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EMPLOYMENT

The importance of the recognition of cultural beliefs in the workplace

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Cultural beliefs in the workplace

Issue in dispute

Can an employee who has a genuine cultural belief that she should attend a training course unrelated to her work or suffer illness, even death, be dismissed for misconduct if her application for leave was rejected by her employer and she refused a direct instruction to return to work?

Summary – genuine cultural belief

An employee who has a genuine cultural belief that she should attend a course to be trained as a traditional healer in response to a calling from her ancestors and that failure to do so could result in illness, even death, is justified in being absent from work on the basis of being sick. An employer cannot discipline such an employee for misconduct, even if such employee disregarded a direct instruction to return to work and had no remaining leave available. However, in circumstances where the employee's absence has a serious impact upon the employer's business, the employer is entitled to institute incapacity proceedings in accordance with the provisions of the Labour Relations Act 66 of 1995, as amended, ("LRA").

Kievits Kroon Country Estate v Mmoledi (875/12) [2013] ZASCA 189

In the recent case of *Kievits Kroon Country Estate v Mmoledi (875/12) [2013] ZASCA 189 (29 November 2013),* the Supreme Court of Appeal had to address the above issue.

The employer, a company that offered conference and leisure facilities to its clients, dismissed the employee, a chef de partie, for misconduct as a result of her absenteeism from work and her failure to follow a direct instruction. The employee had exhausted her sick leave when she received a vision and calling from her ancestors that she attend a course on traditional healing for a period of three weeks. She approached her employer requesting leave. However, as the employer could not afford for the employee to be absent for a significant period of time, the employer agreed that she could take unpaid leave, but only for one week.

While on unpaid leave, the employee was contacted by her employer informing her that her application for further leave (in excess of the one week granted to her) had been denied. The employee indicated that she could not return to work and did not, in fact, return. The employee's reason for non-attendance was that she truly believed that failure to attend the course could result in illness, even death. The employee also handed her employer a sick note from her traditional healer which expressed the need for the employee to attend the course. The employer nevertheless dismissed the employee for misconduct and insubordination.

The Supreme Court of Appeal, in upholding the Commission for Conciliation, Mediation and Arbitrations ("CCMA") and Labour Court's decisions, found that the employee's dismissal was unfair. The court emphasised the need to take into account the employee's cultural beliefs and indicated that where it can be shown that the employee had a sincere and genuine belief that she had no option but to attend

the course for fear of the consequences, she was justified in being absent and in refusing to comply with the employer's instruction. In such circumstances, the failure of the employee to report for work could be said to be justifiable and reasonable.

The court did, however, caution that an employer is not expected to tolerate an employee's prolonged absence from work and it may be fair, in certain circumstances, to terminate the employee's employment by virtue of incapacity due to ill health.

Cultural values – the importance of the case

Cultural values must be taken into account in the workplace. However, employers will only be obliged to give credence to an employee's beliefs as a valid excuse for disobeying an order or absenting him/herself from work, where it is clear that such a belief is genuine and sincere.

Even if the belief is sincere, the employer can still dismiss the employee for incapacity due to ill health; provided the procedures prescribed within the LRA are adhered to.



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