Self-Isolation and Employees' Sick Leave

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The rights and responsibilities of employers and employees alike are customarily embodied in the age old "control test" developed from an early stage in South African jurisprudence. Control and supervision of a particular person (the Employee) by another (the Employer), in various respects, has long been a defining characteristic of the common employer-employee relationship.

Arguably the most indicative determining factor of the employee-employer relationship is the right of the employer to typically have the employee at its back and call for the purposes of rendering the contractual services agreed to. Tied to this right, is the general right for an employer to request an employee to render the agreed services at his/her/its discretion with the employee being obliged to obey all reasonable and lawful commands, instructions and/or orders and conduct same in accordance with the manner prescribed by the employer.

As a fundamental right, and concomitant obligation, Employees must accordingly avail themselves to render the agreed upon service at the behest of the Employer.

However, our law seeks to protect an Employees' fundamental human right to fair labour practices and has codified certain entitlements to ensure the fair treatment of labourers throughout the subsistence of the employment relationship. Some examples of protectable interests are an Employees right to a safe working environment, the regulation of working hours and the provision an allotted amount of time off.

With the obtrusion that is the current global pandemic, some of the protectable interests given to Employees under the law, and the application thereof, have come into sharp focus. The potential for a highly communicable and deadly virus which has rapidly spread, and wreaked havoc, throughout the world to have an impact on the health and safety of the country's workforce, is not only apparent but obvious.

As a result of this one would naturally come to expect that where employees have contracted Covid-19, questions surrounding the safety of a workplace and employee benefits (namely sick leave) would begin to arise.

Section 8(1) of the Occupational Health and Safety Act, 85 of 1993 provides that it is an Employers' duty to ensure that he/she/it provides an Employee with a safe and hazard free working environment insofar as is reasonably practicable.

In dealing with the current threat of the global pandemic, the Government of the Republic of South Africa, as part of its response to the threat, has issued regulation in terms of the Disaster Management Act, 57 of 2002 which states that any person who has tested positive for Covid-19 or displays symptoms associated with Covid-19 must isolate for a period of at least 10 days from date of the positive result or the onset of symptoms.

In the workplace, what this translates to is the need for employees and employers alike to ensure that there is compliance within the workspace, in the interest of maintaining a healthy and safe environment for the collective.

The Basic Conditions of Employment Act, 75 of 1997 further provides an Employee with a minimum amount of paid sick leave equal to the number of days an Employee would ordinarily work during six-weeks per sick leave cycle. This right seeks to protect both an economic interest of the Employee as well as the safety and health of the Employee.

In the recent judgment of ***Mehlala vs Cybersmart (Pty) Ltd [2021] 7 BALR 749 (CCMA),*** issues surrounding a Covid-19 positive employee and such employee's sick leave benefit/right were considered.

In this case, the employee contracted Covid-19 and after testing positive, was booked off work for a period of 10 days. Before the Employee returned to work, she was informed that she would need to obtain a medical certificate which cleared her for duty and declared her fit to resume work.

At this stage she still displayed symptoms associated with the virus and had complained of a continued feeling of illness. The employee returned to her physician on the same day and requested a letter declaring her fit to return to work, however, she indicated to her physician that she was still ill. Her physician told her to complete a period of 14 days isolation, rather than 10 days. The physician further issued a letter to the Employee to this effect. Notably, the letter did not provide a date upon which the Employee was to return to work, but what the letter did state was that the Employee would be booked off for a period of 14 days.

Despite informing her employer of this new development and providing copies of the medical certificates booking her off, it was demanded that she return to work. The Health and Safety Officer informed her that there were identifiable inconsistencies between the two different medical certificates. The first prescribed an isolation period of 10 days and contained a set date for the employees return, whilst the second medical certificate only provided for a 14-day isolation period. The Employee had to therefore determine and calculate the date of her return herself.

The other issue the Employer further took issue with the fact that the second medical certificate was incorrectly dated and did not bear the signature of the employee's physician. It was accordingly rejected, and the employee was instructed to return to work.

Section 23(2) of the Basic Conditions of Employment Act, 75 of 1997 states that proof of incapacity must be a medical certificate which is "issued and signed by a medical practitioner or any other person certified to diagnose and treat patients". It would accordingly seem that the employer was entitled to reject the second medical certificate of the employee, in light of the issues.

Our Labour Appeal Court has further gone on to confirm, in the matter of ***Mgobhozi v Naidoo NO & others [2006] 3 BLLR 242 (LAC),*** that in addition to the above requirements regarding medical certificates, medical certificates without any supporting evidence may amount only to hearsay evidence of an employee's incapacity.

This in light of the prevalent abuse of sick leave benefits afforded under our law by employees.

It is accordingly trite law that an Employer need not accept a sick note presented by an employee which is seemingly, on the face of it, irregular.

The Employer therefore held the view that the additional leave taken by the Employee was unauthorised and upon her return issued a final written warning for unauthorised absence without leave when she failed to report to work after the prescribed, and accepted, period of 10 days. The Employee was further found guilty of insubordination for failing to return to work after being instructed to do so.

Interestingly the Employer, in this instance, sought to verify the Employee's explanation for the 'unauthorised' absence before issuing the Employee with a final written warning. The employee's manager, through communications with the Employee's physician, confirmed that the irregularities complained of by the employer were clerical errors and the result of using templates to complete medical certificates. The physician further stated that he had been approached by the employee and

corrected the relevant sick note to accurately reflect the correct medical advice.

In the CCMA case, the Commissioner found that, on the facts presented, not only did the employee have a legitimate reason for her absence, but under the current regulations and circumstances surrounding the Covid-19 pandemic, the employer's demands, and instructions for the employee to return to work despite her continued ostensive symptoms, was illegal.

The Commissioner found that although the regulations refer to a period of 10 days, this is not cast in stone and may be extended in cases where a person still displays symptoms. The employee's final written warning was accordingly declared unfair and set aside.

This matter serves as a cautionary tale against adopting a strict interpretation of the laws and regulations. Where an employee has offered a reasonable explanation for his/her absence, with sufficient proof to draw the rational conclusion that he/she is incapacitated.

Extra caution should be exercised in light of Covid -19, and employers are reminded that causing employees to be exposed to Covid-19 in the workplace may expose the employer to criminal liability.

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