

EMPLOYMENT

The downside to a side hustle – moonlighting, conflicts of interest and the law

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Employees are required to devote their time, effort and skills to advance their employer's business interests. It is considered a breach of good faith when employees pursue and obtain additional work from other employers which might diminish their employer's profitability. The current economic climate has caused many employees to seek additional sources of income to supplement their primary source of income. With the rise of the "side hustle" culture or "moonlighting", employers must take additional measures to prevent conflicts of interests and safeguard their businesses.

In *Vilakazi v Commission for Conciliation, Mediation and Arbitration and Others* (JR164/20) [2023] ZALCJHB 319 (3 November 2023), the Labour Court considered the issue of moonlighting as a form of conflict of interest.

Facts

The employee was initially employed as a part-time lecturer by the University of the Witwatersrand ("**University**") and also by Alexander Forbes in 2017. The employee resigned from Alexander Forbes pursuant to her full time employment as a lecturer at the University in 2018. The employee was required to acquaint herself with the policies, rules and regulations applicable to her full time employment with the University, in particular, the University's Policy on the Declaration of Interests ("**the Policy**") and the provisions pertaining to conflicts of interest and moonlighting. The Policy defines moonlighting as –

"taking up additional employment, which may require time investment that may impede a staff member in meeting his or her contractual obligation to the University".

In terms of the Policy, an employee is required to approach the Vice Chancellor's office for approval of any external institutional affairs, including moonlighting.

The University was alive to the fact that many of its full time employees were pursuing additional employment, which could result in a conflict with its interests. It implemented policies and regulations to manage the adverse impact of any conflict of interests. Importantly, the University did not *prohibit* moonlighting in the Policy. Instead, it requires that an employee who wishes to take up additional employment declare such interest to the office of the Vice Chancellor before accepting and commencing with such additional employment. The office of the Vice Chancellor would evaluate the terms of the additional employment in light of its own operational requirements and make an informed decision as to whether the additional employment was permissible or not.

However, shortly after taking up full time employment with the University, the employee committed herself to an additional full time job with a third-party employer. The employee failed to disclose her external employment to the office of the Vice-Chancellor and to obtain permission to pursue this external employment whilst in the full time employ of the University.

When the employee's additional employment was discovered by her supervisor, she was charged with and found guilty of gross misconduct. The employee argued that she could manage both full-time positions and that she saw no conflict of interest.

The employee was dismissed and subsequently referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration. The matter remained unresolved at the conciliation and proceeded to arbitration, where it was found that the employee's

dismissal was both procedurally and substantively fair. The employee, dissatisfied with the arbitration award, approached the Labour Court to review and set aside the Commissioner's arbitration award.

Labour Court finding

It was common cause that the employee engaged in moonlighting in breach of the Policy and her fiduciary duties. The Labour Court dismissed the employee's review application and held that her dismissal was both procedurally and substantively fair. The Court found that the two full-time contractual relationships were "mutually incompatible and could not practically exist together".

The Labour Court reiterated that the contract of employment is one of *uberrimae fidei* (of the utmost good faith) and that employees owe their employer a fiduciary duty not to work against its interests.[1] The employment relationship is rooted in the values of trust and confidence. A breach of good faith taints the relationship between an employer and employee to such an extent that dismissal is justifiable and the only appropriate outcome.

Whether a conflict of interest in the form of moonlighting has occurred is not a subjective decision to be reached by an employee. It is the "sole prerogative" of an employer to regulate when moonlighting may be permitted and, if so, on what terms. A disclosure after the fact is moot in that the employer was robbed of the opportunity to apply its mind to the employee's intended additional employment and assess the risk and overall impact of a conflict of interest. A *post-facto* disclosure accordingly cannot remedy the employee's failure to disclose additional employment.

Importance of the case

The Labour Court has confirmed its view that moonlighting without disclosing same is unacceptable. Even in the absence of a clause in the employment contract or a policy provision, employees are seen to violate their fiduciary duty of good faith towards their employer by taking up additional employment without disclosing same to their employer. Pursuing additional full time employment requires prior permission and upfront disclosure. Furthermore, it is not for an employee to subjectively determine the existence of a conflict of interest. In addition to general conflict of interest and disclosure clauses contained in an employment contract, employers are advised to regulate moonlighting and safeguard their businesses by implementing appropriate policies and rules.

Footnotes

[1] See Chapter 9 "Specific Forms of Misconduct" in Grogan *Dismissal* (2022) 4 ed, page 209.



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