Dismissed for not observing workplace Covid-19 protocols? What is fair...

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Two recent decisions from labour dispute resolution forums have dealt with discipline of employees for failing to observe Covid-19 protocols - one dismissal was found to be fair while the other unfair. Understanding the circumstances and differentiators of these two decisions is important for employers.

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Employee dismissed for failing to self-isolate whilst waiting for Covid-19 test result

In a recent decision (*Detawu obo Jacobs v Quality Express* [2021]) the National Bargaining Council for the Road Freight Logistics Industry (NBCRFLI) upheld the dismissal of an employee who failed to observe Covid-19 protocols.

The employee was employed as a truck driver. On 3 August 2020, the employee arrived at work claiming to be suffering from headaches. The employer advised the employee to consult a medical doctor. The employee was booked off from work from 4 - 6 August. According to the medical certificate, the employee was waiting for a Covid-19 test result. The employee nevertheless reported to work on 6 August and handed in a brown envelope which contained two notes – a medical certificate and note from the clinic confirming that the employee was awaiting a Covid-19 test result. The employee was a shop steward and he reported to work as he was due to represent a fellow employee in a disciplinary hearing scheduled for the same day. On 7 August, the employee received a positive Covid-19 test result and he informed the employer accordingly.

The employee had previously self-isolated after coming into contact with someone who had tested positive for Covid-19. The employee was therefore aware of the isolation protocol. The employee was charged with gross misconduct and gross negligence. After attending a disciplinary hearing, the employee was dismissed. The employee referred an unfair dismissal dispute to the NBCRFLI.

The NBCRFLI found that the employee was aware of the correct protocol to follow. Given that the employee had previously isolated himself after being exposed to someone who had tested positive for Covid-19, he was aware that he could only return to work (or de-isolate) once he was aware that he was no longer a risk. The misconduct was serious in nature as his conduct wilfully endangered the safety of others in the workplace. The NBCRFLI ultimately upheld the employee's dismissal.

Employee dismissed for failing to wear a mask in the workplace

In a recent decision (*Numsa obo Manyike v Wenzane Consulting and Construction* [2021]), the Metal Engineering Industries Bargaining Council (MEIBC) found the dismissal of an employee for failing to wear a mask in the workplace to be substantively unfair.

The employee was employed as a semi-skilled rigger. On 3 August 2020, the employee whilst speaking on his mobile phone, lowered his face mask below his chin in order for the party on the other side to hear him. The employee's manager witnessed this. Following a disciplinary hearing, the employee was issued with a written warning and placed on suspension. On 7 August, a similar incident occurred. The employee whilst speaking to a security guard at the workplace lowered his face mask. The employee's manager witnessed this once again. Following a disciplinary hearing, the employee was dismissed. The employee referred an unfair dismissal dispute to the MEIBC.

The employee argued that he was aware that mask-wearing was mandatory in the workplace and that he only removed his mask as the security guard could not understand what he was saying. The employee further argued that the employer did not inform employees of the consequences of not wearing a mask and that if they failed to wear a mask, disciplinary action would be taken.

The MEIBC found that the purpose of discipline is to correct and rehabilitate employees. It is not meant to be punitive in nature. The MEIBC agreed that failure to wear a mask is risky behaviour and that there are various debates and confusion around mask-wearing. In the circumstances of this case, the MEIBC found that dismissal was too harsh and that it was a "punitive knee-jerk reaction" by the employer. The employee's behaviour could have been corrected by means of counselling and education. The employer should have considered alternatives to dismissal. The MEIBC ultimately found the dismissal to be substantively unfair and ordered that the employee be reinstated.

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