

EMPLOYMENT

CCMA pronounces on mandatory vaccination policy

26 January 2022 4 min read

Mandatory vaccination policy

On Friday 21 January 2022, the Commission for Conciliation, Mediation and Arbitration ([CCMA](#)) delivered a much anticipated first pronouncement on the fairness of a dismissal following an employee's refusal to receive the COVID-19 vaccination.

The publication of the latest iteration of the Consolidated Directions on Occupational Health and Safety Measures in Certain Workplaces under the Disaster Management Act No.57 of 2002 (the Directions), on 11 June 2021, sparked much controversy when the Directions affirmed the right of employers to adopt mandatory vaccination policies subject to certain restrictions.

Before adopting a mandatory vaccination policy an employer must undertake a risk assessment to identify those employees who should be subject to such mandatory vaccination policy on the basis of either the risk of transmission of COVID-19 through the specific work performed by the employee or the risk of severe COVID-19 disease or death by virtue of the employees' comorbidities.

Adopting a mandatory vaccination policy

The Directions require any employer adopting a mandatory vaccination policy to notify employees identified for mandatory vaccinations of their rights to refuse the COVID-19 vaccine either on Constitutional grounds (the right to bodily integrity, the right to freedom of religion, belief and opinion) or on medical grounds. Employers are obliged to, where possible, reasonably accommodate employees refusing the COVID-19 vaccine.

Following the publication of the Directions, the burning question has been whether an employer may dismiss an employee, subject to its mandatory vaccination policy, for refusing the COVID-19 vaccine. In the case of *Theresa Mulderij v Goldrush Group* (GAJB 24054-21), the CCMA was called to answer this very question.

In this case, the Goldrush Group (Goldrush) adopted a mandatory vaccination policy in compliance with the Directions in terms of which Theresa Mulderij (Ms M) was required to receive the COVID-19 vaccine. In terms of the policy Ms M was entitled to apply for exemption from the policy, which she duly did. Ms M cited Constitutional grounds, specifically her right to bodily integrity as her reason for refusing the COVID-19 vaccine.

Dismissed for incapacity

Ms M also alleged that she strictly followed COVID-19 safety protocols and that the COVID-19 vaccine did not stop the spread of the virus but minimized the risk of the severity of COVID-19 symptoms. After consideration of her application for exemption, Goldrush declined her application on the basis that Ms M was required to engage with external clients and internal colleagues by virtue of her position. Ms M was subsequently dismissed for incapacity as she could not be accommodated anywhere in the business.

From a reading of the award it is not clear whether the CCMA, in coming to its decision, gave sufficient consideration to whether Goldrush's decision to adopt the mandatory vaccination policy was supported by credible medical evidence. The CCMA nevertheless accepted Goldrush's decision to implement a mandatory vaccination policy, and found that Goldrush had complied with the Directions when

implementing its mandatory vaccination policy. The CCMA ultimately held that Ms M's dismissal was substantively fair, reasoning that Ms M was permanently incapacitated on the basis of her decision not to receive the COVID-19 vaccine.

Although this case is arguably an important decision, it is unlikely to be the final pronouncement on this issue. A number of cases in various fora, including the Labour Court and the High Court, are pending pronouncement in relation to this question, and it is anticipated that these cases will shed more light on whether employers may adopt mandatory vaccination policies, whether employees may be dismissed for refusing the COVID-19 vaccine and if so, the process that an employer should follow to give effect to such dismissal. Considering the right to refuse the COVID-19 vaccine on Constitutional grounds, it is inevitable that these issues will finally be determined by the Constitutional Court.

Employers adopting mandatory vaccination policies walk a fine line between ensuring a safe working environment in compliance with its occupational health and safety obligations, and potentially unduly infringing on employees' Constitutional rights.

Consequently, notwithstanding the CCMA's award in Ms M's case, employers should apply caution when implementing mandatory vaccination policies in respect of specific positions or the entire workforce.

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