WERKSMANS
ATTORNEYS

EMPLOYMENT

Caught on the sidelines: The cost of employee sick leave abuse

9 April 2024 *5 min read*

Danelle Plaatjies – Candidate Attorney and Yendiswa Sithole – Candidate Attorney

What is an employer to do when an employee is booked off on sick leave, only to be seen engaging in social activities that a "sick" person ordinarily should not or could not be engaging in?

In *Hans v Montego Pet Nutrition* [2024] 2 BALR 196 (CCMA), the Commission for Conciliation, Mediation and Arbitration ("**the CCMA**") had to determine, amongst other things, whether an employee's attendance at a social event whilst booked off on sick leave warranted his dismissal.

In this article, we consider the findings of the CCMA and provide some tips for employers to curtail the abuse of sick leave in the workplace.

Facts

The employee was employed for approximately six years before he was dismissed on grounds of misconduct related to dishonesty. The basis of the charges levelled against him were that whilst he was booked off on paid sick leave, he attended a rugby match during which he was seen consuming alcohol. The employer regarded this conduct as amounting to dishonesty in that the employee was clearly not incapacitated from being at work and was thus dishonest in claiming to be sick.

The arbitration proceedings before the CCMA were heard in part on 28 September 2023, subsequent to which they reconvened and were finalised on 1 November 2023. As between the parties, it was disputed whether (1) there was a rule that governs the conduct of employees while on sick leave; (2) dismissal was the appropriate sanction; and (3) the chairperson was biased or not during the hearing. The disputed facts formed the basis for the CCMA Commissioner's determinations.

Rule governing sick leave: The employer's witnesses testified that (1) the employee was aware of the employer's sick leave policies, one of which stated that "*should it be noted that or suspected that an employee is abusing sick privilege, disciplinary action will be taken*" (the "**Rule**") and (2) the employee had attended the initial induction sessions and had duly signed attendance registers as confirmation of his understanding of what was presented.

Chairperson's alleged bias: With respect to procedural fairness, the employee contended that the chairperson was both a referee and a player during the proceedings and that he had adjourned the proceedings without affording him an opportunity to call witnesses for no good reason. In response, it was the employer's case that the chairperson only interfered so as to explain the rights of the parties and that the employee was not denied his right to call witnesses, he simply did not exercise this right.

Appropriate Sanction: The employee submitted that, considering his clean disciplinary record and benign intentions, dismissal was too harsh a sanction.

The Commissioner's findings

Breach of the Rule: Whilst the employee denied that he was aware of the Rule, that the Rule formed part of his contract of employment and that he signed his contract of employment, the CCMA Commissioner found that the employee had been employed for long enough to be well aware of the Rule, which was also in his employment contract that he had concluded years prior. In other words, he was found to have been aware of the Rule. The Commissioner further found that the employee had transgressed it.

Chairperson's alleged bias: Due to the employee's failure to substantiate his claims against the chairperson's impartiality, the CCMA Commissioner found the procedure followed in dismissing the employee was fair.

Appropriate Sanction: The CCMA Commissioner then determined whether dismissal was a fair sanction. The CCMA commissioner referred to *Woolworths (Pty) Ltd v the Commissioner for Conciliation, Mediation and Arbitration and Others* (PA12/2020) [2021] ZALAC 49 (10 December 2021) in which the Court held that the sanction of dismissal is justified in instances of sick leave abuse (which is considered dishonest conduct) as an "*employee is required to act with integrity and abide by the company policies, procedures and codes*". Dishonesty falls short of this standard. The CCMA Commissioner also held that the employer had to take this measure so as to deter other employees from following suit, ultimately protecting its interests.

Importance of the Case

Employees have a common law duty to act honestly during the course of their employment so as to foster the trust relationship between themselves and their employers. Claiming to be too sick to work when one is not, is not only dishonest but also a breach of the contract of employment often warranting dismissal.

Tips for Employers

Employers should ensure that (1) employees are made aware of and are able to access their sick leave policies; (2) policies are updated regularly; and (3) disciplinary actions taken for sick leave abuse are fair, consistent, and in accordance with company policies and applicable laws. Employees should consider whether they are in fact incapacitated from doing their work when claiming sick leave privileges.



Andre van Heerden

Director

View Profile



Jacques van Wyk

Director

View Profile