



Arbitration Award

Case Number: GAJB9612-22

Commissioner: Gcobisa Gosa

Date of Award: 12 December 2022

In the ARBITRATION between

Donaldson Mofokeng

(Union/Applicant)

And

Multichoice Support Services (Pty) Ltd

(Respondent)

APPROVED

DETAILS OF THE HEARING AND REPRESENTATION

1. This is the award in the arbitration between, Mr Donaldson Mofokeng, the Applicant, and Multichoice Support Services (Pty) Ltd, the Respondent. The arbitration was held under the auspices of the CCMA and the award is issued in terms of section 138 (7) of the Labour Relations Act, 66 of 1995 ("the LRA").
2. The arbitration hearing was held over a period of three days. The last sitting was on 28 November 2022. The parties requested to submit written closing arguments. Closing arguments were duly considered.
3. The Applicant was represented by Mr. Setlago, an Attorney from Setlago Attorneys Inc. The Respondent was represented by Mr. Aadil Patel, an Attorney from Cliffe Dekker Hofmeyr Inc.
4. The proceedings were digitally recorded, and handwritten notes were also taken.
5. Both parties submitted bundles of documents. Documents were admitted as they purport to be.

PRELIMINARY ISSUES

6. The Respondent raised a preliminary point that the CCMA does not have jurisdiction to arbitrate the alleged unfair dismissal dispute referred by the Applicant. The true nature of the dispute is an alleged automatically unfair dismissal dispute. This is based on the Applicant's contention that he has been discriminated against for his refusal to vaccinate. Should the Applicant wish for the CCMA to arbitrate the dismissal dispute, he would have to withdraw the discrimination dispute.
7. The Applicant opposed the Respondent's preliminary point on the basis that a consolidation of two matters does not take away the CCMA's jurisdiction. The discrimination and dismissal disputes are independent and the CCMA have jurisdiction to hear both matters. The Applicant did not make any

mention of discrimination in his referral form. The Applicant was dismissed for alleged permanent incapacity based on his refusal to vaccinate.

8. I dismissed the Respondent's preliminary point and found that the CCMA has jurisdiction to hear the matter. The Applicant referred an alleged unfair discrimination dispute to the CCMA on 2 March 2022 under case number GAJB3999-22. The Applicant summarized the nature of the dispute as *"I am being discriminated against by my employer because of my vaccination status and I have been ill treated and locked out without notice only because of my vaccination status"*. The Applicant referred this dispute whilst he was in the employ of the Respondent.
9. After the referral of the alleged discrimination dispute, the Applicant was dismissed on 22 April 2022. The reason for dismissal was an alleged permanent incapacity. The Applicant referred the dismissal dispute to the CCMA. The Applicant classified the nature of his dispute as dismissal related to incapacity. He summarized the nature of his dispute as *"the employer dismissed me and deemed me incapacitated because I am not vaccinated, I gave the employer sound reasons why I cannot vaccinate and also gave the employer reasonable alternative options to accommodate me but they did not consider any of that"*. I consolidated the two disputes at the request of the Respondent.
10. It is clear that the Applicant was dismissed for alleged permanent incapacity. He made it clear to his referral form that the dispute that he is challenging is an alleged unfair dismissal dispute. He did not state on his referral form that his dismissal was an alleged automatically unfair dismissal.
11. The fact that the Applicant referred an alleged unfair discrimination dispute before he was dismissed does not mean that his dismissal was also a discriminatory dismissal.
12. The Applicant referred a discrimination dispute after he was locked out by the Respondent. Yes, the

dismissal is also related to the Applicant's failure to vaccinate, hence I consolidated the two disputes. The referral of the unfair discrimination dispute, or the consolidation of the two disputes, does not take away the CCMA powers to arbitrate the alleged unfair dismissal dispute related to alleged permanent incapacity.

BACKGROUND TO THE DISPUTE

13. The Applicant was employed by the Respondent on 1 May 2015 until he was dismissed on 22 April 2022. At the time of his dismissal, he was employed as a technical and payment consultant. He was earning R13 018, 75 per month.
14. The Applicant referred an alleged unfair discrimination dispute to the CCMA under case number GAJB3999-22. He also referred the alleged unfair dismissal dispute under case number GAJB9612-22. The two disputes were consolidated under case number GAJB9612-22.
15. On the discrimination dispute, the Applicant alleged discrimination on an arbitrary ground, which is his vaccination status. On his dismissal dispute, the Applicant challenged both substantive and procedurally fairness of his dismissal. He sought compensation for both disputes.

ISSUES TO BE DECIDED

16. The first issue to determine is whether the Applicant was unfairly discriminated on an arbitrary ground.
17. The second issue is whether the dismissal of the Applicant was both substantively and procedurally fair or not.

SURVEY OF THE EVIDENCE AND ARGUMENT

Applicant's case

18. The Applicant testified for his case and did not call any witnesses. He testified that he was discriminated by the Respondent in that he was not allowed to enter the Respondent's premises after he refused to vaccinate. On 3 February 2022, he reported for duty but he was not allowed to enter the Respondent's premises and he was man handled by the security guard. He was required to take a Covid19 test, if he wanted to continue working for the Respondent. The test was expensive, as it would have cost him R4000, 00 per month. He could not afford the test. He did not want to vaccinate because it was his right to choose.
19. The Respondent's vaccination policy is discriminatory in that employees who decided not to vaccinate were treated unfairly. Vaccinated employees are allowed to access the workplace, whereas vaccinated and unvaccinated can still get the virus and transmit it. He applied for exemption on constitutional ground, but his application was declined.
20. He was dismissed after an incapacity enquiry was held. He was informed that he was permanently incapacitated due to his failure to vaccinate. He could assist at call centre, but the Respondent stated that he was permanently incapacitated as he was required to interact with customers.
21. The chairperson of the incapacity hearing was impatient. When he requested a risk assessment policy, he was informed to leave the risk assessment policy and focus on the vaccination policy.
22. He confirmed during cross-examination that he takes injections when required by the Doctor to do so. He stated that the reason for his refusal to vaccinate was related to his bodily integrity. He accepted that the vaccine policy was implemented in terms of government directives. He confirmed that Covid19 exists, and he was minimizing the risk by wearing a mask, social distancing, and sanitizing. He does not believe that the vaccination reduce number of covid 19 infections.
23. He confirmed that he refused to take an approved Covid19 vaccination. He denied that not taking the vaccine was unreasonable, as he was not sure of the effects. He stated that the job could be

adjusted, as he could work remotely, assist at stores, where there is minimum interaction with customers. He stated that he had not seen the risk assessment policy before the proceedings. He admitted that his job was at high risk, as he was dealing with customers and his colleagues. He is at the risk of getting Covid19 but even if he was vaccinated, he would still be at the risk of getting Covid19.

24. He stated that the Respondent's Covid19 policy does not comply with the consolidated direction on occupational health and safety measures in that the Respondent was required to do a risk assessment within 21 days of the directive, in order to decide whether it intends to make vaccination mandatory and if so, to identify the employees who are at risk of transmission through their work, age or comorbidities. He later changed his version and stated that the Respondent has complied with the direction in terms of the risk assessment.
25. He agreed that he was made aware that he could be dismissed for refusing to vaccinate. He conceded that there was scientific evidence supporting vaccine and the Respondent acted in terms of the scientific evidence. He denied that the global research shows that vaccinated people are less likely to infect others. He denied that he was a risk to vaccinated employees, because according to him, if vaccine is meant to protect people from getting infections, those vaccinated employees would be safe.
26. He does not know any government institution that provides Covid19 test for free. The meeting was scheduled with Doctor Tshi but he had network problems. He did not recall having a meeting with Doctor Tshi. He denied that he was permanently incapacitated.

Respondent's case

27. The Respondent called three witnesses to testify, namely, Mr Carlos Lourenco Redrigues, Ms Itumeleng Maimela and Ms Dumisile Makhoba.

39. The Employment Equity Act 55 of 1998 ("the EEA") was enacted to give effect to section 9 of the Constitution. The purpose of the EEA is to achieve equity in the workplace by – promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination.¹
40. The matter was referred in terms of section 10 of the EEA. The Applicant alleged that the Respondent's conduct of blocking his access card, thereby preventing him from accessing workplace on the basis of the fact that he was not vaccinated amounted to unfair discrimination of the arbitrary ground of vaccination status.
41. Section 6(1) of the EEA provides that:
- No person may unfairly discriminate, direct or indirectly, against an employee, in any employment policy or practice on one or more grounds, including, race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.*
42. The Applicant alleged discrimination on an arbitrary ground of vaccination status. Because discrimination was alleged on an arbitrary ground, the Applicant was required to prove that the conduct complained of is not rational, it amounts to discrimination and the discrimination is unfair.²
43. The Labour Appeal Court in *Naidoo & Others v Parliament of the Republic of South Africa*³ held that an arbitrary ground must be akin to a ground listed in section 6(1) of the EEA by reference to the core value of human dignity.
44. The LAC held that the EEA is the product of the section 9 of the Constitution and section 9 is not an all-encompassing injunction but has a specific focus to give recognition to the value of human dignity within the context of the historical experience of south Africa's legacy of oppression.
45. The Court held further that the insertion of the word "other" supports the conclusion that the phrase "any other arbitrary ground" was not meant to be a self-standing, but rather one that refers to the specified ground, so that a ground of a similar kind would fall within the scope of section 6(1).

¹ Section 2(a).

² Section 11(2) of the EEA.

'Arbitrary' is not a synonym for the word 'capricious'. The LAC added that section 6(1) of the EEA is to outlaw unfair discrimination that is routed in another arbitrary ground.

46. In line with the Naidoo decision, for the Applicant to succeed in his claim, the ground of discrimination relied upon must involve an injury to human dignity. The Applicant failed to prove that the Respondent's conduct of blocking his access card due to his failure to vaccinate involved an element of injury to human dignity. The Applicant was sent home and the intention was to pursue him to comply with the Respondent's vaccination policy. When it was clear that he was not willing to vaccinate, the Respondent conducted an incapacity inquiry and dismissed the Applicant.
47. The Respondent's conduct amounted to suspension, and it ought to have been challenged in terms of section 186(2) of the LRA, instead of section 6 of the EEA. In any event, such referral would have been superfluous after the dismissal of the Applicant. There was nothing special about the Respondent's conduct to trigger the provisions of section 6(1) of the EEA. The conduct should have been challenged like any other unfair suspension dispute. I therefore find that the Applicant failed to prove that he was unfairly discriminated by the Respondent.
48. On the dismissal dispute, the Respondent alleged that the Applicant was permanently incapacitated as a result of his failure to vaccinate. The Applicant denied that he was permanently incapacitated.
49. Section 188 of the LRA recognises three grounds for a fair dismissal, namely, conduct, capacity or operational requirements. The Respondent dismissed the Applicant for incapacity.
50. The Minister of Employment and Labour issued a consolidated direction on occupational health and safety measures in certain workplaces. The direction was issued in order to provide a direction on how employers should prevent and combat the spread of Covid19 in South Africa.
51. Section 3 of the directive places an obligation on the employer to conduct a risk assessment. The employer is required to undertake a risk assessment to give effect to the minimum measures required by the directions taking into account the nature of the workplace and the requirements of

³ (CA4/2019) (2000) ZALAC 38 (7 May 2020).

the Occupational Health and Safety Act Regulations for Hazardous Biological Agents.⁴ The direction places an obligation on employers, to within 21 days of the coming into force of the amendment to the direction, to decide whether it intends to make vaccination mandatory, and, if so, to identify employees who are at risk of transmission through their work or their risk for severe Covid19 disease or death due to their age or comorbidities.⁵

52. In line with the consolidated direction, the Respondent conducted a risk assessment and developed a risk assessment plan. After conducting a risk assessment, the Respondent took a decision to make vaccination compulsory. All employees of the Respondent were required to vaccinate. There was a process of applying for exemption. The recognised grounds of exemption were constitutional and medical grounds. The Applicant applied for exemption on constitutional ground, but his application was declined. He was then required to vaccinate and was dismissed when he failed to vaccinate.
53. The onus of proving the fairness of the dismissal for incapacity was on the Respondent. The Respondent did not lead any evidence on how the Applicant was declared permanently incapable of performing his duties because of his refusal to vaccinate. No evidence was presented that vaccinated employees would not get the Covid19 virus and would not transmit it. The Respondent's witnesses refused to answer the question of whether vaccinated employees would not transmission the virus on the basis that they are not medical practitioners.
54. It was the Applicant's case that in the absence of any medical evidence to prove that vaccinated individuals would not get and / or transmit the virus, he could not be dismissed for permanent incapacity due to his refusal to vaccinate.
55. He further submitted in cross-examination that even if there was such evidence, that would mean that the Respondent would not have to worry about protecting vaccinated employees, as they are already protected by the vaccine.
56. The Applicant could not be dismissed for permanent incapacity for refusing to vaccinate on the basis that the Respondent had an obligation to protect its employees, in the absence of any evidence to

⁴ Section 3(1)(a)(i) of the direction.

prove that vaccinated employees would not transmit the virus. The Respondent took a position that only unvaccinated employees would transmit the virus, as if there is scientific evidence to prove that vaccinated individuals will not transmit the virus.

57. A right to fair labour practice is a constitutional right.⁶ One of the primary objects of the LRA is to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution.⁷ The LRA protected the right of the employees not to be unfairly dismissed by inserting section 185 in the LRA. The section state that "*every employee has a right not to be unfairly dismissed*".⁸ For the dismissal to be fair, the employer must have a fair reason and the dismissal must be effected in accordance with a fair procedure.
58. For the Respondent to succeed in its claim that the Applicant was permanently incapacitated for his refusal to vaccinate, it was required to do more than arguing before the Commission that the Applicant refused to vaccinate and the refusal was unreasonable. The Respondent was required to prove that the Applicant was a risk to other workers, in that the Applicant would easily contract and transmit the virus to other workers; compared to vaccinated employees who might have less chances of contracting Covid19 virus. As stated above, none of the Respondent's witnesses testified on the issue of transmission of the virus. Understanding the issue of onus, the Respondent had a duty to show that the Applicant was a risk to other workers, but also , the applicant was at risk of contracting and transmitting the virus, compared to the vaccinated employees.
59. The Respondent's witnesses' testimony was on the issue of the risk assessment plan and the issue of reasonable accommodation.
60. A right to fair labour practice is a Constitutional right, it cannot be simply undermined by a vaccination policy and dismiss employees who are refusing to abide by the policy.
61. It is not necessary to deal with the issue of reasonable accommodation, as the Respondent failed to prove that the Applicant was incapable of performing his duties, because of his failure to vaccinate.

⁵ Section (3)(a)(ii) of the direction.

⁶ The right is contained in section 23 of the Constitution of the Republic of South Africa.

⁷ Section 1(a) of the LRA.

⁸ Section 185(a).

62. On the basis that there was no evidence presented before me to show that the Applicant was permanently incapable of performing his duties, as a result of his failure to vaccinate, I find that there was no reason for the dismissal of the Applicant.
63. The Applicant also challenged the procedural fairness of his dismissal on the basis that he was not given the risk assessment plan and the chairperson did not allow him an opportunity to cross-examine witnesses. The assessment plan was part of the Respondent's bundle, and the Applicant did not lead any evidence on the assessment plan. The chairperson had a right to direct the parties when she / he believed that the questions were irrelevant. I therefore find that the dismissal of the Applicant was procedurally fair.
64. Since I have found that the dismissal of the Applicant was substantively unfair, I am now required to determine the appropriate relief. The Applicant does not wish to be reinstated. I will therefore compensate the Applicant. In awarding compensation, I have considered that the Applicant had not secured alternative employment, given the unemployment rate, he may not secure employment within reasonable time. I find eight months compensation to be just and equitable. The compensation amount is calculated at the Applicant's salary of R13 018, 75 per month multiply by eight months = R104 150, 00 (One Hundred and Four Thousand One Hundred and Fifty Rand).

AWARD

APPROVED

65. I find that the Applicant failed to prove that he was unfairly discriminated by the Respondent on a listed or any other arbitrary ground. The Applicant's alleged unfair discrimination claim is hereby dismissed.
66. I find that the dismissal of the Applicant was substantively unfair but procedurally fair.
67. The Respondent, Multichoice Support Services (Pty) Ltd, is ordered to compensate the Applicant, Mr. Donaldson Mofokeng, the amount of R104 150, 00 (One Hundred and Four Thousand One Hundred and Fifty Rand), for the substantively unfair dismissal.

68. The compensation amount stated in paragraph 67 above must be paid to the Applicant by no later than the 28th of December 2022.



Senior Commissioner
Gcobisa Gosa

