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Is dismissing an employee for refusing to vaccinate fair or not?

Donaldson Mofokeng v Multichoice Group (Multichoice Support Services (Pty) Ltd – CCMA Award issued on 12 Dec- 2022

Almost 12 months after the first CCMA arbitration award in the Theresa Mulderij v Goldrush Group matter, the CCMA has once again issued a momentous arbitration award that will be of pivotal importance for the adjudication of covid-19 related matters.

On the 12th of December 2022, the CCMA issued an award in the arbitration between Mr. Donaldson Mofokeng and Multichoice Group (in re: Multichoice Support Services (Pty) Ltd), in which the CCMA ruled in favour of the employee, in that the dismissal of the employee for his refusal to vaccinate was substantively unfair.

The employer, Multichoice, had adopted and implemented a mandatory vaccination policy and gave its

employees an opportunity to apply for exemption from getting vaccinated. Multichoice further held that all its employees were identified as a high risk and thus must all get vaccinated.

Multichoice further held that, all those employees who elected not to get vaccinated are rendered permanently incapacitated and thus were to be dismissed on the basis of permanent incapacity. The employee in this case, Mr. Mofokeng was one of a number of Multichoice employees who elected not to get vaccinated and duly submitted applications for exemption on constitutional grounds. His exemption application was denied by Multichoice and it is noteworthy to mention that Multichoice conceded that, by so rejecting his application to be exempted from vaccination, Multichoice is encroaching on his constitutional right to bodily integrity.

Prior to his dismissal, the employee was a subject of an incapacity hearing, the result of which was that he was rendered permanently incapacitated from rendering his duties as a Technical Support and Payment Consultant. The

employee relied on his constitutional rights as a defence against vaccination during the incapacity hearing. He further relied on the same rights at the CCMA proceedings.

The employee's contention was that there is no scientific evidence to suggest that being vaccinated prevents one from getting infected with the covid-19 virus, nor does it prevent one from infecting others with the virus. In fact, as held by the employee, those who are vaccinated remained a risk of infection and transmission like those who did not vaccinate, thus rendering both groups of employees susceptible to the same or similar risks.

Multichoice sought to rely on its obligations in terms of the Occupational Health and Safety Act, in that it has a duty to create a safe and healthy working environment. Multichoice further relied on compliance with the Consolidated Directive that was issued by the Minister of Employment and Labour, which empowered employers to adopt a mandatory vaccination policy, in line with requirements as listed in Section 3 of the Directive. Amongst the requirements to adopt a mandatory vaccination policy, the employer had to conduct a risk

assessment, according to which the employer must identify those employees who are at risk of transmission through their work, age or comorbidities.

Multichoice submitted a risk assessment during the arbitration proceedings and led evidence thereon. According to Multichoice, ALL employees at Multichoice were identified as a high risk due to their nature of work, which involves interaction with customers. Multichoice argued that having complied with the provisions of the Consolidated Directive in adopting its mandatory vaccination policy, they were fair in classifying the employee (Mofokeng) as being permanently incapacitated. However, what Multichoice failed to prove in evidence, was how the employee's unvaccinated status rendered him incapacitated, permanently even, from rendering his duties.

The question that arises for critical analysis is whether the refusal to get vaccinated causes incapacity.

Currently there exists no medical or scientific evidence or conclusive opinion that says an unvaccinated individual possesses a health and/ or

safety risk (of infection or transmission) to those around him. In fact, the current scientific data as reported by various publications across the globe indicate that the number of deaths amongst the vaccinated have surpassed those of the unvaccinated since the vaccines have been rolled out.

The Commissioner in paragraph 53 of the Award held that *“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”*.

The Commissioner held further that **the Respondent did not lead any evidence to prove that vaccinated employees would not get covid-19 virus.**

In deciding that the decision to dismiss the employee was unfair, the Commissioner referred to the provisions of section 23 of the Constitution and the Labour Relations Act, particularly section 185, amongst other provisions analysed therein. The Commissioner stated that for the employer (Respondent/Multichoice) to

succeed in its claim that the employee was permanently incapacitated for his refusal to vaccinate, the employer was required to prove that the employee was a risk to other employees, in that he would easily contract and transmit the virus to other employees, compared to vaccinated employees.

However, since Multichoice failed to prove same, the Commissioner ruled that there was no need for Multichoice to dismiss the employee, thus the dismissal was declared as unfair.

Interestingly, Multichoice sought to prove the lack of availability of alternative accommodation for the employee at Multichoice. The employer called three witness, all whom corroborated each other to prove that there is no alternative accommodation for the employee, meaning that there is no position at Multichoice which the employee could occupy. The witnesses testified that Multichoice has mandated vaccination for all its positions, they further testified that even those who are currently seeking employment at Multichoice would need to produce a vaccination certificate as part of the requirements to be considered for employment at Multichoice.

The argument that there was no reasonable accommodation was purely academic for purposes of the arbitration proceedings because, by failing to prove how the unvaccinated employee was incapable of performing his duties, the dismissal of the employee was unfair and unreasonable.

We refer to our previous publication for a thorough discussion on the legal frameworks around the vaccination, competing rights of employees and obligations of employers etc.

Summary:

- Employee Mr Mofokeng refused to get vaccinated and relied on his right to bodily integrity in terms of section 12 of the Constitution.
- The employer, Multichoice rendered the employee as permanently incapacitated for his refusal to vaccinate and dismissed him.
- The employer is required to prove how the refusal to vaccinate rendered the employee incapacitated, in order for the employer to succeed in

proving the fairness of the dismissal.

- Multichoice failed to prove that the employee is permanently incapacitated due to refusal to vaccinate.
- The Commissioner held that the decision to dismiss the employee is substantively unfair.
- An Award of R104 150.00 was granted in favour of employee.
- Mr. Mofokeng was represented by Mr. Kgwaedi Monare Setlago of Setlago Attorneys Inc., while Multichoice was represented by Mr. Aadil Patel of Cliff Dekker Hofmeyer Inc.

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