

# Workplace vaccination policies: employers' individual circumstances and proper procedures are still paramount

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Recent apparently contradictory rulings from the Commission for Conciliation, Mediation and Arbitration (CCMA) on whether employers can fairly dismiss employees who refuse to be vaccinated against the COVID-19 virus have caused some confusion in the labour market. Yet in our view, one thing is clear: the decision to introduce a vaccination policy remains one that must be based on each individual employer's circumstances, as set out in its risk assessment and as informed by the prevailing medical science. This principle, coupled with the imperative to follow proper consultation procedures, still holds.

This should offer some comfort to employers wondering where they stand after a recent CCMA ruling in favour of an employee who had been retrenched after refusing to comply with her employer's vaccination policy. In this case between *Kgomotso Tshatshu and Baroque Medical (Pty) Ltd*, the employer had framed vaccination as an operational requirement to reduce the time employees spent away from work due to illness and ensure a safe working environment. The policy required all employees to be vaccinated, failing which their services "may then be terminated for operational reasons". There were no alternative positions or roles that did not require vaccination and four employees were ultimately retrenched.

The employee in this case, a senior inventory controller, had refused to be vaccinated because of her fear of the vaccination, having experienced a previous negative response to a flu vaccine 10 years earlier. She also objected on Constitutional grounds, namely her right to bodily integrity, stating that the vaccine was experimental. The employer required her to substantiate her refusal on medical grounds, but ultimately rejected the doctors' notes she presented as being insufficient. Having rejected her grounds for refusing to vaccinate, the employer dismissed the employee without severance pay.

## Risk assessment was lacking and consultation cursory

The matter went to the CCMA, where the Commissioner ruled that the company's actions amounted to unfair dismissal as its vaccine mandate was an unreasonable rule and unconstitutional. Further, it had not followed the necessary consultation process for retrenchments. Since it had already decided, in advance, that any employee who refused to vaccinate would be dismissed, the consultations were largely lip service. In addition, the Commissioner found the employer had not produced a risk assessment, as required at the time under the Consolidated Occupational Health and Safety Direction. While this Direction contemplated that a risk assessment would be performed to identify certain employees to be vaccinated, it did not provide for or permit a blanket vaccination policy. Going further, the Commissioner

held that mandatory vaccination policies were not only unreasonable but also had "no place in our labour market". He awarded the employee the maximum compensation, equivalent to 12 months' remuneration.

## No cause for alarm

Many who have voiced their opposition to workplace vaccination policies may welcome the decision, but employers who have such policies in place need not necessarily be alarmed.

The decision is only one of many to have come out of the CCMA recently and does not create binding precedent.

Where the employer in this case appears to have fallen short is in failing to produce a risk assessment to substantiate its vaccination policy. It is clear from the applicable regulations that any employer's vaccination rule must be informed by its risk assessment and the particular hazards and working conditions that arise in its specific workplace. Further, when it comes to the dismissal of an employee for failing or refusing to comply with an employer's vaccination policy, employers will need to be able to show that the proper procedures were followed – both in introducing the policy and in exploring alternatives and reasonable accommodation measures. As is always the case, dismissal remains an act of last resort.

## Taking issue with some of the findings

While the ultimate outcome reached on the fairness of the employee's dismissal may be reasonable in the circumstances of the case, a number of issues can be raised over the Commissioner's findings. For example, in relying directly on the Constitution, the Commissioner's reasoning failed to appreciate the principle of subsidiarity and the fact that there is existing legislation which creates the legal framework for vaccination policies in the workplace. In particular, the Commissioner failed to consider the employer's duty, in terms of the Occupational Health and Safety Act, to create and maintain, as far as reasonably practicable, a safe and healthy working environment. The Commissioner also failed to consider the Hazardous Biological Agents Regulations and the Code of Practice on Managing Exposure to SARS-Cov-2 in the Workplace, which further inform this general duty.

In conclusion, while the Commissioner in this case has undoubtedly made his views clear on workplace vaccination policies, the sweeping statements made about such policies in general should not be taken as the final pronouncement on the issue. Any decision to introduce a vaccination policy remains one that must be based on each individual employer's circumstances and adherence to proper procedure.