

# CCMA deems dismissal for refusing to be vaccinated 'fair'

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As the issue and implementation of mandatory vaccination policies (MVP) become ever more apparent to many South Africans, the question constantly arises whether a dismissal based on an employee's failure to vaccinate in line with such an MVP would be deemed to be fair or not. Until very recently, there was very little to go by in the way of case law or arbitration awards to provide guidance due to the novelty of the subject matter. This has, however, now changed. In what is seemingly the first arbitration award issued by the CCMA pertaining to an employee refusing to vaccinate in accordance with a company's MVP, the CCMA has ruled that the dismissal of an employee who declined to be vaccinated in line with such policy was held to be substantively fair.



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The matter in question pertains to *Theresa Mulderij v Goldrush Group*. A brief factual matrix of the case is set out hereunder.

The employer, recognising the need to potentially implement an MVP, drew up a draft policy and had the same sent to their attorneys for review and for a final draft policy to be drawn up. Upon receipt of the final draft policy, the same had to be approved by Exco of the employer. Further to this, an MVP committee was created, which was tasked with identifying various risks and hazards in the workplace to which all employees were exposed, and identifying how these risks and hazards were to be mitigated. Before deciding to implement the MVP, the employer then consulted with various unions and employees regarding the policy and its content. After concluding with the consultations, the employer then allowed those employees who did not wish to be vaccinated to apply for exemption from the policy. This application would be considered by the committee as eluded to above.

In this case, the employee applied to be exempted from being vaccinated. Her reasoning was based primarily upon three different grounds. Firstly, that of S12(2) of the Constitution, which entitles every individual to inter alia bodily integrity. Secondly, she felt under pressure between choosing between vaccinated and her livelihood. More specifically, she had to waive any form of recourse against pharmaceutical companies in the event of any side effects caused by the vaccination. Thirdly, she had, at all times, during the pandemic been vigilant in observing the various rules pertaining to social distance etc. and had as yet not contracted the virus.

## Incapacity

When looking at the arbitration award and delving into the reasoning of the Commissioner, it is important to keep in mind that this dismissal was based on incapacity and not operational requirements. There has been much talk lately about whether or not a dismissal for refusing to be vaccinated in terms of an MVP will be an incapacity-related dismissal or whether it would be related to the operational requirements of a business, ie. retrenchment. Be that as it may, in this instance, the learned Commissioner alluded to the fact that when dealing with a dismissal for incapacity and having the Code of Good Practice firmly in one's mind, it is the duty of the employer to establish whether or not the incapacity is temporary or of a permanent nature.

In the current case, the Commissioner decided that the refusal to be vaccinated constituted permanent incapacity and thus, the employer was entitled to dismiss the employee for same. What is further important to note from the Commissioner's ruling is the fact that the employer draws an inference that the employee, by refusing to be vaccinated in line with the MVP, the employee by implication does not want to participate in the creation of a safe working environment.

In coming to his decision in the current matter, the learned Commissioner also relied upon on a memo which was drafted by Judge Roland Sutherland, the Deputy Judge President of the Gauteng High Court, which, as quoted directly from the Commissioner's award, reads as follows:

*“ There has been, as yet, only mild protest that this (adopting a no-vaccination-no-entry policy) violates the freedom of choice... In my view this is the wrong question. The proper question is whether or not an individual is sufficiently civic-minded to appreciate that a duty of care is owed to colleagues and others with whom contact is made to safeguard them from harm. If one wishes to be an active member of a community then the incontrovertible legitimate interest of the community must trump the preferences of the individual. ”*

## Development of law

Seeing as the current matter is still novel in nature, it is highly probable that either this arbitration award or many more that are sure to come on this topic will find their way to either the Labour Court or the Constitutional Court. Such courts will undoubtedly develop the law relating to this subject matter in far greater detail and provide employers and employees alike with a better understanding of how MVP's may be implemented and how the balancing of respective rights will be interpreted.

For now, however, the current arbitration award and the reasoning of the learned Commissioner give employers an indication of how the CCMA and the various Bargaining Councils may reason when deciding the fairness of dismissal pertaining to MVP's. It is furthermore very likely that while the arbitration award in the current case is nonetheless very valuable for the insights it offers, it remains to be seen how the higher courts will reason with regards to the balancing of individuals' Constitutional rights and the concurrent limitation that may be imposed upon same as well.

## ABOUT THE AUTHOR

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