

The importance of employees adhering to Covid-19 protocols in the workplace

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Covid-19 protocols in the workplace – Issue

Whether the dismissal of an employee who attended work whilst awaiting a Covid-19 test result, who continued to report to work after the Covid-19 test result came back positive and who failed to follow health and safety protocols in the workplace, was fair.

Summary

The dismissal of an employee who reported to work whilst awaiting a Covid-19 test result, who failed to self-isolate after receiving a positive Covid-19 test result, who failed to wear a mask in the workplace and failed to adhere to social distancing protocols, was fair.

Labour Court – Facts

In the case of *Eskort Limited v Mogotsi and others [2021] 8 BLLR 811 (LC)*, the [Labour Court](#) had to consider the above issue. The facts of this case are briefly as follows. The employee was an assistant butchery manager employed at the applicant. He was also a member of the applicant's in-house 'Coronavirus Site Committee' and was responsible for, among others, informing other employees of the procedure to be followed if they were exposed to Covid-19 as well as symptoms they should be aware of.

The employee used to travel to and from work with a colleague who had exhibited Covid-19 symptoms and was booked off from work for four days. His colleague was admitted to a hospital a few days later and was told that he had tested positive for Covid-19.

At the time that his colleague initially fell ill, the employee began experiencing chest pains, headaches and coughs. He was booked off from work from 6 to 10 July 2020. However, he nonetheless reported for work on 10 July 2020. The employee remained reporting for work even after he became aware that his colleague that he travelled with had tested positive for Covid-19.

The employee underwent a Covid-19 test on 5 August 2020 and was informed on 9 August 2020 that he had tested positive. However, the employee had still reported for work on 7, 9 and 10 August 2020. In fact, he personally came to the employer's premises to hand in his positive results.

The employee was observed on video footage at the workplace hugging a colleague a day after he had tested positive. The colleague he was hugging had recently experienced post-surgery complications. The video footage also showed the employee walking around the workplace without a mask.

The employee was charged with (i) gross misconduct relating to his alleged failure to disclose to his employer that he went for a Covid-19 test and was awaiting his results; and (ii) gross negligence in that after his Covid-19 test result came back positive, he continued working and had therefore put the lives of his colleagues at risk. Furthermore, during this period it was alleged that he had failed to abide by the health and safety protocols in the workplace. He was dismissed.

Following his dismissal, the employee referred an unfair dismissal dispute to the CCMA on the grounds, among others, that he had not been provided with any clear direction or instruction from the employer and that he was "subjected to victimisation."

The CCMA held that the employee was required to inform the employer that he underwent a Covid-19 test and was guilty of failing to report his test to the applicant. The employee was found to be grossly negligent and 'extremely irresponsible' as he had reported for duty after he received a positive Covid-19 test result, failed to inform the employer of same, hugged fellow employees and walked around the workplace without a mask on.

However, the CCMA held that in the circumstances, the sanction of dismissal was not appropriate considering the employer's disciplinary code. The conduct, as exhibited by the employee called for the sanction of a final written warning in terms of the disciplinary code. As the employer could not justify the sanction of dismissal, the CCMA held that it was substantively unfair and ordered that the employee be reinstated without back-pay and a final written warning be placed on his record.

Labour Court – Evaluation

On review, the LC held that the findings made by the CCMA Commissioner were entirely disconnected with the evidence that was placed before him. The Commissioner had concluded that the employee's actions were 'extremely irresponsible' in the context of the Covid-19 pandemic and this, the LC stated, should have confirmed the sanction of dismissal and that the employer's disciplinary code was merely a guideline insofar as issues of sanctions were concerned.

The LC emphasised that the Commissioner was obliged to assess the nature of the misconduct in question and determine if the misconduct of the employee could be said to be of gross nature. Once that assessment was made, the Commissioner would have reached the invariable conclusion that the misconduct in question was of such gross nature as to negatively impact on a sustainable employment relationship, the sanction of dismissal would have been appropriate. The Commissioner had failed to consider the totality of the circumstances when considering the appropriateness of the sanction of dismissal.

Ultimately, the LC held that the dismissal of the employee was appropriate given the fact that:

- a. he was aware that he was in contact with a person who had tested positive for Covid-19 and had himself experienced symptoms;
- b. he had endangered the lives of everyone at the workplace including his colleagues, their families and communities;
- c. he was a member of the 'Coronavirus Site Committee', he should have easily recognised his Covid-19 symptoms and should have known what to do when in contact with or exposed to someone who had tested positive for Covid-19;
- d. his conduct was inconsiderate and nonchalant in that he ignored all health and safety protocols in the workplace;
- e. he walked around the workplace without a mask and hugging colleagues, thereby placing everyone he had been in contact with at great risk;
- f. he did not show any form of contrition on his part. He was also dishonest in that he sought to conceal the date upon which he received his Covid-19 test results.

The LC concluded that at no point was the employee victimised. In fact, all the evidence put forward by the employer pointed to the employee being grossly negligent, reckless and dishonest. Therefore, a trust and working relationship between the employer and employee could no longer be sustainable.

The LC set aside the Commissioner's award and held that the employee's dismissal was substantively fair.

Importance of the case

This case emphasises the obligation placed on employees to always abide by Covid-19 health and safety protocols in the workplace, as the failure to do so may result in termination of their employment.

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