Code is itself intended to be a general guide and not a substitute for negotiated disciplinary codes and procedures contained in collective agreements or approved by workplace forums.⁸¹ The test is whether the employer can reasonably be expected to continue with the employment relationship. In *Edcon v Pillemer NO*⁸² the court held that dismissing an employee for lying about an accident in her company car was unfair because two of her managers had written letters declaring that they still trusted her.

Appropriateness of the Sanction of Dismissal for Breach of COVID-19 Regulations

If an employer concludes that an employee's breach of a rule or standard justifies dismissal, the question for the arbitrator or court is whether the dismissal was an appropriate sanction for the offence committed or contravention of the rule or standard.⁸³ This means that the sanctions must fit the offence. To arrive at this conclusion, the employer must consider alternative sanctions before taking the decision to dismiss the employee.⁸⁴ The factors that need to be taken into account when determining the appropriateness of the sanction of dismissal include the gravity of the infringement, the employee's blameworthiness; the employee's circumstances, the

77 Section 188 of the LRA.

78 See Schedule 8 to the LRA.

79 *Changula v Bell Equipment* (1992) 13 ILJ 101 (LAC); *SA Yster-Staal- en Verwante Nywerhede Unie en 'n ander v A SEA Electric SA (Pty) Ltd* (1998) 9 ILJ 463 (IC).

80 *Highveld District Council v CCMA and others* (2003) 24 ILJ 517 (LAC); *SA Tourism Board v CCMA and others* [2004] 3 BLLR 272 (LC); and *Greater Letaba Local Municipality v Mankgaba NO and others* (2008) 29 ILJ 1167 (LC).

81 See item 1 of the Code. See also *Eskort Ltd v Mogotsi and others* at 1206.

82 (2009) 30 ILJ 2642 (SCA).

83 Item 7 of the Code of Good Practice: Dismissal.

84 Item 3(2) of the Code of Good Practice: Dismissal.

nature of the job and the circumstances of the infringement; and consistency in taking the disciplinary action (Grogan 2017, 213).

The cardinal rule is whether the employee's conduct has destroyed the necessary trust relationship or rendered the employment relationship intolerable.⁸⁵ Aggravating factors that may justify dismissal may include wilfulness on the part of the employee;⁸⁶ lack of remorse;⁸⁷ previous written warnings or a longer record of infringements; the employer having previously brought the seriousness of the relevant infringement to the attention of the employee; damage and loss to the employer as a result of the infraction;⁸⁸ and the use of racist epithets and insults (Grogan 2017, 223–224). Where an employee has shown no remorse, and had by their conduct, nothing to show that they would not repeat their acts, there should be no reason why the employer should have shown leniency and the employer may take a harsher sanction than a mere final warning.⁸⁹ Factors that may work in the employee's favour include long service; an unblemished disciplinary record; remorse; coercion by fellow employees to commit the infraction;⁹⁰ and the employee's personal circumstances.⁹¹

In *De Beers Consolidated Mines (Pty) Ltd v CCMA*,⁹² the LAC went far as to say that these factors are not really “mitigating” circumstances at all, in the sense in which a clean record may serve to reduce a penalty in a criminal trial. The court held that the only relevance of a clean record in this context is the extent to which it indicates that the employee is likely to repeat the offence. However, the court came to a different approach in *Sidumo v Rustenburg Platinum Mines Ltd*⁹³ where a security guard was dismissed for the failure to search employees leaving a high-security area in a mine, and who permitted some employees he had not searched to sign a register confirming that they had been searched. The arbitrator agreed that the guard's misconduct was serious but the dismissal was too harsh a sanction in view of the length of service and a clean disciplinary record. The court ordered the employer to reinstate the security guard subject to a final warning.

85 This was developed by the Industrial Court in *Anglo American Farms v Komjwayo* (1992) 13 ILJ 573 (LAC); and *Hendricks v Mercantile and General Reinsurance Co of SA Ltd* (992) 15 ILJ 304 (LAC).

86 *Adcock Ingram Critical Care v CCMA* [2001] 9 BLLR 979 (LAC).

87 *Theewaterskloof Municipality v SALGA* [2010] 10 BLLR 1216 (LC); *Legobote v Quest Flexible Staffing* [2013] 12 BLLR 1229 (LC); *Overstrand Municipality v Mageman NO* [2014] 2 BLLR 195 (LC).

88 This factor was included in item 98 of the CCMA Guidelines: Misconduct arbitration.

89 *ARB Powertech Transformers (Pty) Ltd v Centre for Dispute Resolution, Metal and Engineering Industries Bargaining Council and others* (2007) 28 ILJ 1232 (LC).

90 *Maine v African Cables Ltd* (1985) 6 ILJ 234 (LC).

91 Item 3(5) of Schedule 8 to the Code.

92 (2000) 21 ILJ 1051 (LAC).

93 (2006) 27 ILJ 2076 (SCA).

In *Democratised Transport Logistics & Allied Workers Union on behalf of Jacobs and Quality Express*⁹⁴ the employee was charged with gross misconduct and negligence after he had reported for duty knowing that he could be COVID-19 positive and failed to notify the management. He had shown COVID-19 symptoms and was advised to see a doctor and was booked off for three days. On the third day, he came to work to represent a fellow employee at a disciplinary hearing since he was also a shop steward. The following day it was established that the employee tested positive for COVID-19. It was clear that the employee's coming to work exposed other employees to the risk of contracting COVID-19. It was held that the employee should have only come to work after being cleared from COVID-19 and was therefore dismissed for misconduct. The arbitrator was thus satisfied that the employee was guilty and that his conduct amounted to serious misconduct which would justify the sanction of dismissal.

The question is whether dismissing an employee for misconduct committed outside of the workplace is fair or within the employer's prerogatives. The general rule is that actions performed outside of the workplace and working hours are beyond the scope of the employer's disciplinary authority. This is based on the premise that the private lives of employees are usually of no concern to their employers. However, disciplinary action for an employee's extramural conduct may be justified in certain circumstances, namely when a connection can be established between the extramural misconduct of the employee and the negative impact that this conduct could have on the employer's business or the trust relationship between them. In *Mabusela and Metropolitan Health*,⁹⁵ the employee was dismissed by his employer on charges of defamation and bringing the company into disrepute by posting a derogatory statement on Twitter where he stated that the employer was forcing its employees to return to work during the hard lockdown. The employee referred an unfair dismissal case to the CCMA. The commissioner was satisfied that the employee was guilty of some form of misconduct, but found that it was mitigated by surrounding circumstances. There was no evidence of malice or an intention to harm the employer and, in the premises, dismissal was not the appropriate sanction and was therefore unfair.

In *Edcon v Cantamessa*,⁹⁶ the court held that the positing of a racist comment on Facebook by a senior employee whose Facebook page identified her as an employee of the employer justified disciplinary action even though she had used her personal computer while on leave and outside the ambit of her working hours or workplace. The test is whether the misconduct complained of affected the employment relationship and not whether the conduct at issue was covered by the employment contract. In this regard, it is sufficient for the employer to establish that it has a legitimate interest in such conduct and that the conduct in question affects the employment relationship.

94 (2021) 42 *ILJ* 2334 (NBCRFLI).

95 (2021) 42 *ILJ* 2307 (CCMA).

96 (2021) 41 *ILJ* 195 (LC).

Compulsory Vaccination and the Constitution

The enforcement of COVID-19 measures and now mandatory vaccination in the workplace gives employers wide powers to dismiss employees if they fail or refuse to comply. Taking such drastic measures against employees may have the effect of limiting their rights guaranteed in the Constitution. One such right is the right to bodily and psychological integrity.⁹⁷ The Constitution states that the rights in the Bill of Rights are not absolute and may be limited in terms of section 36 of the Constitution.⁹⁸ The question that arises is whether the dismissal of an employee for the failure to comply with COVID-19 measures or refusing to vaccinate where such vaccination has been made a policy in the workplace can be justified in terms of section 36 of the Constitution.⁹⁹ Dismissal for failure to comply with COVID-19 measures including a refusal to take compulsory vaccination will require compliance with the limitation clause in section 36 of the Constitution as it has the effect of limiting a constitutional right such as the right to bodily and psychological integrity.¹⁰⁰

The article argues that the limitation of the employees' right to bodily and psychological integrity would be justified if it was informed by the law of general application which is accessible and applies to everyone uniformly. Before a limitation can be said to be reasonable and justifiable, it must first be established that the conduct that it intends to limit is in terms of the law of general application (Currie and Klaaren 2013, 152). This means that the limitation of the right must be sourced in law. In South Africa there are different categories of law, viz: common law, customary law and legislation (Tenza 2018, 480). The article argues that only the law that comes from Parliament can justifiably limit a right in the Bill of Rights. In this regard, the article submits that the legislature will have to enact a law that will authorise employers to compel workers to vaccinate before they come to work.

Once it has been established that a right in the Bill of Rights has been limited, the next phase is to link the law that infringes the right to factors listed in section 36(1)(a)–(e) of the Constitution. These factors allow the person or institution that intends to limit the right in the Bill of Rights to weigh the advantages and disadvantages of limiting the

97 Section 12(1)(c) of the Constitution.

98 Section 36(1) of the Constitution.

99 Section 36 reads as follows:

“(1) The rights in the Bill of Rights may be limited in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.”

100 Section 12(1)(c) of the Constitution.

right.¹⁰¹ In weighing up the advantages and disadvantages of limiting the right to bodily and psychological integrity, it can be taken into account that vaccination, if prescribed in terms of an Act of Parliament, could be sufficient to fit into the larger purpose of the Constitution of establishing a society based on the values of human dignity, equality and freedom. Such law will serve a worthwhile purpose of preventing the spread of COVID-19 in the workplace and saving the lives of people as science has shown that the number of deaths is reduced when people are vaccinated. It will also constitute a less restrictive means to achieve the goals prescribed in the Constitution.¹⁰² It is submitted that there would be more advantages to compelling employees to vaccinate as this will save the economy from going into the doldrums due to numerous lockdowns. It will also save the loss of jobs and perhaps put to a halt to the rising unemployment rate which is currently sitting at 34.9 per cent.¹⁰³ The introduction of compulsory vaccination would help to alleviate the pressure on the economy as opposed to allowing people to go unvaccinated as this increases the pressure on the economy. It also negatively affects the employment of workers, as they could lose more wages while employers lose more profit and face the possible closure of businesses due to persisting lockdowns.

Conclusion

The issue of providing a safe working environment to employees is broad to enough include an environment that is free of COVID-19 infections. The employer may not achieve the goal of providing a safe and healthy working environment alone and without cooperation from the employees. The employer would need to adopt a policy that specifically regulates the issue of COVID-19 in the workplace to which everyone in the workplace will have to comply. The policy would have to state the consequences of failing to comply with the COVID-19 measures or rules, such as dismissal. Some of these measures or rules may have the effect of limiting one or more of the rights guaranteed in the Bill of Rights. The article argues that since rights in the Bill of Rights are not absolute and can be limited in terms of the law of general application, any right that could be limited in the process of fighting the spread of COVID-19 will be justified as the aim would be to achieve a worthwhile purpose of protecting and saving the lives of employees and other people in the workplace. Such conduct will have a further purpose of saving the economy and loss of jobs due to continued lockdowns.

101 This is referred to as the proportionality principle, *S v Makwanyane* 1995 (3) SA 391 (CC) 436.

102 Section 1 and 36(1) of the Constitution.

103 Quarterly Labour Force Survey 2021 <www.statssa.gov.za> accessed 15 January 2022.

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