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EMPLOYMENT

Resigning rather than being vaccinated

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Resignation vs vaccinated

As an employee, what are your rights when an employer places pressure on you to be vaccinated? Should an employee have any objections to vaccination, and the employer imposes a mandatory vaccination policy, does the employee have recourse to protection against being forced to be vaccinated? Employees may find themselves questioning whether they want to continue working for their employer in this situation. The real-world relevance of this questions stems from current global data which tends to indicate that these are practical concerns which have lead numbers of employees who refuse to work, or even go so far as to resign, rather than be forced to be vaccinated. In South Africa, which is recognised to have a robust labour framework which is generally protective of employee rights, how would this situation be regulated?

Section 186(e) of the Labour Relations Act, 66 of 1995

As a starting point, should an employee decide to resign rather than be vaccinated, a starting point to consider would be section 186(e) of the Labour Relations Act, 66 of 1995 ("LRA") which provides that it is considered to be an unfair dismissal when "an employee terminates his/her employment with or without notice because the employer made continued employment intolerable for the employee". In other words, the employee must resign (which is not a dismissal by an employer) in circumstances in which the employee didn't want to actually do so, but staying employed was considered to be an intolerable option, due to the conduct of the employer. This is referred to as a *constructive dismissal*, in which the employer is held responsible for making the working environment so toxic, deplorable or intolerable, that the employee simply could not endure it any longer and resigned as a result.

In light of recent moves by employers to impose mandatory vaccination against Covid-19 on employees, and objections which have anecdotally been raised against vaccination by groups of private individuals who have come to be (somewhat pejoratively) termed as anti-vaxxers, the question is raised as to whether the request or requirement (through adoption of a mandatory vaccination policy) to be vaccinated would entitle an employee to resign, must be tested against the requirements for demonstrating a constructive dismissal.

The Commission for Conciliation, Mediation and Arbitration

The primary starting point when considering whether a constructive dismissal has occurred is to note that, since the employee is seeking to hold the employer responsible for the employee's actions, the normal onus which rests on the employer to prove that the dismissal was fair, is reversed, and the employee must prove that the employer's conduct led him/her to resign. This is an objective test, as nicely summed up in the classic case of *Botha v ARDT 2000 Trading CC trading as Kandyland [2004] 12 BALR 1527 (CCMA)*, where it was stated that "*a judicial officer should consider the conduct of the employer as a whole and decide whether it was so unbearable as to result into a decision of the employee to resign*." Additionally, the CCMA stated that "*it should be emphasised that in order to show that an employee's continued employment was intolerable, the [employee] must allege and prove facts that show that it was objectively the case*." As such, the mere fact that the employee subjectively felt that he had no option other than to resign, does not demonstrate a constructive dismissal; it must be shown that a reasonable person in the same circumstances as the employee would also have felt no option other than to resign.

With regard to this last point, and in conjunction with the requirement that the conduct of the employer must render the continued employment *intolerable*, and since it is likely that an employee otherwise aware of his rights when faced with a mandatory vaccination policy would be able to compel the employer to consider a number of other options to try and accommodate his reluctance to be vaccinated, it is likely that an employee resigning as a result of pressure placed on him by his employer, or due to the adoption of a mandatory vaccination policy in the workplace, would find it difficult to successfully hold his employer responsible for an alleged constructive dismissal.

Employers should be aware that if employees demonstrate reluctance to be vaccinated, although they may threaten to do so, and may ultimately resign, provided that the employer has taken the necessary steps to adopt a vaccination policy, and is treating all employees fairly and consistently, it is unlikely to face legal consequences from employees who resign to avoid the vaccinated workplace.

Resignation or dismissal? Find out more.

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